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The Human Right To Citizenship

Situating the Right to Citizenship within International and Regional Human Rights Law

Barbara von Rütte

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By

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Tables

Abbreviations

ACC	African Charter on the Rights and Welfare of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court of Human and Peoples' Rights
AG	Advocate General of the CJEU
ArCHR	Arab Charter on Human Rights
Art.	Article(s)
ASEAN	Association of Southeast Asian Nations
AU	African Union
Aufl.	Auflage (edition)
BGE	Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts (official reports of the judgments of the Swiss Federal Supreme Court)
BGer	Schweizerisches Bundesgericht (Swiss Federal Supreme Court)
BVerwG	Detusches Bundesverwaltungsgericht (Germand Administrative Court)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CJEU	Court of Justice of the European Union
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CNMW	Convention on the Nationality of Married Women
CO	Concluding Observations
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRCI	Covenant on the Rights of the Child in Islam
CRPD	Convention on the Rights of Persons with Disabilities
CRS	Convention on the Reduction of Statelessness
CSR	Convention relating to the Status of Refugees
CSS	Convention relating to the Status of Stateless Persons
CTS	Consolidated Treaty Series
CtteeEDAW	Committee on the Elimination of Discrimination Against Women
CtteeERD	Committee on the Elimination of Racial Discrimination
CtteeMW	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families

CtteeRC	Committee on the Rights of the Child
CtteeRPD	Committee on the Rights of Persons with Disabilities
Doc.	Document
ECHR	European Convention on Human Rights
ECN	European Convention on Nationality
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
ed(s)	Editor(s)
eg	exempli gratia (for example)
et al	et alia (and others)
ETS	European Treaty Series
EU	European Union
EUCFR	EU Charter of Fundamental Rights
f/ff	following
GC	Grand Chamber of the ECtHR
GCM	Global Compact for Safe, Orderly and Regular Migration
GLOBALCIT	Global Citizenship Observatory
HRC	Human Rights Council
HRCttee	Human Rights Committee
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
Ibid.	ibidem (in the same place)
ICCPR/CCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ID	Identity Documents
ie	id est (in other words)
ILC	International Law Commission
let.	letter
LNTS	League of Nations Treaty Series
n	note, footnote
No./Nos./Nr.	Number
OAS	Organization of American States
OJ	Official Journal of the EU
OSCE	Organization for Security and Cooperation in Europe
p	page
PACE	Parliamentary Assembly of the Council of Europe
para	paragraph
PCIJ	Permanent Court of International Justice

Res	Resolution
RIAA	Reports of International Arbitral Awards
SCA	Federal Act on Swiss Citizenship
SDG	Sustainable Development Goals
SFRY	Socialist Federal Republic of Yugoslavia
SR	Systematische Rechtssammlung (classified compilation of Swiss federal legislation)
TFEU	Treaty on the Functioning of the European Union
U.S.C.	Code of Laws of the United States of America
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKSC	Supreme Court of the United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
US	United States
v	versus (against)
Vol	Volume

CHAPTER 1

Introduction

> The classic doctrinal position, which viewed nationality as an attribute granted by the state to its subjects, has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the state as well as human rights issues.[1]
>
> IACtHR, Advisory Opinion on the Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, 1984

⁂

1 Citizenship and International Migration — Setting the Problem

At the end of 2020, 281 million persons lived outside their country of origin.[2] Migrants make up 3.6% of the global population. This number has grown continuously over the last decade in all world regions, and has grown faster than the world's overall population. International migration, as these numbers highlight, will continue to shape our societies in the foreseeable future. Directly linked to international migration is the question of citizenship. Alongside territorial borders, citizenship draws a formal line between insiders and outsiders, between those who have an unconditional right to enter and remain in a state and those who remain subject to migration control.[3] Far from diminishing its practical, societal and political relevance, international migration highlights the role citizenship plays as an ongoing marker of exclusion.[4]

1 *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* [1984] IACtHR OC-4/84, Series A No. 4 (1984) para 33.

2 UN Department of Economic and Social Affairs, International Migration 2020 Highlights, January 2021 <https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/international_migration_2020_highlights_ten_key_messages.pdf>.

3 See on the use of the terms 'citizenship' and 'nationality' Chapter 2, 1.

4 Ernst Hirsch Ballin, *Citizens' Rights and the Right to Be a Citizen* (Brill Nijhoff 2014) 131. See also Catherine Dauvergne, 'Citizenship with a Vengeance' (2007) 8 Theoretical Inquiries in Law 489; Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009) 2 ff.

For individuals, citizenship — or nationality[5] — remains a crucial prerequisite for the effective enjoyment of many human rights and for accessing institutions that secure these rights.[6] Citizenship guarantees political rights, an unconditional right to enter and remain in the state of citizenship and to move freely within its borders, and access to protection and the services of that state.[7] While it is clear that citizenship alone does not ensure substantive equality and actual belonging, a person's citizenship remains central to her prospects in life, her international mobility and her chances to have effective access to protection and basic economic rights.[8] Importantly, one's citizenship has a direct impact on mobility rights, the possibility to migrate to another country and the right to remain in that country.[9] At the other end of the spectrum, statelessness — the status of a person who is not considered as a national by any state under the operation of its law[10] — leaves a person in a legal limbo and in a particularly vulnerable situation.[11] Given the importance of nationality for one's realities and chances in life, it is not surprising that the European Court of Human Rights (ECtHR) recognizes citizenship as part of a person's social identity protected by the right to private life.[12]

For states, the question of who belongs to their people is equally central. Citizenship determines who can enter and stay in a state, who belongs to the *demos* and for whom a state is responsible *vis-à-vis* other states. In times of increasing global migration the question of access to and loss of nationality, moreover, is an important aspect of migration governance: shall migrants be

5 See on the terminology used Chapter 2, I.

6 Committee on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women' (CtteeEDAW 2014) UN Doc. CEDAW/C/GC/32 para 51. See also Ruth Rubio-Marín, 'Introduction: Human Rights and the Citizen/Non-Citizen Distinction Revisited' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014) 10.

7 See Chapter 2, III.1.

8 Shachar famously described citizenship as a "birthright lottery", see Shachar, *The Birthright Lottery* (n 4).

9 E Tendayi Achiume, 'Migration as Decolonization' (2019) 71 Stanford Law Review 1509, 1530 f.

10 Article 1 Convention Relating to the Status of Stateless Persons, 28 September 1954, 360 UNTS 117 ('1954 Convention', 'CSS').

11 See Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008).

12 *Genovese v Malta* [2011] ECtHR Application No. 53124/09 para 33; *Mennesson v France* [2014] ECtHR Application No. 65192/11 para 97; *Labassee v France* [2014] ECtHR Application No. 65941/11 para 76; *Ramadan v Malta* [2016] ECtHR Application No. 76136/12 para 62.

included into society and granted citizenship or shall the terms of access to nationality be shaped in a restrictive way with the consequence of a growing number of non-citizen[13] residents?[14] What are the consequences of inclusive compared to exclusive citizenship regimes for migration and democracy?[15] New forms of migration and mobility accentuate this tension. Domestic nationality laws are confronted with diverging biographies of migrants and changing patterns of migration and mobility. Against that background, the regulation of acquisition and loss of citizenship remains a controversial political question in many states. Nationality regimes are subject to frequent change and revision.[16] Some reforms aim at liberalizing access to citizenship.[17]

13 With the term non-citizens, I refer generally to so-called foreigners, migrants, refugees, asylum seekers, stateless persons, irregular migrants and others who do not have the citizenship of the state in which they are present. See also David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press 2008) 1 f. The term 'alien' is only used in case the original source has this terminology.

14 See also Joel P Trachtman, 'Fragmentation of Citizenship Governance' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 600. See on for the effects of such policies eg Jens Hainmueller, Dominik Hangartner and Giuseppe Pietrantuono, 'Catalyst or Crown: Does Naturalization Promote the Long-Term Social Integration of Immigrants?' (2017) 111 American Political Science Review 256; Irene Bloemraad and Alicia Sheares, 'Understanding Membership in a World of Global Migration: (How) Does Citizenship Matter?' (2017) 51 International Migration Review 823.

15 See eg Marc Helbling, Stephan Simon and Samuel D Schmid, 'Restricting Immigration to Foster Migrant Integration? A Comparative Study Across 22 European Countries' (2020) 46 Journal of Ethnic and Migration Studies 2603; Kristian Kriegbaum Jensen and others, 'Roadblocks to Citizenship: Selection Effects of Restrictive Naturalisation Rules' (2021) 47 Journal of Ethnic and Migration Studies 1047; Arnfinn H Midtbøen and others, 'Assessments of Citizenship Criteria: Are Immigrants More Liberal?' (2020) 46 Journal of Ethnic and Migration Studies 2625.

16 See exemplarily for the year 2018 Lorenzo Piccoli, '2018: A Year in Citizenship' (*GLOBALCIT*, 8 March 2019) <http://globalcit.eu/2018-a-year-in-citizenship/>.

17 In the European context, Germany famously introduced a *jus soli* mechanism for children born in Germany in 2000. In 2014, it removed the 'duty to choose' (Optionspflicht) for children who grew up in Germany and allowed for dual or multiple citizenship. See eg Michael Deinhard, *Das Recht der Staatsangehörigkeit unter dem Einfluss globaler Migrationserscheinungen* (BWV, Berliner Wissenschaftsverlag 2015) 136 ff; Kay Hailbronner and others (eds), *Staatsangehörigkeitsrecht* (6. Aufl., CH Beck 2017) 4 ff. Similarly, Portugal adopted a new, more inclusive nationality law including a *jus soli* mechanism in 2018, see Ana Rita Gil, 'Amendments to the Portuguese Nationality Law — Towards an (Even) More Inclusive Citizenship' *GLOBALCIT* (1 August 2018) <http://globalcit.eu/amendments-to-the-portuguese-nationality-law-towards-an-even-more-inclusive-citizenship/>. Switzerland in 2017 introduced a *jus soli* mechanism for third generation migrants, see Barbara von Rütte, 'Die erleichterte Einbürgerung für Jugendliche der dritten Generation' [2017] Jusletter vom 20. März 2017. Norway and Denmark introduced dual citizenship, see Arnfinn H Midtbøen, 'No Longer the "Last Man Standing": Norway Decides to Allow Dual

Often though, new legislative projects tighten naturalization requirements[18] or expand denationalization powers,[19] thereby reinforcing the exclusionary potential of citizenship.[20]

Rarely, however, are political discourses about citizenship framed as human rights issues.[21] This could come as a surprise, given that the right to citizenship is codified as a human right in one of the most important human rights

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Citizenship' *GLOBALCIT* (9 January 2019) <http://globalcit.eu/no-longer-the-last-man-standing-norway-decides-to-allow-dual-citizenship/>; Global Citizenship Observatory GLOBALCIT, 'Denmark: The Law on Dual Citizenship Came into Effect on 1 September' *GLOBALCIT* (1 September 2015) <http://globalcit.eu/denmark-the-law-on-dual-citizenship-comes-into-effect-on-1-september/>.

18 Eg in Switzerland the revised Federal Act on Swiss Citizenship, 20 June 2014, SR 141.0 ('SCA') reduced the residence requirement but overall introduced higher thresholds for naturalization, see Barbara von Rütte, 'Das neue Bürgerrechtsgesetz' [2017] Anwaltsrevue 202. In Austria residence requirements for refugee were increased, see Gerd Valchars, 'Verschärfung für Ungewollte' *Der Standard* (Wien, 9 July 2018) <https://www.derstandard.at/story/2000083140556/verschaerfung-fuer-ungewollte>. In the US, the Trump Administration repeatedly stressed plans to restrict *jus soli* as part of their anti-immigration agenda, Patrick J Lyons, 'Trump Wants to Abolish Birthright Citizenship. Can He Do That?' *The New York Times* (New York, 22 August 2019) <https://www.nytimes.com/2019/08/22/us/birthright-citizenship-14th-amendment-trump.html>.

19 Amongst others Australia, Austria, Denmark, Belgium, Bosnia and Herzegovina, the Netherlands, South Africa, Switzerland, Turkey, and the UK have introduced provisions allowing expanding state powers to deprive nationality in the context of national security measures, Institute on Statelessness and Inclusion and Global Citizenship Observatory GLOBALCIT, 'Instrumentalising Citizenship in the Fight against Terrorism. A Global Comparative Analysis of Legislation on Deprivation of Nationality as a Security Measure' (2022) <https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf>. See also Laura van Waas and Sangita Jaghai, 'All Citizens Are Created Equal, but Some Are More Equal Than Others' (2018) 65 Netherlands International Law Review 413, 419; Leslie Esbrook, 'Citizenship Unmoored: Expatriation as a Counter-Terrorism Tool' (2016) 37 University of Pennsylvania Journal of International Law 1273; Global Citizenship Observatory GLOBALCIT, 'New Citizenship Deprivation Rules in the Wake of Paris Attacks' *GLOBALCIT* (9 December 2015) <http://globalcit.eu/new-citizenship-deprivation-rules-in-the-wake-of-paris-attacks/>; Parliamentary Assembly of the Council of Europe, 'Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach?' (PACE 2019) Report Doc. 14790 (2019) para 23 ff. In France plans to expand deprivation powers were dropped, see Global Citizenship Observatory GLOBALCIT, 'Hollande Drops Plans to Revoke Citizenship of Terrorism Suspects' *GLOBALCIT* (30 March 2016) <http://globalcit.eu/hollande-drops-plans-to-revoke-citizenship-of-terrorism-suspects/>.

20 See eg Midtbøen and others (n 15) 4; Ayelet Shachar, 'Beyond Open and Closed Borders: The Grand Transformation of Citizenship' (2020) 11 Jurisprudence 1, 13 ff. See also Rubio-Marín, 'Introduction' (n 6) 1 ff.

21 See also Hirsch Ballin (n 4) 131.

instruments, the Universal Declaration of Human Rights (UDHR)[22]. Article 15 UDHR 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.

Regardless of this provision, states continue to see citizenship as a sovereign privilege and contest the legal validity of the right to a nationality as a human right. In the absence of a rights-based understanding of citizenship, non-citizens are left in a weak position when claiming access to the nationality of a particular state based on the right to nationality. Why is that? Why are domestic nationality laws so often very exclusionary and the granting of citizenship by way of naturalization considered to be a privilege? What is there to say about the rapidly re-emerging practice of denationalization in the context of counter-terrorism measures? It is this tension between the recognition of the right to nationality in international human rights law and the continuing assertion of sovereignty in nationality matters by states that forms the subject of this book.

II Objective, Scope and Delimitation

By juxtaposing the normative claim for a right to citizenship against contemporary human rights law, this book explores the right to citizenship from an individual rights perspective. Taking a human rights approach, it seeks to delimit the boundaries of state sovereignty in nationality matters and to identify the contours of the human right to citizenship from the perspective of the individual, looking not only at statelessness, deprivation of citizenship or dual citizenship, but more broadly at acquisition, loss and enjoyment of citizenship in a migration context.[23] The book explores the existence, the scope and the content of the right to citizenship in international human rights law and discusses the rights it entails for individuals and, conversely, the obligations it imposes on states. It highlights the ways in which international law grants individuals concrete rights and entitlements in nationality matters. Thereby,

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

23 Similarly also James A Goldston, 'Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens' (2006) 20 Ethics & International Affairs 321, 341.

it critically reflects on the limitations of state sovereignty in the regulation of citizenship imposed by international human rights law.

The book aims to provide a principled interpretation of the right to citizenship as an effective and enforceable individual human right. On the basis of the analysis of the international legal framework, the book argues that the right to citizenship: aims at protecting fundamental characteristics of the human person; is consistent with the existing body of international human rights law; is sufficiently precise to give rise to identifiable and predictable rights; and is supported by the case law of human rights implementing bodies, namely treaty bodies and human rights tribunals. Access to nationality, including naturalization, should be understood in a context of legal entitlements instead of a discretionary 'pick-and-choose' of prospective citizens by states. This is complemented with a normative argument: the protection gaps left open under current international law should be closed by recognizing a right to the citizenship of a specific state on the basis of one's effective connection to that state according to the principle of *jus nexi*. Applying the *jus nexi* principle of membership in order to determine conditions under which individuals should have an enforceable right to acquire (or retain) the citizenship of the state to which they have a significant connection would significantly strengthen the enforcement of the right to citizenship.[24]

The study is based on two basic premises. First, as will be discussed at length in the following, I consider citizenship to be a central element of a person's social identity and essential for the protection of a person's fundamental human rights, as well as constitutive for the functioning of modern democracies.[25] Given the importance of citizenship, states should not only prevent and reduce statelessness. They should equally ensure that individuals have an effective and meaningful nationality.[26] Second, the study builds on the premise that our current political and legal system — including the international legal framework for the protection of human rights — is based on the existence of nation states.[27] The legitimacy of nation states, territorial borders and nationality can certainly, and rightly so, be questioned.[28] Nevertheless, this is

24 Shachar, *The Birthright Lottery* (n 4). See on the principle of *jus nexi* Chapter 2, III.2.5 as well as in detail Chapter 6.

25 See in more detail Chapter 2, III.

26 See in more detail Chapter 6.

27 See also Bloemraad and Sheares (n 14) 826.

28 See eg Achiume (n 9); Andreas Cassee, *Globale Bewegungsfreiheit: ein philosophisches Plädoyer für offene Grenzen* (Suhrkamp 2016); Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015).

not as such the subject of this study. Rather, for the purposes of this study, I acknowledge the existence of nation states and present my findings based on the current legal–political order of territorial states.

Nationality as a cross-cutting issue touches upon different fields of law. It is a classical matter of international law, as it determines which individuals belong to one state or another and, thus, concerns the relationship between states. Secondly, it governs the relationship between an individual and their state of nationality on the internal, domestic level. This is traditionally a matter of national constitutional law.[29] Thirdly, nationality is also a human rights issue. This is the focus of this book. It examines the right of individuals to a nationality, covering acquisition, enjoyment, change and loss of nationality. Going beyond statelessness, the book also covers the rights of persons that have a nationality in acquiring another nationality, or persons that are confronted with losing their nationality even if this does not immediately threaten to render them stateless. It does not, however, discuss the rights and status granted to non-citizens that come close to citizenship.[30] Moreover, I do not address the rights of non-citizens to access a certain territory or legal status aside from nationality, even though access to the territory is an important prerequisite for accessing citizenship.[31]

III Approach and Outlook

This book pursues theoretical, doctrinal legal research based on a human-rights approach.[32] The relevant existing legal standards on nationality are identified, examined in their historical and current context, and thoroughly evaluated in order to identify the rights of individuals and the corresponding

29 See on the link between citizenship and constitutions Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press 2020).

30 Namely forms of quasi-citizenship, permanent residency or denizenship which entail certain rights that traditionally were reserved for citizens.

31 I acknowledge the risk that easing the rules for accessing citizenship might move the pressure of migration control to the physical borders to prevent non-citizens from accessing the territory in the first place.

32 Morel defines rights-based approaches as "based on the idea that every human being is both a person and a rights-holder, empowered to claim the rights he or she is entitled to against duty-bearers", Michèle Morel, *The Right Not to Be Displaced in International Law* (Intersentia 2014) 23. See also UN Special Rapporteur on the Human Rights of Migrants, 'Report of the Special Rapporteur on the Human Rights of Migrants' (Special Rapporteur on the Rights of Migrants 2016) UN Doc. A/71/285 para 30.

obligations of states as the duty-bearers. The sources for the relevant standards on nationality taken into consideration are — in accordance with Article 38(1) of the Statute of the International Court of Justice (ICJ)[33] — international conventions, international custom and general principles of law.[34] In addition, soft law instruments of relevant international organizations, namely the UN with its different bodies — but also regional bodies such as, for example, the Council of Europe (CoE) or the African Union (AU) — are included. Judicial decisions and legal scholarship serve as an additional, subsidiary means for interpreting the legal instruments (Article 38(1)(d) ICJ-Statute). This covers decisions by the quasi-judicial UN human rights treaty bodies, namely the UN Human Rights Committee (HRCttee), the Committee on the Rights of the Child (CtteeRC), the Committee on the Elimination of Discrimination against Women (CtteeEDAW), and the Committee on the Elimination of Racial Discrimination (CtteeERD) which, on an optional basis, can review individual complaints against state parties,[35] as well as regional human rights monitoring bodies and courts such as the ECtHR, the Inter-American Court of Human Rights (IACtHR) or the African Commission on Human and Peoples' Rights (ACmHPR). I am aware that these sources have varying normative weight and not always the same geographical application. Nevertheless, the sources taken into consideration are the most progressive or protective standards for the rights of non-citizens relating to nationality and provide the benchmark for a rights-based interpretation of the right to nationality.[36]

This being said, the book conducts an in-depth analysis at the macro-level of international law. The national perspective is beyond the scope of this study. Consequently, national legislation, policies and case law are not systematically analyzed but only selectively taken into consideration where relevant for a better understanding of the implementation of international standards at the domestic level.[37] Beyond the legal doctrinal approach, the study suggests a broader interpretation of the right to citizenship based on the principle of *jus*

33 Statute of the International Court of Justice of 26 June 1945, 892 UNTS 119 ('ICJ-Statute').

34 See generally on the relevance of the different sources of law in international human rights law also Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 Australian Yearbook of International Law 82.

35 Çalı, Costello and Cunnighamn refer to the UN Treaty Bodies as "soft courts", see Başak Çalı, Cathryn Costello and Stewart Cunnighamn, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (2020) 21 German Law Journal 355, 356.

36 See for a similar approach Weissbrodt (n 13) 5 ff.

37 See Shaw, *The People in Question* (n 29).

nexi and maps the implications of such interpretation.[38] Given the inherent political character of citizenship and its regulation, a broader interdisciplinary perspective is indispensable. Hence, while this study is first and foremost a legal analysis, it also draws on the debates of neighboring academic disciplines in order to contextualize the regulation of citizenship in international law and to motivate the claim for the recognition of citizenship as a human right.

The book is structured in three main parts and seven chapters. The first part provides the background for the analysis and lays out the theoretical framework for the conceptualization of citizenship and its function in international law. After this introduction, Chapter 2 sets the terminological and theoretical frame for the subsequent analysis of the right to citizenship in international law. It clarifies the notions of 'nationality' and 'citizenship' and explains their use for the purposes of the book. Turning to the concepts of nationality and citizenship, it provides an overview of the historical evolution of the concept of citizenship. On that basis, it defines the concept of citizenship used in the book as a legal status, a relationship between an individual and a state that, despite the existence of internationally protected human rights applicable irrespective of citizenship, secures important rights and imposes certain obligations. In a third part, the chapter looks at the human rights dimension of citizenship and explores different theoretical accounts of citizenship as a (moral) human right. This provides the theoretical basis for the subsequent discussion — whether the right to citizenship is also a legal human right.

Chapter 3 complements the first, theoretical part of the book by adding a public international law perspective. It shifts the focus from normative accounts of the right to citizenship to the legal framework and looks at the historical evolution of the regulation of nationality in public international law. The chapter aims at providing the broader legal framework for the discussion on the human right to citizenship by highlighting the linkages between nationality and the very foundational concepts of statehood and sovereignty. It starts with a discussion of the interrelationship between statehood, sovereignty and nationality, and explains the traditional perception of nationality as a matter within states' *domaine réservé*. The second part of the chapter questions this paradigm based on an analysis of the evolution of the regulation of nationality matters in international law throughout the 20th century.

The second part of this book focuses on the regulation of the right to nationality in international law and provides a comprehensive analysis of the current legal framework and its interpretation by international and regional courts

38 See in more detail Chapter 6, II.

and treaty bodies. A critical evaluation of this framework allows to identify the protection and accountability gaps which undermine the effectiveness and enforceability of the right to citizenship in practice. First, Chapter 4 zooms in on the international legal framework codifying the right to nationality. It starts with a discussion of the codification of the right to nationality in Article 15 UDHR. This provision still represents the starting point for the recognition of the right to nationality in international human rights law. This is followed by a mapping of the relevant human rights instruments at the universal as well as at the regional level that codify a right to nationality — directly or indirectly based on the interpretation of other guarantees. The chapter concludes by discussing whether the right to nationality or certain aspects of it have acquired the rank of customary international law.

Based on this framework, Chapter 5 analyzes the nature, scope and content of the right to a nationality as currently protected by international law. It begins by qualifying the right to nationality as a civil and political right and then turns to its scope of application. A third section identifies the different rights and obligations that can be derived from the right to nationality along the lines of the main aspects of the right — the acquisition, change, loss and enjoyment of nationality — but also transversal obligations and procedural standards that apply to all aspects of the right to nationality. This is followed by a discussion of the conditions for lawful interferences with the right to nationality. The analysis of the scope and content of the right to nationality shows that the right to nationality entails different specific rights and obligations states must observe when regulating acquisition and loss of nationality.

In the third part, Chapter 6 turns to the protection gaps that remain unaddressed by the current legal framework and offers a normative critique of the current international legal framework and puts forward an alternative, rights-based interpretation of the right to citizenship based on the principle of *jus nexi*. The chapter shows how the principle of *jus nexi* relates to international citizenship and international human rights law and outlines how the principle could be applied to strengthen the right to citizenship. Finally, the chapter discusses the possible implications of a *jus nexi*-based right to citizenship for the scope and content of the right, as well as for the possibility of lawfully interfering with the right.

Chapter 7 recapitulates the questions addressed in this study, presents a summary of the main findings and ends with concluding remarks on how the proposal of a *jus nexi*-based right to citizenship could be implemented.

CHAPTER 2

Citizenship and Nationality

Terms, Concepts and Rights

> 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.[1]
>
> ICJ, Nottebohm (Liechtenstein v Guatemala), 1955

In the landmark case of *Nottebohm,* the International Court of Justice famously defined nationality as a legal bond between a person and a state "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".[2] This quotation is often the starting point for studies on nationality in international law. It defines the term 'nationality' and implies a certain underlying concept of nationality as a legal status. The present chapter will begin with an outline of the usage of the notions of 'nationality' and 'citizenship' in this study (I.), before discussing the concept of nationality and its legal nature (II.). A third section will then briefly trace the theoretical debates qualifying citizenship as a (moral) human right in order to set the ground for the discussion of citizenship as a legal human right (III.).

I Citizenship or Nationality? A Note on Terminology

So far the terms 'citizenship' and 'nationality' have both been used — and mostly as interchangeable notions, as is often done in international legal studies on nationality and citizenship.[3] However, the two terms cannot just

1 *Nottebohm* (*Liechtenstein v Guatemala*) [1955] ICJ Reports 1955, p. 4 23.

2 *ibid.*

3 See eg Mirna Adjami and Julia Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27 Refugee Survey Quarterly 93, 94 n 2; Ruth

be treated as synonyms — depending on the discipline, legal tradition and language, the two terms represent different concepts.[4] Hence, the question of how the terms are to be used in this study deserves some discussion.

The Oxford English Dictionary (OED) defines nationality as:

> the status of being a citizen or subject of a particular state; the legal relationship between a citizen and his or her state, usually involving obligations of support and protection; a particular national identity; [and] a group of persons belonging to a particular nation; a nation; an ethnic or racial group.[5]

The term 'citizenship', by contrast, is defined as "the position or status of being a citizen" and an "engagement in the duties and responsibilities of a member of society".[6] Moreover, the Dictionnary notes that "[a]s a legal status synonymous

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Donner, *The Regulation of Nationality in International Law* (2nd ed, Transnational Publishers 1994) xv; Matthew J Gibney, 'Statelessness and Citizenship in Ethical and Political Perspective' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 46; Ernst Hirsch Ballin, *Citizens' Rights and the Right to Be a Citizen* (Brill Nijhoff 2014) 71; Sandra Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives* (Brill Nijhoff 2015) 5; Anne Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction' (2010) 53 German Yearbook of International Law 623, 625; Katja Swider, 'A Rights-Based Approach to Statelessness' (University of Amsterdam 2018) 22; Yaffa Zilbershats, *The Human Right to Citizenship* (Transnational Publishers 2002) 5; Ruth Rubio-Marín, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge University Press 2000) 19 n 7; Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press 2020) 19 ff. See also Committee on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women' (CtteeEDAW 2014) UN Doc. CEDAW/C/GC/32 para 52. Implicitly also David Owen, 'On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights' (2018) 65 Netherlands International Law Review 299. See for a critical account of this practice Katherine Tonkiss, 'Statelessness and the Performance of Citizenship-As-Nationality' in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017).

4 See for a detailed discussion Olivier Vonk, *Nationality Law in the Western Hemisphere: A Study on Grounds for Acquisition and Loss of Citizenship in the Americas and the Caribbean* (Brill Nijhoff 2014) 24 ff. See also Mantu (n 3) 5; Kim Rubenstein, 'Globalization and Citizenship and Nationality' in Catherine Dauvergne (ed), *Jurisprudence for an Interconnected Globe* (Ashgate 2003) 161; Swider, 'Rights-Based Approach to Statelessness' (n 3) 20 ff.

5 'Nationality, (n.)', Oxford English Dictionary, <https://www.oed.com/view/Entry/125292?redirectedFrom=nationality&>.

6 'Citizenship, (n.)', Oxford English Dictionary, <https://www.oed.com/view/Entry/33521?redirectedFrom=citizenship#eid>.

with nationality, citizenship typically confers the rights to live and work in a particular nation state and to participate in its politics while being subject to taxation".[7]

Thus, while they can be used synonymously, the terms 'nationality' and 'citizenship' can also have different meanings and represent significantly different concepts.[8] Paul Weis distinguishes nationality in a politico-legal sense from nationality as a historico-biological term.[9] The former denotes membership in a state whereas the latter refers to

> the subjective corporate sentiment of unity of members of a specific group forming a 'race' or 'nation' which may, though not necessarily, be possessed of a territory and which, by seeking political unity on that territory, may lead to the formation of a state.[10]

Further complexity is added through the fact that in the English legal tradition, the notions of 'citizenship' and 'nationality' can also refer to different categories of citizens regarding the possession of political rights.[11]

Similar variations can be observed in other European languages. In French and Spanish '*nationalité*' and '*nacionalidad*' are used to refer to the external formal legal bond between an individual and a state. '*Citoyenneté*' and '*ciudadanía*', on the other hand, refer to political membership within the state.[12] In German, the Anglo-Saxon notion of 'citizenship' and the French '*citoyenneté*' have no direct counterpart.[13] The main term is '*Staatsangehörigkeit*' which

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7 *Ibid.*

8 See eg International Law Commission, 'Report on Nationality, Including Statelessness' (International Law Commission 1952) UN Doc. A/CN.4/50 6 <http://untreaty.un.org/ilc/documentation/english/a_cn4_50.pdf>. See further Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016) 93; Gerard-René de Groot and Olivier Vonk, *International Standards on Nationality Law: Texts, Cases and Materials* (Wolf Legal Publishers 2016) 3.

9 Paul Weis, *Nationality and Statelessness in International Law* (2nd ed, Sijthoff & Noordhoff 1979) 3.

10 *ibid.*

11 Vonk, *Nationality Law in the Western Hemisphere* (n 4) 24. See also International Law Commission, 'Hudson Report' (n 8) 6 f. See also Delia Rudan, 'Nationality and Political Rights' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 117.

12 de Groot and Vonk (n 8) 3.

13 Sükrü Uslucan, *Zur Weiterentwicklungsfähigkeit des Menschenrechts auf Staatsangehörigkeit: Deutet sich in Europa ein migrationsbedingtes Recht auf Staatsangehörigkeit an — auch unter Hinnahme der Mehrstaatigkeit?* (Duncker & Humblot 2012) 42.

represents the legal link of nationality, whereas the term '*Staatsbürgerschaft*' is used more in social sciences than in law to refer to the political or participatory dimension of membership.[14] The term '*Nationalität*' is rarely used.

In legal debates, the term 'nationality' was traditionally used to refer to the international aspect of belonging to a state, linking an individual to a particular state as opposed to others, whereas 'citizenship' was understood as referring to the internal, national and municipal aspect of membership to a state, including the rights and duties of the individual in relation to that state.[15] Both terms, therefore, denote the legal status of an individual as a member of a nation state, but reflect two different legal frameworks, ie the international legal framework and the domestic legal framework respectively.[16] In non-legal debates, the two notions are rarely used synonymously.[17] In fact, the conflation of citizenship with nationality is often seen as problematic in social sciences.[18] The term nationality, on the one hand, has a strong ethnical, or even nationalistic connotation and is thus rarely used to describe membership in a state. Citizenship, on the other hand, is used to refer to broader forms or notions of membership, belonging, equality and participation in society, beyond the mere legal status.[19]

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14 Hailbronner finds the term '*Staatsbürgerschaft*' to be useless ("*unbrauchbar*") for the problems relating to nationality in constitutional and international law, Kay Hailbronner and others (eds), *Staatsangehörigkeitsrecht* (6. Aufl., CH Beck 2017) 30. See also Benito Aláez Corral, 'Staatsangehörigkeit und Staatsbürgerschaft vor den Herausforderungen des demokratischen Verfassungsstaates' (2007) 46 Der Staat 349. In the Swiss German context *Bürgerrecht* is used rather than *Staatsangehörigkeit* or *Staatsbürgerschaft*, Alberto Achermann and Barbara von Rütte, 'Kommentar zu Art. 37 BV' in Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (eds), *Bundesverfassung* (Helbing Lichtenhahn 2015) 775; Brigitte Studer, Gérald Arlettaz and Regula Argast, *Das Schweizer Bürgerrecht: Erwerb, Verlust, Entzug von 1848 bis zur Gegenwart* (Verlag Neue Zürcher Zeitung 2008) 16.

15 Weis, *Nationality in International Law* (n 9) 4 f. See also Vonk, *Nationality Law in the Western Hemisphere* (n 4) 25.

16 Rubenstein (n 4) 161.

17 See eg Saskia Sassen, 'Towards Post-National and Denationalized Citizenship' in Engin F Isin and Bryan S Turner (eds), *Handbook of Citizenship Studies* (SAGE Publications 2002) 278.

18 See eg Verena Stolcke, 'The "Nature" of Nationality' in Veit Michael Bader (ed), *Citizenship and Exclusion* (MacMillan Press, St Martin's Press 1997) 62 f.

19 For a legal study using citizenship ("*Bürgerschaft*") as a concept broader than nationality ("*Staatsangehörigkeit*") see Anuscheh Farahat, *Progressive Inklusion: Zugehörigkeit und Teilhabe im Migrationsrecht* (Springer 2014) 120. See also Kristin Henrard, 'The Shifting Parameters of Nationality' (2018) 65 Netherlands International Law Review 269, 272. Kostakopoulou uses the notion of 'nationality model of citizenship' to refer to the dominant paradigm of membership in the nation state, Dora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge University Press 2008).

Hence, the term citizenship has a normative dimension of opening up social membership.[20]

International law mainly uses the term 'nationality' and domestic law 'citizenship'.[21] Accordingly, most international legal instruments from the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws,[22] the UDHR, the UN human rights treaties, the American Convention on Human Rights (ACHR),[23] the Arab Charter on Human Rights (ArCHR),[24] the European Convention on Nationality (ECN)[25] to the African Union Draft Protocol to the African Charter on Human and People's Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa[26] use the term 'nationality'. In soft law instruments the term 'nationality' also prevails.[27] International courts and treaty bodies seem to use both

20 Kim Rubenstein and Daniel Adler, 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7 Indiana Journal of Global Legal Studies 519, 552.

21 Zilbershats (n 3) 4. See also Siegfried Wiessner, 'Blessed Be the Ties That Bind: The Nexus between Nationality and Territory' (1986) 56 Mississippi Law Journal 447, 449 f.

22 Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April 1930, LNTS Vol. 179, p. 89 ('1930 Convention').

23 American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, OAS Treaty Series No. 36 ('American Convention', 'ACHR').

24 Arab Charter on Human Rights, 23 May 2004, reprinted in 12 *International Human Rights Reports* 893 (2005) ('Arab Charter', 'ArCHR').

25 European Convention on Nationality, 6 November 1997, ETS No. 166 ('ECN').

26 Draft Protocol to the African Charter on Human and People's Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa, Draft adopted September 2015, revised June 2018 ('Draft Protocol on Nationality' or 'AU Draft Protocol').

27 The UN Human Rights Committee and the CoE bodies use the term 'nationality' in resolutions touching upon nationality matters, see eg UN Commission on Human Rights, 'Resolution 1999/28 on Human Rights and Arbitrary Deprivation of Nationality' (UN Human Rights Commission 1999) UN Doc. E/CN.4/RES/1999/28; UN Commission on Human Rights, 'Resolution 2005/45 on Human Rights and Arbitrary Deprivation of Nationality' (UN Human Rights Commission 2005) UN Doc. E/CN.4/RES/2005/45; Human Rights Council, 'Resolution 7/10 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2008) UN Doc. A/HRC/RES/7/10; Human Rights Council, 'Resolution 10/13 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2009) UN Doc. A/HRC/RES/10/13; Human Rights Council, 'Resolution 13/2 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2010) UN Doc. A/HRC/RES/13/2; Human Rights Council, 'Resolution 20/5 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2012) UN Doc. A/HRC/RES/20/5; Human Rights Council, 'Resolution 20/4 on the Right to a Nationality: Women and Children' (HRC 2012) UN Doc. A/HRC/RES/20/4; Human Rights Council, 'Resolution 26/14 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2014) UN Doc. A/HRC/RES/26/14; Human Rights Council, 'Resolution 32/5 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2016) UN Doc.

'nationality' and 'citizenship'. The Permanent Court of International Justice (PCIJ), the ICJ and the IACtHR only use nationality,[28] whereas UN treaty bodies, the African Commission and the African Court on Human and Peoples' Rights use both terms, sometimes even within the same ruling.[29] Interesting is the example of the ECtHR which refers to 'citizenship' just as much as to 'nationality'.[30] The case law of the ECtHR — which *nota bene* is not bound by

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A/HRC/RES/32/5; Council of Europe, Committee of Ministers, 'Recommendation No. R (84) 21 of the Committee of Ministers to Member States on the Acquisition by Refugees of the Nationality of the Host Country' (Committee of Ministers 1984); Council of Europe, Committee of Ministers, 'Recommendation No. R (99) 18 on the Avoidance and the Reduction of Statelessness' (Committee of Ministers 1999); Council of Europe, Committee of Ministers, 'Recommendation Rec(2000)15 of the Committee of Ministers to Member States Concerning the Security of Residence of Long-Term Migrants' (Committee of Ministers 2000); Council of Europe, Committee of Ministers, 'Recommendation CM/Rec(2009)13 of the Committee of Ministers of the Council of Europe on the Nationality of Children' (Committee of Ministers 2009) CM/Rec(2009)13; Parliamentary Assembly of the Council of Europe, 'Resolution 417 (1969) on Acquisition by Refugees of the Nationality of Their Country of Residence' (PACE 1969); Parliamentary Assembly of the Council of Europe, 'Recommendation 696 (1973) on Certain Aspects of the Acquisition of Nationality' (PACE 1973); Parliamentary Assembly of the Council of Europe, 'Resolution 2099 (2016) on the Need to Eradicate Statelessness of Children' (PACE 2016); Parliamentary Assembly of the Council of Europe, 'Resolution 2263 (2019) on Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach?' (PACE 2019). See by contrast Parliamentary Assembly of the Council of Europe, 'Recommendation 1500 (2001) on Participation of Immigrants and Foreign Residents in Political Life in the Council of Europe Member States' (PACE 2001). The UN Global Compact on Migration speaks of 'nationality' as well as 'citizenship', UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration,General Assembly Resolution 73/195' (UN General Assembly 2018) UN Doc. A/RES/73/195.

28 *Nationality Decrees Issued in Tunis and Morocco* (*Advisory Opinion*) [1923] PCIJ Series B No. 4; *Nottebohm* (n 1); *Baruch Ivcher Bronstein v Peru* [2001] IACtHR Series C No. 74; *Case of the Girls Yean and Bosico v Dominican Republic* [2005] IACtHR Series C No. 130 (2005) 92.

29 *John K Modise v Botswana* [2000] ACmHPR Communication No. 97/93; *The Nubian Community in Kenya v The Republic of Kenya* [2015] ACmHPR Communication No. 317/06; *Anudo Ochieng Anudo v United Republic of Tanzania* [2018] ACtHPR Application No. 012/2015; *DR v Australia, Communication No 42/2008* [2009] CtteeERD UN Doc. CERD/C/75/D/42/2008; *Benon Pjetri v Switzerland, Communication No 53/2013* [2016] CtteeERD UN Doc. CERD/C/91/D/53/2013; *Borzov v Estonia, Communication No 1136/2002* [2004] HRCttee UN Doc. CCPR/C/81/D/1136/2002; *Sipin v Estonia, Communication No 1432/2005* [2008] HRCttee UN Doc. CCPR/C/93/D/1423/2005; *Q v Denmark, Communication No 2001/2010* [2015] HRCttee UN Doc. CCPR/C/113/D/2001/2010.

30 See eg *Karassev v Finland* (*Decision*) [1999] ECtHR Application No. 31414/96; *Genovese v Malta* [2011] ECtHR Application No. 53124/09; *Petropavlovskis v Latvia* [2015] ECtHR Application No. 44230/06; *Ramadan v Malta* [2016] ECtHR Application No. 76136/12; *K2 v The United Kingdom* (*Decision*) [2017] ECtHR Application No. 42387/13; *Hoti v Croatia*

the terminology of its legal framework as the European Convention on Human Rights (ECHR)[31] and its protocols do not enshrine a right to nationality or citizenship — is exemplary for the tendency to use the terms interchangeably. Finally, the term 'citizenship' figures prominently in EU law. However, here the term 'citizenship' is used to refer to Union citizenship, a legal status *sui generis* different from and in addition to nationality of a member state. Regarding membership at the national level in the member states, EU law uses primarily the term 'nationality' with some exceptions.[32]

For the purposes of this study, the terms nationality and citizenship will both be used to refer to full membership to a state in the legal sense of a bond between an individual and a state. In principle, the two terms will be used interchangeably. However, the term 'nationality' is mainly used to quote or refer to sources of international law using this terminology. Thus, where Chapter 4 discusses the sources covering the 'right to nationality', the term 'nationality' is used to correctly reflect the wording of the sources. Where, however, the sources themselves use the term 'citizenship' or where the discussion goes beyond the current positive legal framework, preference will be given to the notion of 'citizenship'. As Peter Spiro already proposed, the reconceptualization of citizenship shall be accompanied by a "shift away from the use of the term 'nationality' to denote the formal tie between the individual and the state, and toward the now more appropriate use of 'citizenship'".[33] Similarly, Ernst Hirsch Ballin gives preference to the term 'citizenship', which does not evoke associations of state sovereignty at nation state level but instead "expresses the fact that it is the legal status of a citizen of a polity".[34] In Chapter 6 the discussion

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[2018] ECtHR Application No. 63311/14; *Alpeyeva and Dzhalagoniya v Russia* [2018] ECtHR Application Nos. 7549/09 and 33330/11; *Said Abdul Salam Mubarak v Denmark* (*Decision*) [2019] ECtHR Application No. 74411/16.

31 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5 ('European Convention on Human Rights', 'ECHR').

32 See exemplarily Article 20(1) of Treaty on the Functioning of the European Union (consolidated version, 26 October 2012, OJ C 326/47, 'TFEU') which states that "Citizenship of the Union is hereby established. Every person holding the *nationality* of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national *citizenship*" (emphasis added).

33 Peter J Spiro, 'A New International Law of Citizenship' (2011) 105 The American Journal of International Law 694, 695. See also Decaux who argues that "[a]ujourd'hui on parlerait sans doute plus commodément de 'citizenship' pour éviter toute connotation avec le débat sur les minorités nationales", Emmanuel Decaux, 'Le droit à une nationalité, en tant que droit de l'homme' (2011) 22 Revue trimestrielle des droits de l'homme 237, 240.

34 Hirsch Ballin (n 3) 71. See also Caia Vlieks, Ernst Hirsch Ballin and Maria Jose Recalde-Vela, 'Solving Statelessness: Interpreting the Right to Nationality' (2017) 35 Netherlands Quarterly of Human Rights 158, 161.

will thus shift from the 'right to nationality' to the 'right to citizenship' in order to reflect a contemporary, more inclusive and rights-based understanding of equal membership in democratic states.[35]

II The Concept of Citizenship

The discussion about terminology shows that the concepts of citizenship and nationality are anything but straightforward. Depending on one's perspective, the understandings of citizenship and its legal qualification and political significance vary. The following section will discuss how the concepts of citizenship and nationality evolved historically (II.1), how the concepts can be theorized (II.2) and what citizenship means as a legal status (II.3).

1 *Historical Traces of the Concept of Citizenship*

Alexander Makarov wrote in 1947 that the concept of citizenship is as old as the concept of the state.[36] Historically, the origins of the concept of citizenship are nevertheless often traced back to classic antiquity.[37] In the Greek city states, citizens had a privileged right to participate in the governing of the city.[38] Citizens came together in the *polis* to discuss matters of public life. Citizens were those who were entitled to "participate actively in the collective life and in the construction of the community".[39] It reflects the Aristotelian conception of a citizen as someone who is both ruler and ruled.[40] Citizenship, as J.G.A. Pocock writes, was thereby "not just a means to being free; it is the way

35 Similarly also Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 64 f.

36 "Die Staatsangehörigkeit besteht so lange wie der Staat selbst, den in allen Zeitabschnitten der Geschichte der Menschheit haben die Staaten, welche auch ihre Form gewesen sein mag, ein persönliches Substrat gehabt", Alexander N Makarov, *Allgemeine Lehren des Staatsangehörigkeitsrechts* (1. Aufl., W Kohlhammer 1947) 17.

37 JGA Pocock, 'The Ideal of Citizenship Since Classical Times' [1992] Queen's Quarterly 31, 31. See for a discussion of earlier as well as non-Western forms of socio-political organization Alexander C Diener, 'Re-Scaling the Geography of Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 38 ff.

38 Nevertheless, there was no uniform understanding of citizenship in ancient Greece, see Kostakopoulou (n 19) 15.

39 Gonçalo Matias, *Citizenship as a Human Right, The Fundamental Right to a Specific Citizenship* (Palgrave Macmillan 2016) 13.

40 See Pocock (n 37) 31. See for a feminist critique of Pocock's categorization Susan Moller Okin, 'Women, Equality, and Citizenship' (1992) 99 Queen's Quarterly 56.

of being free itself".[41] While those with citizen rights ruled collectively among equals, the Greek concept of citizenship was highly exclusionary. Only free adult males who received their citizenship based on descent were recognized as citizens. Women, children, slaves, foreigners, metics and other minority groups remained excluded from collective self-rule.[42]

In the Roman Empire, the concept of citizenship was expanded beyond city states to governed territories.[43] Moreover, its functions were extended. The Roman *civitas* shifted the focus from citizenship as the right to participate in political decisions, to citizenship as a legal status.[44] Under this system, the individual was a citizen not primarily by virtue of participation in political life, but due to social status, property and the legal system.[45] According to Pocock, a citizen meant "someone free to act by law, free to ask and expect the law's protection, a citizen of such and such a legal community, of such and such a legal standing in that community".[46] Just as in the Greek system, Roman citizenship excluded along the lines of birth, class, race and gender.[47] While citizenship was awarded to privileged, property-owning men on the basis of *jus sanguinis*, women, slaves and non-Romans were excluded and thereby denied legal status.

Both the Greek and Roman concept of citizenship provide a basis for a contemporary discussion of citizenship. While the Greek model of citizenship was concerned with the equality of citizens as rulers or makers of the law, the Roman model of citizenship focused on the status and the equality of citizens under the law.[48] Thus, citizenship evolved from mere political rights to membership in a legal community.[49] As Linda Bosniak notes, we can derive from the Roman model that citizenship is a matter of formal, juridical membership in an organized political community as well as a precondition and entitlement to the enjoyment of rights. The Greek — or Aristotelian — conception shaped

41 Pocock (n 37) 34.

42 Kostakopoulou (n 19) 15. See also David Scott Fitzgerald, 'The History of Racialized Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 133.

43 Matias (n 39) 21. See also Ryan K Balot, 'Revisiting the Classical Ideal of Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 24.

44 Pocock (n 37) 37.

45 *ibid 36.*

46 *ibid 37.*

47 See Balot (n 43) 18.

48 Richard Bellamy, *Citizenship: A Very Short Introduction* (Oxford University Press 2008) 29.

49 Pocock (n 37) 38.

the idea of citizenship as political participation.[50] Until today, the Roman model was associated with a liberal idea of citizenship, while the Greek model was said to reflect republican forms of citizenship.[51] However, one should be careful to transpose the ideas of these historical models to contemporary normative accounts of inclusive and equal citizenship.[52]

In the feudal societies of the European Middle Ages citizenship lost much of its political meaning and was replaced by notions of allegiance to the king or local ruler and religious affiliation.[53] Everyone within the territory of the king's land was his subject and owed allegiance — ie loyalty and fealty. Forms of citizenship only appeared at the local level in towns and cities. In the High and Late Middle Ages such cities gained importance as (partly) independent, self-governing political units.[54] The inhabitants of these cities were granted certain privileges and obligations. Citizenship was acquired on the basis of descent, but it was also accessible through naturalization for new inhabitants on the basis of residence.[55] Oftentimes citizenship was connected to membership in a professional guild and linked to the right to exercise a profession and to conduct trade.[56]

It is only with the rise of sovereign nation states after the Peace of Westphalia in 1648 and the early modern era that the concept of citizenship as membership in a sovereign state arose.[57] The French and American Revolutions supported the central role of the free and equal citizen as the basis of popular sovereignty, thereby replacing feudal ruling structures.[58] Citizens' rights were proclaimed. Citizenship was transmitted based on birth. In addition, it could also be

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50 Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2006) 19.

51 See eg Christian Joppke, 'The Instrumental Turn of Citizenship' [2019] 45 Journal of Ethnic and Migration Studies 858, 860 f.

52 See eg Balot (n 43) 18.

53 Kostakopoulou (n 19) 16.

54 *ibid 17 f.*

55 Matias (n 39) 30 f.

56 Kostakopoulou (n 19) 18.

57 Makarov (n 36) 17. Bauböck sees the 'Westphalian conception' of citizenship as a third, distinctly modern form of citizenship whose primary function is to establish a mechanism for determining individual membership in the international state system. Such Westphalian citizenship, as he notes, would correlate to the notion of "nationality in international law", Rainer Bauböck, 'Genuine Links and Useful Passports: Evaluating Strategic Uses of Citizenship' (2019) 45 Journal of Ethnic and Migration Studies 1015, 1017. See in more detail Chapter 3.

58 See Diener (n 37) 44. See for the evolution of the notion of citizenship in the American context Linda K Kerber, 'The Meanings of Citizenship' (1997) 84 The Journal of American History 833.

acquired by naturalization. Gonçalo Matias describes citizenship in the French Revolution as a concept that is not only inclusive and egalitarian, but also "a clear and transparent legal category that anyone could acquire".[59] Obviously, though, 'anyone' was limited to adult free men. The preeminence of nation states as the primary form of sovereign statehood increased throughout the 19th and 20th century and, with it, nationalism. As Dora Kostakopoulou shows:

> Membership of the political community thus became conditioned on membership of a sovereign nation. Citizens were deemed to possess certain national characteristics, be they a common origin, a common culture, religion, language and so on, which distinguished them from 'foreigners'. Accordingly, the boundaries of the state became congruent with the boundaries of the nation and the principle of spatial exclusion replaced the pre-modern principle of subjection to a sovereign ruler as the premise of citizenship law.[60]

Thereby, citizenship became increasingly intertwined with ideas of the state — and even more so the 'nation' — being an ethnically, culturally and linguistically homogenous entity.[61] This further strengthened the exclusionary force of citizenship. Closely related to an ethnic, exclusionary understanding of citizenship was the increasing weight of the call for the right to control the entry and stay of persons on national territory as an expression of state sovereignty in the early 20th century.[62] At the same time European colonialism and the processes of de-colonization in the 20th century contributed to the establishment of nation states as the central political entities while it perpetuated exclusionary and racialized regimes of citizenship.[63] Hence, even though citizen, as Linda Kerber argues, "is an equalizing word", the history of citizenship shows the tendency to use membership and rights as markers of difference and exclusion.[64]

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59 Matias (n 39) 34.

60 Kostakopoulou (n 19) 25.

61 See also Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff 2010) 74 ff.

62 Stolcke (n 18) 64. See also Kostakopoulou (n 19) 26.

63 See for a detailed postcolonial account of citizenship and further references Kamal Sadiq, 'Postcolonial Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017); and Fitzgerald (n 42).

64 Kerber (n 58) 834. See also Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 Ethics 250; Nira Yuval-Davis, 'Women, Citizenship and Difference' (1997) 57 Feminist Review on Women and Citizenship 4.

2 *Theoretical Conceptualizations of Citizenship*

Based on the conceptualization of citizenship in Greece and Rome respectively, citizenship today is still often described as either political membership in the Aristotelian sense or a legal status with certain rights and obligations in the Roman tradition.[65] Beyond these classical approaches to citizenship, however, contemporary theoretical, political and legal discourse has seen countless attempts at identifying or defining a concept of citizenship, with different outcomes depending on the perspective and context of analysis.[66] The Oxford Handbook of Citizenship, for example, observes:

> manifold dimensions of citizenship: as a legal status and political membership; as rights and obligations; as identity and belonging; as civic virtues and practices of engagement; as a discourse of political and social equality or responsibility for a common good.[67]

To borrow from Audrey Macklin: "if citizenship were a home appliance, it would be the only one you would ever need".[68] Nevertheless, many citizenship scholars have tried to identify the main dimensions of citizenship: citizenship as a (legal) status, citizenship as rights, citizenship as identity or belonging and citizenship as political activity.[69] These dimensions can be distinguished theoretically, but in practice often overlap and are mutually dependent.[70] This answers the question *what* citizenship is. Following Bosniak, a definition of

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65 See eg Bosniak, *Citizen and Alien* (n 50) 19.

66 See also Veit Michael Bader, 'Citizenship of the European Union. Human Rights, Rights of Citizens of the Union and of Member States' (1999) 12 Ratio Juris 153, 156 f. See also the proposal for a fourfold typology of basic conceptions of citizenship based on the underlying interests developed by Rainer Bauböck and Vesco Paskalev, 'Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation' (2015) 30 Georgetown Immigration Law Journal 47.

67 See Ayelet Shachar and others, 'Introduction: Citizenship — Quo Vadis?' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 4.

68 Audrey Macklin, 'Who Is the Citizen's Other? Considering the Heft of Citizenship' (2007) 8 Theoretical Inquiries in Law 333, 334.

69 Linda Bosniak, 'Citizenship Denationalized' (2000) 7 Indiana Journal of Global Legal Studies 447, 455. See for similar categories also Irene Bloemraad, 'Does Citizenship Matter?' in Ayelet Shachar and others (eds), *Oxford Handbook of Citizenship* (Oxford University Press 2017) 526 f; Christian Joppke, 'Transformation of Citizenship: Status, Rights, Identity' (2007) 11 Citizenship Studies 37; Will Kymlicka and Wayne Norman, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' (1994) 104 Ethics 352.

70 Bloemraad (n 69) 527.

the concept of citizenship also calls for an answer to the question of *where* citizenship takes place and — crucial in the context of this thesis — *who* falls within the category of citizenship.[71]

Territorially, citizenship is at least in the legal discipline usually understood to apply in relation to the (nation) state. This is, however, not necessarily the case.[72] There are also accounts of citizenship that go beyond the traditional focus on the state and look at citizenship at the local, regional, global or supranational level, as well as conceptualizations of citizenship fully detached from territory.[73] Citizenship has also been conceptualized as extending beyond the political sphere to include the social and private domains — if the latter two are not already understood as political.[74] This being said, the state remains the most important entity for citizenship understood as legal status and political participation.

The question of *who* a subject of citizenship is, is usually answered in two ways. Some see citizenship as a universal concept which ultimately should include everyone, whereas others discuss citizenship from its margins and focus on the exclusionary mechanisms it entails.[75] Whether as rights, status, membership or as identity, citizenship as a (political) concept always implies both inclusion of those who belong and exclusion of those who are outside.[76] Rogers Brubaker described citizenship as being internally inclusive and externally exclusive thus allowing for social closure.[77] Others have used the image of the 'janus-face' to describe the differentiating function of citizenship.[78] As such a marker of belonging, citizenship today is an important cause for inequality on

71 Bosniak, *Citizen and Alien* (n 50) 17.

72 Linda Bosniak, 'Multiple Nationality and the Postnational Transformation of Citizenship' in David A Martin and Kay Hailbronner (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects* (Kluwer Law International 2003) 45.

73 See eg Bosniak, 'Citizenship Denationalized' (n 69); Daniel Loick, 'Wir Flüchtlinge. Überlegungen zu einer Bürgerschaft jenseits des Nationalstaats' (2017) 45 Leviathan 574; Saskia Sassen, *Losing Control?: Sovereignty in an Age of Globalization* (Columbia University Press 1996); Yasemin Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago 1994); Neil Walker, 'The Place of Territory in Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

74 See Bosniak, *Citizen and Alien* (n 50) 20 ff.

75 *ibid* 29.

76 See also Vanessa Barker, 'Democracy and Deportation: Why Membership Matters Most' in Katia Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press 2013) 238.

77 Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992) 21. See also Chapter 6.

78 Bosniak, *Citizen and Alien* (n 50) 99.

a global level.[79] Yet, this boundary between those included and those excluded is not binary. Rather, there are degrees of citizenship and gradients of alienage.[80] Moreover, these borders of citizenship between those within and those on the outside are not limited to state borders, they apply everywhere: "at the physical boundary of the national territory — in the political practices and policies — in social norms (gender, sexuality, etc.) — and embodied in individuals (non-citizens and citizens carry the border)".[81] Hence, citizenship is often linked with the principle of equality.[82] In particular, scholars of immigration and nationality see citizenship as "the core analytical concept for thinking about the way in which the community's membership and boundaries are constituted in the first instance".[83] Similarly, in feminist and queer theory, Critical Race Theory or in Critical Disability Studies, the ostensible universality of citizenship and its egalitarian dimension have been questionned.[84] Against this background Kim Rubenstein reminds us that citizenship is "neither gender, class, nor race neutral, but affected by different groups' positions within nation states".[85]

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79 See Barker (n 76); Stephen Castles, 'Nation and Empire: Hierarchies of Citizenship in the New Global Order' (2005) 42 International Politics 203; Yossi Harpaz, *Citizenship 2.0: Dual Nationality as a Global Asset* (Princeton University Press 2019). See for a ranking of the most 'valuable' nationalities Dimitry Kochenov and Justin Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index: An Objective Ranking of the Nationalities of the World* (Hart Publishing 2020).

80 The terminology is owed to a discussion with Audrey Macklin in the context of the 1st Expert Meeting of Academics: Statelessness, Citizenship & Inclusion, at the NYU Center for Global Affairs in June 2017. See also Tendayi Bloom, *Noncitizenism: Recognising Noncitizen Capabilities in a World of Citizens* (Routledge 2018); Indira Goris, Julia Harrington and Sebastian Köhn, 'Statelessness: What It Is and Why It Matters' (2009) 32 Forced Migration Review 4; Lindsey N Kingston, *Fully Human: Personhood, Citizenship, and Rights* (Oxford University Press 2019); Macklin, 'The Citizen's Other' (n 68) 354; Jason Tucker, 'Questioning de Facto Statelessness: By Looking at de Facto Citizenship' (2014) 19 Tilburg Law Review 276.

81 Diener (n 37) 53.

82 Mantu (n 3) 3.

83 Bosniak, *Citizen and Alien* (n 50) 33. Similarly also Kingston (n 80). See further Castles who distinguishes four differentiating contradictions of citizenship, Castles (n 79) 205.

84 See among many Fitzgerald (n 42); Ratna Kapur, 'The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion' (2007) 8 Theoretical Inquiries in Law 537; Leti Volpp, 'Feminist, Sexual, and Queer Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (2017); Iris Marion Young, *Inclusion and Democracy* (Oxford University Press 2010); Yuval-Davis (n 64).

85 Rubenstein (n 4) 163.

The discussion of the different concepts of citizenship shows that citizenship, as Kerber posits, "means what we make it mean".[86] Citizenship is a relative concept and subject to change.[87] It reflects the evolving and transforming ideas and ideals of community, subjective and collective perceptions of identity and political self-determination and the ongoing negotiations of who belongs.[88] Citizenship is also 'relational', defined and continuously shaped by one's social interactions with others.[89] Different forms of citizenship have been said to appear and disappear, the decline of the concept of citizenship altogether has been announced and its revival observed.[90] Current contributions describe a transformation of citizenship to instrumental citizenship, 'citizenship lite' or the commodification of citizenship.[91] This relativity of citizenship highlights that the subjects of citizenship — citizens and non-citizens — are constructed.[92] As noted by Bosniak, "citizens and non-citizens are not beings found in nature; they are made and unmade by law and politics".[93] The same

86 Kerber (n 58) 854. See also Farahat (n 19) 54; Daniel Thym, 'Frontiers of EU Citizenship: Three Trajectories and Their Methodological Limitations' in Dimitry Kochenov (ed), *EU Citizenship and Federalism. The Role of Rights* (Cambridge University Press 2017) 713.

87 See also Myres S McDougal, Harold D Lasswell and Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press 1980) 597 f.

88 See also Mantu (n 3) 3.

89 Karen Knop, 'Relational Nationality: On Gender and Nationality in International Law' in T Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001). See also Irene Bloemraad and Alicia Sheares, 'Understanding Membership in a World of Global Migration: (How) Does Citizenship Matter?' (2017) 51 International Migration Review 855.

90 Observing a denationalization of citizenship: Bosniak, 'Citizenship Denationalized' (n 69); Sassen, 'Post-National Citizenship' (n 17). Observing a diminishment of the importance of citizenship due to the proliferation of rights irrespective of citizenship: David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (Johns Hopkins University Press 1996); Soysal (n 73). Claiming that citizenship is back "with a vengeance": Catherine Dauvergne, 'Citizenship with a Vengeance' (2007) 8 Theoretical Inquiries in Law 489.

91 Bauböck, 'Genuine Links and Useful Passports' (n 57); Christian Joppke, 'The Inevitable Lightening of Citizenship' (2010) 51 European Journal of Sociology 9; Joppke, 'Instrumental Turn' (n 51); Ayelet Shachar, 'The Marketization of Citizenship in an Age of Restrictionism' (2018) 32 Ethics & International Affairs 3.

92 Marie-Bénédicte Dembour, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg' (2003) 21 Netherlands Quarterly of Human Rights 63, 93.

93 Linda Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 International Journal of Constitutional Law 9, 11.

is true for the systems of citizenship attribution. The modes for attributing citizenship at birth on the basis of territory — *jus soli* — or on the basis of descent — *jus sanguinis* — are equally politically constructed and enforced by law, and so are the requirements for acquiring nationality later in life through naturalization.[94] This, however, also means that the concept of citizenship can be subject to change. The question, then, is based on which principles law and politics make citizens and citizenship.

For the purpose of this study, I will focus on citizenship in a legal sense — that is citizenship as a legal status, a relationship between an individual and a state that, despite the existence of internationally protected human rights applying to everyone irrespective of one's citizenship, still secures important rights and may bear certain obligations. The *locus* and subject of the analysis are the nation state, its citizens and non-citizens. The question is how international human rights law shapes this relationship between the state, citizens and non-citizens in nationality matters and how it impacts access to, and exclusion from, that legal status. The different conceptions of citizenship thereby serve as a challenge to reflect on the concept of citizenship in international human rights law critically.

3 *Citizenship as a Legal Status*

3.1 The Concept of Citizenship in International Law

What does it mean that I understand citizenship as a legal status for the purposes of this study? In one of the main treatises on nationality of the 20th century, Makarov defined citizenship as a "Rechtsverhältnis zwischen dem Staat und seinen Angehörigen […], bei dessen Regelung die Eigenschaft der Person als Subjekt dieses Rechtsverhältnisses einen rechtlichen Status dieser Person bildet".[95] In other words, citizenship is a legal relationship between the state and its members in which the relationship of the individual member to the state is a specific legal status.[96] Thus, citizenship as a legal status is the legal recognition of the relationship between a state and an individual and is itself the formal basis for rights and duties of the individual in the state of

94 See also Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009) 10. With regard to naturalization see Ricky van Oers, *Deserving Citizenship. Citizenship Tests in Germany, the Netherlands and the United Kingdom* (Brill Nijhoff 2013). See on the principles of *jus soli* and *jus sanguinis* in more detail below Chapter 2, 11.3.2.

95 Makarov (n 36) 31.

96 Makarov thereby tries to reconcile the two positions understanding citizenship either as a legal status or a legal, quasi-contractual relationship, see *ibid 22 ff.*

nationality.[97] Citizenship in a legal sense is, therefore, "the quintessential *legal* relationship between individuals and their state".[98] It determines both the legal criteria for membership and the nature of the connection between the state and its members.

The most famous definition of nationality for the purposes of international law has been adopted by the ICJ in 1955 in the *Nottebohm* case:

> 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.[99]

It defines citizenship or nationality as a formal legal bond, a relationship, between an individual and a state. This relationship brings with it certain rights and duties, even though they are not necessarily specified. Moreover, the *Nottebohm* ruling suggests that the relationship between the individual and the state should be established due to, or based on a certain pre-existing connection or attachment between that individual and the state.

Recent international standards build on the definition of the ICJ. The Inter-American Court of Human Rights, for example, first defined nationality as the "political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state".[100] Eventually, it extended that definition:

> nationality is a juridical expression of a social fact that connects an individual to a State. Nationality is a fundamental human right [...]. The importance of nationality is that, as the political and legal bond that connects a person to a specific State, it allows the individual to acquire and exercise rights and obligations inherent in membership in a political community. As such, nationality is a requirement for the exercise of specific rights.[101]

The Advocate General of the Court of Justice of the European Union (CJEU), Poiares Maduro, found in its opinion in the *Rottman* case that

97 Bosniak, 'Citizenship Denationalized' (n 69) 456; Rubenstein (n 4) 162.

98 Ruvi Ziegler, *Voting Rights of Refugees* (Cambridge University Press 2017) 92.

99 *Nottebohm* (n 1) 23.

100 *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* [1984] IACtHR OC-4/84, Series A No. 4 (1984) para 35.

101 *Yean and Bosico* (n 28) paras 136–137.

> [i]t is well known that nationality can be defined as the legal relationship under public law between an individual and a given State, a relationship which gives rise to a body of rights and obligations for that individual. The characteristic feature of that nationality relationship is that it is founded on a special bond of allegiance to the State in question and on reciprocity of rights and duties. With nationality, the State defines its people. What is at stake, through the nationality relationship, is the formation of a national body politic [...].[102]

All this suggests that in international law citizenship is to be understood as a legal status — a legal status that allocates individuals to a certain state. From the perspective of international law, the element of allocation of individuals to a particular state is the primary function of nationality.[103] Through the institute of citizenship the state defines its population and forms its body politic. At the domestic level, citizenship grants full membership in the state that comes with a specific bundle of rights.[104] The rights and obligations tied to the status of full membership and the basis for the status — the conditions for acquisition and loss of citizenship — are generally left to be regulated at the national level.[105] Beyond the allocation function, the concept of citizenship from a legal perspective is, as some argue, hollow or empty.[106] In 1929, the Harvard Research in International Law, for example, found that "nationality has no positive, immutable meaning".[107] Similarly, Rainer Bauböck recently noted that citizenship does "not entail any particular content either in terms of rights or political participation".[108] In that sense, citizenship as a legal status is a dual concept governed, at the same time, by rules of both domestic and international law

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102 *Opinion of Advocate General Maduro in Case C-135/08* (*Rottman*) [2009] CJEU C-135/08 para 17.

103 See also Mantu (n 3) 5.

104 See on the external and internal aspect of citizenship Shaw, *The People in Question* (n 3) 4.

105 See Farahat (n 19) 53 f; Mantu (n 3) 2. See, however, for the discussion of the limits of the *domaine réservé* of states in nationality matters under international law Chapter 3, II.

106 Farahat (n 19) 54; de Groot and Vonk (n 8) 35; Kay Hailbronner, 'Rights and Duties of Dual Nationals: Changing Concepts and Attitudes' in David A Martin and Kay Hailbronner (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects* (Kluwer Law International 2003) 20; Makarov (n 36) 30. Arguing for a more substantive understanding of nationality, Vlieks, Hirsch Ballin and Recalde-Vela (n 34) 164.

107 Research in International Law of the Harvard Law School, 'The Law of Nationality' (1929) 23 American Journal of International Law 21.

108 Bauböck, 'Genuine Links and Useful Passports' (n 57) 3.

and has effects at the domestic and the international levels.[109] International citizenship law, then, is the body of rules found in international legal texts that govern the acquisition and the loss of nationality or rather, that set the limits of state' discretion when regulating acquisition or loss of citizenship.[110]

As will be shown in more detail below, citizenship, moreover, is an essential element of statehood from an international legal perspective.[111] States are essentially communities of individual human beings that collectively govern a particular territory and the persons on that territory. They do not exist without a population, a body politic or a citizenry. At the same time, citizenship in a legal sense equally presupposes the existence of a state.[112] As such, citizenship is therefore directly linked to the concept of the state and its sovereignty.[113]

Through this link between membership, identity, rights and obligations and statehood, citizenship impacts society as a whole. As Tendayi Bloom notes, "it is impossible to create a liberal State in a world of States without also creating citizenship".[114] The definition of the collective identity of a state through its population, and with it the criteria for membership in that collective, however, are highly political questions. Foreigners and newcomers to the community of citizens are often perceived (or instrumentalized) as a possible threat to antecedent ideas of identity. Sandra Mantu describes nationality attribution and loss in that context as "a symbolic field of state power that dictates the composition of the citizenry, therefore affecting underlying ideals of identity and membership".[115] Hence, the competence to decide on access to, but also loss of membership remains carefully guarded by the state and its representatives.[116]

Therefore, the link between individuals and a state through citizenship can be described as threefold — it links a population to a territory and political governance, thereby establishing statehood, it links an individual with a state, thereby forming the basis for full and equal membership, and it links

109 See Gunnar G Schram, 'Article 15 UDHR' in Asbjørn Eide and others (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992) 229. See also Farahat (n 19) 54 f; Mantu (n 3) 6; Weis, *Nationality in International Law* (n 9) 29.

110 See also Makarov (n 36) 17.

111 Malcolm N Shaw, *International Law* (6th ed, Cambridge University Press 2008) 659; Vlieks, Hirsch Ballin and Recalde-Vela (n 34) 165. See also Chapter 3, I.1.

112 Fripp (n 8) 22.

113 Kristine Kruma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge* (Martinus Nijhoff 2014) 31.

114 Bloom, *Noncitizenism* (n 80) 11.

115 Mantu (n 3) 15.

116 See also Jeffrey Blackman, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law' (1998) 19 Michigan Journal of International Law 1141, 1151. See in more detail Chapter 3, II.

individuals to a specific state, thereby allowing for a nation state system. To fulfill these three functions, citizenship is generally a (relatively) stable and secure status.[117] The large majority of people acquire their citizenship at birth and keep that same citizenship throughout their entire life. The following section briefly discusses these main modes of acquisition and loss of citizenship.

3.2 Acquisition and Loss of Citizenship

How is citizenship acquired, or — from the perspective of the state — attributed? Acquisition and loss of citizenship is regulated at the national level. In general, citizenship can be acquired automatically, by declaration or registration or by naturalization.[118] The large majority of persons acquire citizenship at *birth*.[119] To do so, two different systems are dominant: acquiring citizenship on the basis of one's place of birth — following the system of *jus soli* — and acquiring citizenship based on descent, ie from one's parents' citizenship at the moment of birth under the system of *jus sanguinis*.[120] Under both systems acquisition of citizenship occurs *ex lege* based on the fact of birth.[121] Historically, *jus soli* was the main principle of citizenship attribution in common-law countries, whereas *jus sanguinis* was prevalent civil-law jurisdictions. The US, other American states and the UK followed the principle of *jus soli*, whereas *jus sanguinis* was long predominant in continental Europe, Africa and Asia. As a recent study based on the GLOBALCIT database shows, all 177 states included in the database provide for *jus sanguinis* acquisition of citizenship — be it only to secure the acquisition of citizenship for children born to nationals residing abroad.[122] Thus, *jus sanguinis* today has an almost global reach. *Jus soli*, by contrast, is provided in 32 countries in an automatic and unconditional form, and in another 25 countries in a more restricted

117 Mantu (n 3) 12.

118 de Groot and Vonk (n 8) 50.

119 Iseult Honohan and Nathalie Rougier, 'Global Birthright Citizenship Laws: How Inclusive?' (2018) 65 Netherlands International Law Review 337, 338.

120 See for an overview on use of *jus soli* and *jus sanguinis* for birthright citizenship acquisition in Global Citizenship Observatory (GLOBALCIT), 'Global Birthright Indicators, Version 3.0' (Global Citizenship Observatory (GLOBALCIT) 2017) <https://public.tableau.com/profile/lorenz03504#!/vizhome/Globalbirthrightindicators/Globalbirthrightindicators>. The Vatican State is the only state which does not grant citizenship on the basis of birth or descent, but based on residence and office or service with the Vatican, see Hailbronner and others (n 14) 46.

121 de Groot and Vonk (n 8) 51.

122 Honohan and Rougier (n 119) 340. For the database see Global Citizenship Observatory (GLOBALCIT), 'Global Database on Modes of Acquisition of Citizenship, Version 1.0' (GLOBALCIT 2017) <https://globalcit.eu/modes-acquisition-citizenship/>.

form.[123] In practice, most states — including European states — today apply a combination of both principles allowing for acquisition based on descent for children born to citizens and for some form of acquisition based on birth in the country at least for children born to non-citizens with a stable residence right.[124] International law does not prescribe the use of either of the two principles, nor does it exclude the possibility of attributing citizenship based on a different connecting factor.[125] Some authors, however, see a slight preference for the principle of *jus soli* in human rights instruments.[126]

In particular, *jus sanguinis* has been criticized for having an ethnic connotation and hindering the inclusion of migrants — resulting in underinclusion of persons with migant background whereas over-including the descendants of emigrants.[127] *Jus soli,* by contrast, is found to provide for a more inclusive, egalitarian and democratic system of citizenship attribution, as citizenship is attributed to everyone born in the country irrespective of their background.[128] This, so the criticism, leads to overinclusion of children who are merely 'accidentally' born in the country.[129] Moreover, both systems fail to include those migrants who arrived at a young age and spend all their life in a state — the so-called 1.5 generation.[130] As Iseult Honohan and Nathalie Rougier conclude:

> The extent to which a citizenship regime may be considered appropriately inclusive [...] depends partly on the character of immigration

123 Honohan and Rougier (n 119) 340. See for a historical perspective the analysis made in the Harvard Law Research of 1929, Research in International Law of the Harvard Law School (n 107) 29.

124 Hailbronner and others (n 14) 46; Honohan and Rougier (n 119) 340.

125 Hailbronner and others (n 14) 46. See also Peter J Spiro, 'Citizenship, Nationality, and Statelessness' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 282; Weis, *Nationality in International Law* (n 9) 95 f.

126 See eg Article 20(2) ACHR and Article 6(4) ACC as well as Human Rights Committee, 'General Comment No. 17: Article 24 (Rights of the Child)' (HRCttee 1989) UN Doc. CCPR/C/21/Rev.1/Add.9 para 8. Article 6 ECN addresses both acquisition of nationality based on descent as well as of birth in the territory. See also Adjami and Harrington (n 3) 105; Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 International Journal of Refugee Law 156, 169; Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008) 58 ff.

127 Shachar, *The Birthright Lottery* (n 94) 121.

128 *ibid 115.*

129 Rainer Bauböck, 'Democratic Inclusion. A Pluralistic Theory of Citizenship' in Rainer Bauböck (ed), *Democratic Inclusion* (Manchester University Press 2018) 70.

130 See *ibid 68.*

> policies, the availability of naturalisation procedures for immigrants and the possibility of renouncing citizenship where ties are lost.[131]

In addition to acquisition at birth on the basis of *jus soli* and *jus sanguinis*, citizenship can be acquired after birth by declaration or registration, and, most importantly, through *naturalization*.[132] Weis defines naturalization as "the grant of nationality to an alien by a formal act, on an application made for the specific purpose by the alien".[133] Acquiring citizenship through naturalization does not occur *ex lege* but is based on a decision of a public authority. The GLOBALCIT database shows that 170 of the 174 states listed in the dataset for ordinary naturalization have a provision in domestic law allowing for naturalization.[134]

Some countries know an entitlement to naturalization, but in most cases naturalization is discretionary.[135] Thereby, naturalization is normally made contingent upon the fulfilment of certain criteria.[136] These criteria often relate to a certain period of residence, an immigration status, language skills, other integration criteria relating to civic knowledge or social contacts, the absence of a criminal record or a threat to state security, economic self-sufficiency or wealth, as well as, sometimes, a commitment to certain values or an expression of loyalty.[137] In practice the material barriers imposed by substantive naturalization requirements relating to civic integration and formal hindrances such as complicated procedures or excessive fees, as well as the discretion of the authorities involved set a high threshold for acquiring citizenship through naturalization.[138]

In case of loss of citizenship, on the other hand, a distinction is usually made between *renunciation*, if citizenship is relinquished at the initiative of

131 Honohan and Rougier (n 119) 340.

132 de Groot and Vonk (n 8) 50. Adoption is deemed equivalent to birth.

133 Weis, *Nationality in International Law* (n 9) 99.

134 Global Citizenship Observatory (GLOBALCIT), 'Database Acquisition of Citizenship' (n 122). No provisions on naturalization are found in the legislations of Lebanon, Myanmar, Nepal and Sri Lanka. Moreover, in many states in the Middle East naturalization is theoretically possible but in practice remains largely unachievable as the requirements are so restrictive, see Zahra Albarazi, 'Regional Report on Citizenship: The Middle East and North Africa (MENA)' (Global Citizenship Observatory (GLOBALCIT) 2017) GLOBALCIT Comparative Report 2017/3 <http://cadmus.eui.eu/bitstream/handle/1814/50046/RSCAS_GLOBALCIT_Comp_2017_03.pdf?sequence=1&isAllowed=y>.

135 de Groot and Vonk (n 8) 60. See also Chapter 5, III.3.6.

136 In case of facilitated naturalization, the criteria generally are reduced but not lifted entirely.

137 See also de Groot and Vonk (n 8) 60 f.

138 See on exclusionary effects of naturalization tests van Oers (n 94).

the individual, *lapse*, if citizenship is lost *ex lege* upon realization of certain grounds of loss, such as eg residence abroad for a certain time or the acquisition of another nationality, *nullification* if the acquisition of nationality is ex post declared to be null and void, and *withdrawal* if citizenship is deprived based on a decision of a public authority.[139]

The human rights implications of these different modes of acquisition and loss of citizenship will be discussed in more detail in Chapter 5. For now, the discussion turns to the functions of citizenship from the persepective of the individual.

3.3 Functions of Citizenship

From the perspective of the individual citizenship is essential to access certain rights and, as a consequence thereof, has a significant impact on that person's social identity.[140] This has been acknowledged by the ECtHR, which sees the concept of citizenship closely linked to a person's social identity and hence their private life:[141]

> [T]he denial of citizenship may raise an issue under Article 8 [ECHR] because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person's social identity.[142]

Thus, from the perspective of the individual, citizenship is more than an empty shell or a purely formal, neutral legal status. As the UN Special Rapporteur on Racism Tendayi Achiume notes, "[i]n reality, however, for all human beings, their capacity to enjoy full human rights depends on their citizenship, nationality or immigration status".[143] Citizenship, in the famous words of Hannah Arendt, is the "right to have rights".[144]

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139 de Groot and Vonk (n 8) 64.

140 See also Eva Ersbøll, 'Nationality and Identity Issues — A Danish Perspective Special Issue: EU Citizenship: Twenty Years on: Part II: Legal Citizenship in the EU and Its Frontiers' (2014) 15 German Law Journal 835, 836.

141 See in more detail below Chapter 6, II.2.1. See also Barbara von Rütte, 'Social Identity and the Right to Belong — The ECtHR's Judgment in Hoti v Croatia' (2019) 24 Tilburg Law Review 147.

142 *Genovese v Malta* (n 30) para 33.

143 UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, 'Report on Racial Discrimination in the Context of in the Context of Laws, Policies and Practices Concerning Citizenship, Nationality and Immigration' (Special Rapporteur on Racism 2018) UN Doc. A/HRC/38/52 para 7.

144 Hannah Arendt, *The Origins of Totalitarianism* (Harcourt 1973) 296. See in more detail Chapter 2, III.2.1.

Depending on the specific national context there are different rights and obligations tied to citizenship.[145] As Irene Bloemraad and Alicia Sheares write:

> [C]itizenship provides access to opportunities, rights, and benefits; it connotes legitimacy; it leads to mobilization by other actors; it spurs personal investment or more rapid socialization in the economic, civic or political life of the country; it signals to others particular skills, motivations, or time horizons; and it carries social psychological effects for social identity and collective solidarity.[146]

In a similar manner, Matthew Gibney points to three key benefits of citizenship: "privileges, security and voice".[147] Lindsey Kingston categorizes citizenship as giving rise to rights to place and rights to purpose which are both necessary for a dignified life.[148] Depending on one's concept of citizenship, the relevance of the rights tied to it varies. From a republican conception of citizenship access to political rights and participation in political activities is the most important aspect.[149] A liberal concept of citizenship might put more weight on the fact that citizenship grants certain rights on an equal basis.[150] From a migration perspective, the right to territorial security is the central function of citizenship.[151] For the purposes of international law, three functions of citizenship as a legal status seem most important: diplomatic protection, political rights and the unconditional right to enter and remain in the state of nationality.

3.3.1 *Diplomatic Protection*

Historically, *diplomatic protection* has been one of the central functions of citizenship. As Weis writes, "international diplomatic protection is a right of the State, accorded to it by customary international law, to intervene on behalf of its own nationals, if their rights are violated by another State, in order to

145 Katja Swider and Caia Vlieks, 'Learning from Naturalisation Debates: The Right to an Appropriate Citizenship at Birth' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer International Publishing 2018) 149.

146 Bloemraad and Sheares (n 89) 841.

147 Gibney, 'Statelessness and Citizenship' (n 3) 51. See also Hirsch Ballin (n 3) 141.

148 Kingston (n 80) 5.

149 See Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 1958); Bosniak, 'Citizenship Denationalized' (n 69) 470 ff.

150 See Bosniak, 'Citizenship Denationalized' (n 69) 465.

151 See eg Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004) 8.

obtain redress".[152] Diplomatic protection is, however, according to traditional international law, not a right of the individual but of the state.[153] It is the protection individuals may receive from their state of nationality if their rights are violated in another state.[154]

Being a right of the state, diplomatic protection was traditionally limited to the protection of nationals of the state concerned.[155] As the PCIJ noted in the *Panevezys-Saldutiskis-Railway* case:

> This right [to exercise diplomatic protection] is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection [...].[156]

Exceptions to this nationality-of-claims rule are only made regarding stateless persons and refugees that cannot avail themselves of the protection of their state of nationality.[157]

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152 Weis, *Nationality in International Law* (n 9) 33.

153 See *Nottebohm* (n 1) 24.

154 Annemarieke Vermeer-Künzli, 'Nationality and Diplomatic Protection, A Reappraisal' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 76. See also Article 1 International Law Commission Draft Articles on Diplomatic Protection, 2006, Supplement No. 10, UN Doc. A/61/10 ('ILC Draft Articles on Diplomatic Protection').

155 See on the discussion sparked by the ICJ's judgment in the *Nottebohm* case on the question whether nationality has to be effective for the exercise of diplomatic protection Alice Edwards, 'The Meaning of Nationality in International Law in an Era of Human Rights, Procedural and Substantive Aspects' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 32; Alexander N Makarov, 'Das Urteil des Internationalen Gerichtshofes im Fall Nottebohm' (1955) 16 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 407; Robert D Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 Harvard International Law Journal 8; Peter J Spiro, 'Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion' (2019) Investment Migration Working Paper No 2019/1 <https://investmentmigration.org/download/nottebohm-genuine-link-anatomy-jurisprudential-illusion-imc-rp-2019-1/>; Vermeer-Künzli (n 154) 77.

156 *Panevezys-Saldutiskis Railway* (*Estonia v Lithuania*) [1939] PCIJ Series A./B. No. 76 para 65.

157 Article 8 ILC Draft Articles on Diplomatic Protection (n 154). The Commentary to the Draft Articles describes Article 8 as 'an exercise in progressive development of the law', International Law Commission, 'Commentary on the Draft Articles on Diplomatic Protection' (ILC 2006) Yearbook of the International Law Commission, 2006, Vol. II, Part Two 36. See also Andreas Kind, *Der diplomatische Schutz: Zwischenstaatlicher*

3.3.2 *Political Rights*

Another central function of citizenship is access to *political rights*.[158] As Arendt argued, the fundamental injustice of statelessness — of the absence of recognition as a citizen by any state — "is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective".[159] For Arendt, voice is thus the central function of citizenship.[160] Similarly, Susanne Baer argues that political rights are at the center of every idea of human rights:

> Sie [politische Rechte] begründen die Zugehörigkeit zu einem politischen Gemeinwesen und ermöglichen dessen Mitgestaltung, sie sind aber auch Grundlage jeder Rechtssubjektivität, die in solchen Gemeinwesen wurzelt.[161]

In a large sense, political rights cover different rights protecting participation in public life and political affairs: from the right to vote as such to more indirect forms of political engagement such as freedom of expression, freedom of assembly and freedom of association, which are equally essential preconditions for functional democracies.[162]

Among these political rights the right to take part in elections and public affairs, including the right to vote, has a special status. It is one of the few rights that are not conceived as 'human' rights applying to everyone alike, but as a citizens' right that can be exercised only by nationals of the state concerned.[163]

Rechtsdurchsetzungsmechanismus im Spannungsfeld von Individualrechten, Aussenin-teressen, Staatsangehörigkeit und Schutzpflichten: Eine schweizerische Perspektive (Dike Verlag Zürich 2014) 116 ff; Vermeer-Künzli (n 154) 76.

158 Rudan (n 11) 117. See on the implications of the exclusion of non-citizens from political rights for democracy below Chapter 6, 1.2.

159 Arendt, *Origins of Totalitarianism* (n 144) 296.

160 See by contrast Linda Bosniak, 'Status Non-Citizens' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 328 ff.

161 Susanne Baer, 'Politische Rechte' in Arnd Pollmann and Georg Lohmann (eds), *Menschenrechte: Ein interdisziplinäres Handbuch* (Metzler 2012) 257.

162 Human Rights Committee, 'General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)' (HRCttee 1996) UN Doc. CCPR/C/21/Rev.1/Add.7 para 12. See also Walter Kälin and Jörg Künzli, *Universeller Menschenrechtsschutz: der Schutz des Individuums auf globaler und regionaler Ebene* (4. Aufl., Helbing Lichtenhahn Verlag 2019) 582 ff.

163 Kälin and Künzli, *Menschenrechtsschutz* (n 162) 607. Interesting is, however, Article 21 UDHR which grants 'everyone' the right to take part in the government of 'his' country, see also Zilbershats (n 3) 59.

Hence, Article 25 of the International Covenant on Civil and Political Rights (ICCPR)[164] stipulates:

> Every *citizen* shall have the right and the opportunity, without any of the distinctions [...] and without unreasonable restrictions:
> (a) To take part in the conduct of public affairs [...];
> (b) To vote and to be elected at genuine periodic elections [...];
> (c) To have access [...] to public service in his country.[165] (emphasis added)

This does not mean that non-citizens are never granted political rights. Some rights such as the right to freedom of expression, to freedom of assembly and to freedom of association apply to everyone, including non-citizens.[166] Moreover, an increasing number of states allow non-citizen residents to participate in elections and referenda — particularly at the local level and, in the case of the EU, at the supranational level — or even to be elected for public office.[167] The

164 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 ('ICCPR').

165 Similar provisions can be found in other instruments, such as Article 5(c) of the Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965, 660 UNTS 195, 'CERD'), Article 7(f) of the Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979, 1249 UNTS 13, 'CEDAW') and Article 29 Convention on the Rights of Persons with Disabilities as well as at the regional level Article 23 ACHR or Article 13 ACHPR.

166 Human Rights Committee, 'General Comment No. 15: The Position of Aliens Under the Covenant' (HRCttee 1986) para 7. Article 16 ECHR which allows imposing restrictions on the political activity of non-citizens is considered to be outdated and is not normally applied by the ECtHR, see Kälin and Künzli, *Menschenrechtsschutz* (n 162) 590. See however with regard to the argument that a loyalty requirement for the purposes of naturalization restricts the rights to freedom of expression and of assembly *Petropavlovskis v Latvia* (n 30).

167 Dan Ferris and others, 'Noncitizen Voting Rights in the Global Era: A Literature Review and Analysis' (2020) 21 Journal of International Migration and Integration 949. The question of political participation of resident non-citizens is discussed in a large body of academic literature. See among many Jean-Thomas Arrighi and Rainer Bauböck, 'A Multilevel Puzzle: Migrants' Voting Rights in National and Local Elections' (2017) 56 European Journal of Political Research 619; Rainer Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' (2006) 75 Fordham Law Review 2393; Julie Fraser, 'Inclusive Democracy: Franchise Limitations on Non-Resident Citizens as an Unjust Restriction of Rights under the European Convention on Human Rights' (2017) 33 Utrecht Journal of International and European Law; Andrea de Guttry, 'The Right of Aliens to Vote and to Carry Out Political Activities: A Critical Analysis of the Relevant International Obligations Incumbent on

extension of the franchise to permanent resident non-citizens is also increasingly called for as a measure to foster integration and increase democratic legitimacy.[168] Nevertheless, non-citizens, in principle, cannot claim a right to take part in elections and public affairs in their state of residence based on international law. Therefore, the right to take part in elections and public affairs can, at least for now, not replace the right to citizenship regarding access to political rights. Political rights remain one of the central functions of citizenship.[169]

3.3.3 *Right to Enter and Remain*

For the purposes of this study — and from a migration law perspective — the main function of citizenship, however, is the unconditional *right to enter and remain*.[170] Citizens have an unconditional right stay in their state of nationality, and if they leave, to return. Non-citizens, by contrast, can be denied entry into the territory and — within certain limits[171] — can be expelled.[172] A state, as the ECtHR repeatedly claimed, "is entitled, as a matter of international law [...] to control the entry of aliens into its territory and their residence there".[173] Thus, non-citizens are subject to a state's exclusion power and "remain subject

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the State of Origin and on the Host State' [2018] Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 933; Richard Lappin, 'The Right to Vote for Non-Resident Citizens in Europe' (2016) 65 International and Comparative Law Quarterly 859; David Owen, 'Transnational Citizenship and the Democratic State: Modes of Membership and Voting Rights' (2011) 14 Critical Review of International Social and Political Philosophy 641; Luicy Pedroza, *Citizenship Beyond Nationality: Immigrant's Right to Vote Across the World* (University of Pennsylvania Press 2019); Cristina M Rodríguez, 'Noncitizen Voting and the Extraconstitutional Construction of the Polity' (2010) 8 International Journal of Constitutional Law 30; Ruth Rubio-Marín, 'Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants' (2006) 81 New York University Law Review 117; Ziegler (n 98).

168 PACE, 'Recommendation 1500 (2001)' (n 27).

169 See for a limitation of political rights of dual citizens *Tănase v Moldova* [2010] ECtHR Application No. 7/08.

170 See also Guild, *The Legal Elements of European Identity* (n 151) 8; R (on the application of Johnson) (Appellant) v Secretary of State for the Home Department (Respondent) [2016] UK Supreme Court [2016] UKSC 56 para 33.

171 For example, the right to one's own country under Article 12(4) ICCPR (see Chapter 6, II.2.2) but also the principle of *non-refoulement*.

172 See on the right to freedom of movement in a migration context also Richard Perruchoud, 'State Sovereignty and Freedom of Movement' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012).

173 *Üner v The Netherlands* [2006] ECtHR Application No. 46410/99 para 54.

to potential removal", as Bosniak writes.[174] The limitation of the prohibition of expulsion to nationals is enshrined, amongst others, also in Article 3 Protocol No. 4 to the ECHR:[175]

> 1 No one shall be expelled, by means either of an individual or of a collective measure, from the territory *of the State of which he is a national*.
> 2 No one shall be deprived of the right to enter the territory of the *state of which he is a national*. (emphasis added)

The right to enter and remain in a state is of central importance for the enjoyment of all other rights. As David Owen notes, "the right to entry and residence is primary here since to possess civic rights in a given place, one has to have the freedom to be in (or return to) that place".[176] In a similar manner Elspeth Guild sees the unconditional right to residence tied to citizenship as an essential element for a person's identity "as it is the legal expression of the individual's relationship to the territory and the state".[177] Thus, the unconditional right to enter and remain — the right to territorial security — is the function of citizenship that likely has the most immediate and far-reaching practical consequences for the individual in their daily life.[178]

Given the importance of these functions of citizenship for an individual's life, it does have significant consequences for a person to be a citizen or not. In particular, the exclusionary power and the lack of territorial security remains one of the main reasons why access to (and retention of) citizenship remains so important.[179] As the Committee on the Elimination of Racial Discrimination concludes, "denial of citizenship for long-term or permanent residents could result in creating disadvantages for them in access to employment and social benefits" and possibly amount to discrimination.[180] The connection between citizenship and the right to enter and remain in a state also

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174 Bosniak, 'Status Non-Citizens' (n 160) 327. See on the exclusionary effect of citizenship also below Chapter 6, I.3.

175 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16 September 1963, ETS No. 046 ('Protocol No. 4').

176 Owen, 'The Right to Have Nationality Rights' (n 3) 303.

177 Guild, *The Legal Elements of European Identity* (n 151) 17.

178 See also Bosniak, 'Status Non-Citizens' (n 160) 327.

179 See Chapter 6, I.3.

180 Committee on the Elimination of Racial Discrimination, 'General Recommendation No. XXX on Discrimination Against Non-Citizens' (CtteeERD 2002) para 15.

shows the direct link between migration law — or rather the legal framework regulating access to the territory of a state — and citizenship.[181] The following section shall examine this relationship between citizenship and human rights in more detail.

III Citizenship as a Human Right

The functions of citizenship discussed in the previous section highlight the close relationship between human rights and citizenship.[182] In the relationship between citizenship and human rights, two different aspects must be distinguished. As noted by Carol Batchelor "nationality is not only a right of itself, it is a necessary precursor to the exercise of other rights".[183] The following section will discuss these two facets of citizenship: On the one hand, that citizenship is a human rights issue in the sense that it secures access to other human rights (III.1). On the other hand, that citizenship in and of itself can be qualified as a moral (III.2) and legal human right (III.3).

1 *Citizenship as Access to (Human) Rights*

The rights discussed in the foregoing section show the continuing importance of citizenship for the enjoyment of citizens' rights.[184] But also beyond the rights explicitly reserved for citizens, citizenship continues to be essential

181 Thus, arguments for more inclusive citizenship regimes contain a risk of increasing the exclusionary tendencies of citizenship and shifting the pressure to the territorial border and the question of access to a state. However, while I consider both forms of exclusion to be problematic, I focus here on the question of access to citizenship and leave the question of access to the territory aside. See on the right to immigration eg Joseph Carens, *The Ethics of Immigration* (Oxford University Press 2013); Andreas Cassee, 'Das Recht auf globale Bewegungsfreiheit: Eine Verteidigung' (2014) 141 Archiv für Rechts- und Sozialphilosphie, Beihefte 55; Martino Mona, *Das Recht auf Immigration: rechtsphilosophische Begründung eines originären Rechts auf Einwanderung im liberalen Staat* (Helbing Lichtenhahn 2007).

182 See on the relationship of citizenship and human rights David Owen, 'Citizenship and Human Rights' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (2017). See further Paulina Tambakaki, *Human Rights or Citizenship?* (Birkbeck Law 2010).

183 Carol A Batchelor, 'Developments in International Law: The Avoidance of Statelessness Through Positive Application of the Right to a Nationality' in Council of Europe (ed), *Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality* (Council of Europe 1999) 52.

184 See on the relationship of citizenship and human rights Owen, 'Citizenship and Human Rights' (n 182). See further Tambakaki (n 182).

to safeguard access to and the enjoyment of basic human rights and fundamental freedoms at the domestic level.[185] Even though human rights by definition apply to everyone irrespective of their citizenship simply by virtue of their humanity, in practice citizenship remains a crucial prerequisite for the effective enjoyment of human rights.[186] The Convention on the Elimination of All Forms of Racial Discrimination, for example, explicitly allows its state parties to draw a distinction between citizens and non-citizens. This is just one example to highlight how important nationality still is to have unrestricted and effective access to rights.[187] Stephen Hall describes the right to nationality for that reason as "a civil and political meta-right of the most far reaching importance".[188] The effective enforcement of human rights at the national level remains difficult without citizenship and access to protection, privileges and political voice remains closely tied to full legal membership status.[189] One would think that the decisive factor for the protection of one's rights should be one's humanity[190] yet citizenship remains crucial to effectively claim these rights in practice.[191]

The lack of (legal) protection is most significant for persons that are stateless, ie "not considered as a national by any state under the operation of its law".[192] Stateless persons are subject to all sorts of restrictions and even privation of their rights.[193] The lack of a nationality, as the Supreme Court of the United Kingdom has held in the case of *Secretary of State for the Home Department v*

185 See Elspeth Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?' (2018) 30 International Journal of Refugee Law 661, 662; Hirsch Ballin (n 3) 141; Kesby (n 35) 52.

186 Adjami and Harrington (n 3) 94; Barker (n 76) 242 ff; Sara Kalm, 'Citizenship Capital' (2020) 34 Global Society 528. See already Arendt, *Origins of Totalitarianism* (n 144) 292.

187 See also Michelle Foster and Timnah Rachel Baker, 'Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?' (2021) 11 Columbia Journal of Race and Law 83, 104.

188 Stephen Hall, 'The European Convention on Nationality and the Right to Have Rights' (1999) 24 European Law Review 586, 588.

189 Gibney, 'Statelessness and Citizenship' (n 3) 51.

190 Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 119.

191 See also Jo Shaw and Igor Stiks, 'Introduction: What Do We Talk about When We Talk about Citizenship Rights?' in Jo Shaw and Igor Stiks (eds), *Citizenship Rights* (Ashgate 2013) xix.

192 Article 1(1) CSS.

193 Bloom, *Noncitizenism* (n 80) 49. See also Gibney, 'Statelessness and Citizenship' (n 3) 47. See also UN Independent Expert on Minority Issues, 'Report on Minorities and the Discriminatory Denial or Deprivation of Citizenship'.

Al-Jedda, results in "worldwide *legal disabilities* with terrible practical consequence".[194] Thus, in our current international state-based system, statelessness continues to be an anomaly and a situation that leaves the persons concerned at risk of substantive violations of their basic human rights.[195] But also beyond statelessness, being a national not just somewhere, but in a place to which one has a substantial connection, is essential for a dignified life.[196] Moreover, some nationalities offer a stronger claim, better protection, more privileges and a louder political voice.[197] In that sense, citizenship appears to be a "birthright lottery".[198] Hence, access to citizenship remains crucial not only for stateless persons and in a migration context, but generally to access rights and equal opportunities.

2 *Citizenship as a Moral Human Right*

The second aspect in the relationship between citizenship and human rights is whether citizenship itself qualifies as a human right — both as a moral or political human right in theoretical and philosophical debates, as well as a human right in legal doctrine.[199] This distinction between 'moral or political human rights' and 'legal human rights' is helpful for the purpose of this study to distinguish the discussion about a right to citizenship or membership in legal philosophy or political theory, and the actual incorporation of this right in the international legal framework.[200] Following such a distinction, moral

194 *Secretary of State for the Home Department v Al-Jedda* [2013] UK Supreme Court [2013] UKSC 62 para 12.

195 Gibney, 'Statelessness and Citizenship' (n 3) 45; Tamás Molnár, 'The Prohibition of Arbitrary Deprivation of Nationality under International Law and EU Law: New Perspectives' [2014] Hungarian Yearbook of International Law and European Law 67; van Waas, *Nationality Matters* (n 126) 9.

196 Though there may be valid theoretical arguments that nationality is not *per se* good and that acquiring a(ny) nationality is not always in the interest of stateless persons. See Swider, 'Rights-Based Approach to Statelessness' (n 3) 10; see also Katja Swider, 'Why End Statelessness?' in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *End Statelessness?* (Routledge 2017). See also Bloom who points out that the imposition of citizenship cannot be seen as emancipatory only, Bloom, *Noncitizenism* (n 80) 88.

197 Dembour, *When Humans Become Migrants* (n 190) 30. See also Kalm (n 186) 202.

198 Shachar, *The Birthright Lottery* (n 94).

199 See also Owen, 'Citizenship and Human Rights' (n 182) 248.

200 I am aware that this categorization is simplistic and that there is a large debate about the conceptualization of human rights as moral or legal rights, see eg Aaron Fellmeth, *Paradigms of International Human Rights Law* (Oxford University Press 2016). See for a similar categorization Samantha Besson, 'The European Union and Human Rights: Towards A Post-National Human Rights Institution?' (2006) 6 Human Rights Law Review 329 ff.

human rights are those rights protecting the most elemental aspects of human dignity that are grounded in a normative ideal independent of their actual codification in positive law. As discussed in more detail below, legal human rights, by contrast, are those rights of individuals against a certain duty bearer, usually the state, that, in principle, are legally protected and codified in (international) law.[201] Thus, both moral and legal human rights share the rationale of protecting the fundamental human dignity of individuals against acts of a specific duty bearer.[202] The main distinctive feature between the two categories is the fact that legal human rights need a basis in positive (international) law and that they — at least theoretically — can be claimed and enforced in practice vis-à-vis state actors.[203]

There are several normative accounts that argue why citizenship should be recognized as a moral human right. In the following section, some selected positions that recognize citizenship as a moral or political human right shall be discussed in more detail.[204] The positions discussed below can be distinguished from authors who maintain that citizenship is not a right or human right. Christian Joppke, for example, argues that "citizenship itself is not a right or 'right to have rights'".[205] Still others claim that citizenship is no longer a relevant category in an age of universal human rights.[206] Yasemin Soysal, for example, posited in the 1990ies that national citizenship will prevail as an identity at the level of the nation state but is no longer a significant construction "in terms

201 See Kerstin von der Decken and Nikolaus Koch, 'Recognition of New Human Rights: Phases, Techniques and the Approach of "Differentiated Traditionalism"' in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights* (1st edn, Cambridge University Press 2020) 7; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 441. See in more detail below Chapter 2, III.3.

202 Fellmeth (n 200) 3.

203 Fundamental rights of individuals against the state in domestic law are usually referred to as constitutional fundamental rights, rather than human rights, see similarly Peters, *Beyond Human Rights* (n 201) 440.

204 The positions summarized are those found to be most pertinent for the subsequent discussion of the right to citizenship in international human rights law. However, others have developed similar arguments for a moral or political right to citizenship, eg Rainer Bauböck, *Transnational Citizenship, Membership and Rights in International Migration* (Edward Elgar Publishing 1994); Bauböck, 'Democratic Inclusion' (n 129); Bauböck and Paskalev (n 66); Hirsch Ballin (n 3); Kostakopoulou (n 19).

205 Joppke, 'Instrumental Turn' (n 51).

206 Soysal (n 73). See also Bosniak who argues that the rights of non-citizens — "alien citizenship" — should continuously approximate the rights and status of citizens in order to avoid the exclusionary side of citizenship, and does not argue directly for a right to citizenship, Bosniak, *Citizen and Alien* (n 50).

of its translation into rights and privileges".[207] Instead, she argues that a "new mode of membership, anchored in the universalistic rights of personhood" — a post-national membership — emerges.[208]

2.1 Hannah Arendt's Right to Have Rights

Arendt famously coined the notion of citizenship as the "right to have rights".[209] That right to have rights, for her, "means to live in a framework where one is judged by one's actions and opinions" and "to belong to some kind of organized community".[210] Arendt argues that human rights failed to fulfill the promise of protection beyond the limits of the nation state when they would have been most needed — in the face of totalitarian regimes:

> The Rights of Man, after all, had been defined as 'inalienable' because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.[211]

For Arendt, the promise of universal human rights remains empty.[212] For her, the atrocities of World War II made apparent that human rights cannot effectively materialize in the nation state system. In the war, stateless persons had lost not only their nationality and citizens' rights, they also lost their human rights. They were left in a condition of fundamental rightlessness due to not belonging to any community whatsoever.[213] Arendt concludes that citizenship is the direct and indispensable prerequisite for the protection of rights and the possession of human rights.[214] For her, membership in the political community remains an essential element of being human.[215] The refugees left stateless

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207 Soysal (n 73) 159.

208 *ibid.*

209 Arendt, *Origins of Totalitarianism* (n 144). See for a thorough analysis Seyla Benhabib, *The Rights of Others, Aliens, Residents, and Citizens* (5th printing, Cambridge University Press 2007) 49 ff; Kesby (n 35).

210 Arendt, *Origins of Totalitarianism* (n 144) 296 f. See on the notion of 'the right to have rights' in the Arendtian sense Ayten Gündogdu, *Rightlessness in an Age of Rights* (Oxford University Press 2015); Kesby (n 35).

211 Arendt, *Origins of Totalitarianism* (n 144) 291 f.

212 See Gündogdu (n 210).

213 Arendt, *Origins of Totalitarianism* (n 144) 295. See also Gündogdu (n 210).

214 See Owen, 'The Right to Have Nationality Rights' (n 3) 299 f.

215 See also Manuela Sissy Kraus, *Menschenrechtliche Aspekte der Staatenlosigkeit* (Pro-Universitate-Verlag 2013) 120.

after World War II had had lost, first and above all, "a place in the world which makes opinions significant and actions effective".[216] Through that loss, Arendt posits, they were expelled from humanity.[217] With the loss of citizenship rights, these stateless persons effectively also lost their human rights:[218]

> Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter of choice, or when one is placed in a situation where, unless he commits a crime, his treatment by others does not depend on what he does or does not do. This extremity, and nothing else, is the situation of people deprived of human rights. They are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion.[219]

For Arendt, citizenship is the right to have rights, the basic precondition to belong to humanity, the prerequisite to the enjoyment of all other rights. Yet, she questions the ability of an international human rights framework to protect that right in a world structured by nation states.[220] Rather, she claims, "the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself".[221] For her the state, and with it national citizenship, is the guarantor of human rights.[222] As Alison Kesby summarizes:

> Arendt argues that the stateless point to the existence of a 'right to have rights'. If human rights flow from membership of a political community, the one true human right is the right to belong to such a community — the right to have rights.[223]

Hence, Arendt does not see citizenship as a human right in an (international) legal sense. Her analysis of statelessness seems to be informed by her own

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216 Arendt, *Origins of Totalitarianism* (n 144) 296.
217 *ibid 297.*
218 Benhabib (n 209) 50.
219 Arendt, *Origins of Totalitarianism* (n 144) 296.
220 See also Kesby (n 35) 3; Mantu (n 3) 10.
221 Arendt, *Origins of Totalitarianism* (n 144) 298.
222 Owen, 'The Right to Have Nationality Rights' (n 3) 300.
223 Kesby (n 35) 3.

experience during the Holocaust and is not necessarily transposable to today's realities of statelessness.[224] Moreover, her conceptualization of belonging shows her republican understanding of citizenship.[225] Nevertheless, her conceptualization of citizenship as belonging to the community into which one is born as a precondition for a humane and dignified life provides an important theoretical foundation for the discussion of the right to citizenship in international human rights law.[226]

2.2 Seyla Benhabib's Cosmopolitan Right to Membership

Drawing on Immanuel Kant and Arendt's work Seyla Benhabib develops her own argument for the recognition of citizenship as a human right. In her 2004 book 'The Rights of Others', she examines the consequences of transnational migration for the boundaries of political membership and challenges the doctrine of state sovereignty by arguing "that a cosmopolitan theory of justice cannot be restricted to schemes of *just distribution* on a global scale, but must also incorporate a vision of just *membership*" (original emphasis).[227] This, in her opinion, entails a right to citizenship for non-citizens subject to certain conditions. Permanent alienage, she finds, "is not only incompatible with a liberal-democratic understanding of human community; it is also a violation of fundamental human rights".[228] Other than Arendt who "cannot deconstruct the stark dichotomy between human rights and citizens' rights", Benhabib aims to bridge the gap between these two dimensions and incorporate citizenship into a universal human rights regime.[229] "The right to have rights", she writes, "today means the recognition of the universal status of personhood of each and every human being independently of their national citizenship".[230] The challenge for her is to decouple the right to have rights from the status of nationality.

Benhabib argues that liberal democratic states cannot help but recognize a human right to membership:

> Liberal democracies that would condemn decolonizing nations for these practices [rendering people stateless] must themselves accept

224 Gibney, 'Statelessness and Citizenship' (n 3) 51. See also Brad K Blitz, 'The State and the Stateless. The Legacy of Hannah Arendt Reconsidered' in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *End Statelessness?* (Routledge 2017).

225 Kesby (n 35) 4.

226 Similarly also Owen, 'The Right to Have Nationality Rights' (n 3) 300.

227 Benhabib (n 209) 3.

228 *ibid f.*

229 *ibid 22.*

230 *ibid 68.*

> naturalization, i.e., admittance to citizenship, as the obverse side of the injunction against denaturalization. Just as you cannot render individuals stateless at will, nor can you, as a sovereign state, deny them membership in perpetuity. You may stipulate certain criteria of membership, but they can never be of such a kind that others would be permanently barred from becoming a member of your polity. Theocratic, authoritarian, fascist, and nationalist regimes do this, but liberal democracies ought not to.[231]

Drawing on discourse theory, she bases her claim on the right to communicative freedom.[232] She argues that there would never be reciprocally acceptable, permissible grounds to justify barring certain persons or groups permanently from membership because of the kinds of human beings they are.[233] The only criteria for membership that "do not violate the self-understanding of liberal democracies as associations which respect the communicative freedom of human beings qua human beings" are criteria that stipulate certain qualifications, skills or resources such as length of stay, language competence, civic literacy, material resources or marketable skills.[234] The right to membership, according to Benhabib, also entails a right to know how to acquire membership — the conditions for naturalization must be transparent, information accessible and procedures not arbitrary:[235]

> There must be a clear procedure, administered in lawful fashion, through which naturalization can occur and there must be a right of appeal in the event of a negative outcome, as there would be in most civil cases. One must not criminalize the immigrant and the foreigners; one must safeguard their right to due process, to representation in one's language, and the right to independent counsel.[236]

Addressing the objection that such a right to membership limits democratic sovereignty, Benhabib concedes that the right to membership should not be understood as a right to citizenship in a specific polity. Liberal democracies, in

231 *ibid 135.*
232 *ibid 136.* See also Kraus (n 215) 141.
233 Benhabib (n 209) 139.
234 *ibid.*
235 *ibid f.*
236 *ibid 140.*

her view, are free to determine the specificities of naturalization procedures. However, she claims:

> what would be objectionable from a moral point of view is the absence of any procedure or possibility for foreigners and resident aliens to become citizens at all; that is, if naturalization were not permitted at all, or if it were restricted on the basis of religious, ethnic, racial, and sexual preference grounds, this would violate the human right to membership.[237]

Thus, according to Benhabib non-citizen migrants do have a (moral) human right to membership.[238]

2.3 Ruth Rubio-Marín's *Jus Domicilii*

Ruth Rubio-Marín also argues for a right to membership.[239] For her, resident non-citizens should be recognized as citizens automatically and unconditionally, based on *jus domicilii*, ie based on residence in a state.[240] The current practice of exclusion of permanent resident immigrants from the political realm in Western countries, she finds, leads to a split between the civil and political society and threatens the democratic stability and legitimacy of governance.[241] She maintains that:

> all those who live on a permanent basis in a liberal democratic state ought to be considered members of that democracy and thus share in the sphere of civic equality with the equal recognition of rights and duties. [...] to the extent that the enjoyment of a full and equal set of rights and duties, within the political community of the state remains attached to the recognition of the formal status of national citizenship, after a certain residence period permanent resident aliens, both legal and illegal, ought to be automatically, and thus unconditionally, recognized as citizens of the state, regardless of whether or not they already enjoy the status of national citizens in some other community, and hence, whether or not that second citizenship makes of them dual or multiple nationals.[242]

237 *ibid 141.*
238 See also Farahat (n 19) 124 ff.
239 Rubio-Marín, *Immigration as a Democratic Challenge* (n 3).
240 See also Matias (n 39) 208 ff.
241 Rubio-Marín, *Immigration as a Democratic Challenge* (n 3) 4.
242 *ibid 6.*

Rubio-Marín bases her argument on the fact of social membership.[243] All those who are subject to the decisions collectively adopted and who are dependent on the protection of the state and who belong to the community socially — including irregular migrants[244] — should also formally be recognized as full members of the organized political community.[245] Without full inclusion, permanent residents are disadvantaged *vis-à-vis* national citizens, which ultimately threatens the stability of a liberal democratic system.[246] Thus, permanent residents should be regarded as potential citizens and ultimately included in political decisions. Like Benhabib, Rubio-Marín recognizes that the normative argument of a right to membership poses a certain challenge for sovereign self-determination in a democratic state.[247] However:

> Rather than being deprived of its right to 'self-definition' concerning membership, I argue that the national community cannot exercise such a right *vis-à-vis* those whom it should consider full members according to democratic principles.[248] (original emphasis)

The nationality community for her becomes "an ever-changing entity which has to take account of the social realities already operating within its territory".[249] Beyond those who already belong to the community through permanent residence, however, the state remains free to shape its laws regarding citizenship, immigration, and naturalization: "to a large extent the distribution of membership will essentially remain a matter of democratic self-determination and will presumably be guided by national self-interest".[250] The claim to automatic incorporation, for her, "challenges not the traditional state prerogatives on membership so much as their scope".[251]

Rubio-Marín distinguishes two main claims, the main claim of full inclusion granting equal rights and duties and a secondary claim that this inclusion is best guaranteed through full and automatic membership.[252] Eventually, she gives preference to the secondary claim, arguing that it serves the egalitarian

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243 *ibid 21 ff.*
244 See *ibid 81 ff.*
245 *ibid 20.*
246 *ibid 28.*
247 *ibid 60 ff.*
248 *ibid 60.*
249 *ibid.*
250 *ibid 38.*
251 *ibid 40.*
252 *ibid 20 f and 99 ff.*

idea of citizenship better and allows for a single status of membership.[253] Resident aliens should not be asked to change or assimilate, but simply be recognized as nationals of the state of residence.[254] The automatic acquisition of citizenship based on residence leads to the emergence of dual or even multiple citizenship. That, for Rubio-Marín, is not a problem. Turning to international law, she notes that dual citizenship is increasingly tolerated and the principle that people should belong to "one state only" is outdated.[255] She writes:

> In a world with increasing human mobility which more and more shows the insufficiencies of simply assuming that people will be exclusively rooted in one country, only the claim of automatic membership through residence advanced here would serve such a purpose. The major rules for allocating citizenship, *jus soli* and *jus sanguinis*, operate automatically. The idea thus would be to introduce automatic membership through residence in order to update the automaticity rule and to keep the inclusive and protective purpose that it serves adapted to a new and increasingly widespread social reality.[256] (original emphasis)

The normative argument why democratic societies should grant permanent residents irrespective of their legal status an automatic and unconditional right to citizenship developed by Rubio-Marín is also convincing.

2.4 Joseph Carens' Theory of Social Membership

In his work 'The Ethics of Immigration' on open borders Joseph Carens summarizes his position on access to citizenship.[257] Carens discusses the right to acquire citizenship at birth and through naturalization. He argues that residence in a state makes an individual a member of that society and this social membership gives rise to moral claims to membership in the political community which deepen over time.[258] This argument, he notes:

> rests primarily on the distinction between members and others, and on a claim about the moral significance of social membership. Once democratic states have admitted immigrants as permanent residents, they are

253 *ibid 99.*
254 *ibid 105.*
255 *ibid 127 f.*
256 *ibid 126.*
257 Carens (n 181).
258 *ibid 158.*

> obliged not to marginalize them, not to exclude them from the security and opportunities that the rights of membership bring. In sum, long-term residence in society creates a moral entitlement to the legal rights of membership.[259]

He argues that children of immigrants with a right to remain in democratic states should acquire citizenship at birth, just as children of citizens, because their ties to the society are equally strong and merit equal recognition.[260] Turning to migrants who arrive after birth, Carens argues that here too:

> democratic principles severely limit the conditions which a democratic state may impose as prerequisites for citizenship. While states may exercise some discretion in the rules they establish for naturalization, they are obliged to respect the claims of belonging that arise from living in a political community on an ongoing basis.[261]

Children who migrate at a young age have a moral claim to acquire citizenship for the same reasons as migrant children born in the territory. The state and society in which a child grows up "profoundly shapes her socialization, her education, her life chances, her identity, and her opportunities for political agency".[262] Thus, he claims, migrant children should be granted citizenship automatically and unconditionally, without any tests or requirements. "The state is responsible for those aspects of her social formation that are relevant to citizenship."[263] Regarding adult immigrants, Carens examines the legitimacy of formal legal requirements for acquiring citizenship based on principles of social membership and democratic legitimacy.[264] Based on the social membership of adult migrants, he argues, the claim to membership grows stronger over time:

> At some point, the threshold is passed. They have been there long enough that they simply are members of the community with a strong moral claim to have that membership officially recognized by the state by its granting of citizenship, or at least a right to citizenship if they want it.[265]

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259 *ibid 109.*
260 *ibid 30.*
261 *ibid 45.*
262 *ibid 46.*
263 *ibid.*
264 He thereby draws on Rubio-Marín's categories, see *ibid 50 n 5.*
265 *ibid 50.*

The principle of democratic legitimacy provides a second ground for the argument that everyone should be granted citizenship rights to participate in the political process.[266] Regarding possible criteria for the acquisition of citizenship he finds that "it is not morally permissible for a democratic state to make access to citizenship contingent upon what a person thinks or believes".[267] Equally, he rejects an obligation to renounce the former nationality, good character or economic self-sufficiency requirements and language and civil knowledge tests as unjust and potentially discriminatory.[268] Hence, the only acceptable criterion for naturalization is residence over a certain period of time.[269] Residence over time results in social membership and social membership forms the basis for moral claims to citizenship.[270]

2.5 Ayelet Shachar's *Jus Nexi*

In her book 'The Birthright Lottery', Shachar combines citizenship with property law and arguments of global justice.[271] She critically assesses "the existing legal regimes for allocating entitlement to political membership".[272] Based on that analysis she argues that both *jus soli* and *jus sanguinis* are arbitrary criteria for attributing political membership, which "distribute voice and opportunity in a vastly unequal manner" and draws an analogy between birthright citizenship and inherited property.[273] She questions the purely formal and apolitical transfer of membership on the basis of birthright and argues that the current system "serves to legitimize (and make invisible) the significant intergenerational transfers of wealth and power, as well as security and opportunity".[274] She claims that this

> idea of allocating political membership on the basis of ascription is at odds with the foundations of civic nationalism, which stresses the value of choice by the governed. Unlike consent, merit, achievement, residency, compensation, or need, the acquisition of automatic (birthright) membership in the polity is, arguably, the least defensible basis for distributing access to citizenship because it allocates rights and opportunities

266 *ibid.*
267 *ibid 52.*
268 *ibid 53 ff.*
269 *ibid 164.*
270 *ibid 160.*
271 Shachar, *The Birthright Lottery* (n 94).
272 *ibid 3.*
273 *ibid 11.*
274 *ibid 4.*

> according to aspects of our situation that result from unchosen circumstances that are fully beyond our control. This runs counter to the core principles of liberal and democratic theory.[275]

While Shachar acknowledges that birthright citizenship principles may be explained by administrative convenience, this is not sufficient to justify the global inequalities caused by such system.[276]

In order to address these inequalities she proposes a two-stage approach: on the one hand, she proposes a "birthright privilege levy on the transfer of political membership to address the global distributive consequences of birthright citizenship".[277] Such a levy collected in wealthier polities could function as an instrument of global justice to balance out the "coercive and unjust effects of this regime and fund worldwide redistribution of opportunity", and thereby "strengthen the enabling function of membership everywhere".[278] On the other hand, she suggests supplementing or ultimately even replacing birthright citizenship with a genuine connection principle of citizenship acquisition — the so-called principle of *jus nexi*.[279] This *jus nexi* principle should establish

> that citizenship must account for more than the mere automatic transmission of entitlement. Instead, some proximity must be established between full membership status in the polity and an actual share in its rights and obligations, responding to the democratic legitimacy concerns raised by both under- and overinclusion.[280]

She argues that

> *jus nexi* offers resident stakeholders a predictable and secure route to becoming full members, irrespective of their lack of birth-based connection to the polity. In this respect, *jus nexi* allows both greater democratic accountability and political equality for those who are most directly affected by the legal authority of the state [...].[281] (original emphasis)

275 *ibid 124.*
276 *ibid 141.*
277 *ibid 96.*
278 *ibid.*
279 *ibid 165.* See on the principle of *jus nexi* in more detail Chapter 6, II.
280 *ibid 164 f.*
281 *ibid 180.*

Rather than arguing for more open citizenship regimes, Shachar criticizes the attribution of citizenship through the birthright-based modes of *jus soli* and *jus sanguinis* as such. To overcome the structural injustices of birthright citizenship, political membership should be based "on actual membership and social attachment rather than mere birthright entitlement".[282]

2.6 David Owen's Right to a Nationality

Owen, in a recent article, returns to Arendt's reflections on 'the right to have rights' and Shachar's *jus nexi* and argues that equal membership in global political society and the organization of equal political standing of individuals in an international order of self-ruling territorial states, requires constructing *the right to have nationality rights*.[283] Looking at the issue of statelessness, he notes that statelessness, nationality rights and governmental conceptions of national community are deeply entangled.[284] Therefore, he argues, it is necessary to have "a normative conception of the institution of state citizenship that identifies which persons have legitimate claims to membership of which state".[285] Such a normative conception

> of the institution of state citizenship in an international order of plural self-ruling states is not simply to allocate persons to states on the basis of unilateral state choices or unilateral individual choices but on the basis of a reciprocal relationship between individuals and states.[286]

Then turning to the right not to be arbitrarily deprived of one's nationality, Owen finds that citizenship rules in a global political society of plural autonomous states have two functions: first, to make sure that everyone is a citizen of a state and has equal standing in global society and, second, to "link persons to states in ways that best serve the common interest".[287] Therefore, a system in which states have a discretionary right to determine their own citizenship rules, in his opinion is not compatible with a right not to be arbitrarily deprived of one's nationality.[288]

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282 *ibid 188.*
283 Owen, 'The Right to Have Nationality Rights' (n 3) 301.
284 *ibid 305.*
285 *ibid 306.*
286 *ibid 310.*
287 *ibid.*
288 *ibid 312.*

Owen discusses the right to change one's nationality from both a liberal and a republican perspective and concludes that both perspectives are not compatible with a view that would restrict the right to change one's nationality. However, the right to change one's nationality can only be exercised effectively if it is complemented by a right to naturalize. He argues:

> [A] norm of state discretion subject to merely to constraint against statelessness is not a legitimate basis for international order. Rather the legitimacy of this political order requires that it acknowledges *ius nexi* as a basic constitutional principle and, hence, a human right to naturalize under conditions where a person has a genuine link to a state.[289] (original emphasis)

He concludes that the right to have nationality rights is central for equal membership in global political society.[290]

The positions summarized all develop a normative standpoint why the acquisition of citizenship is a moral human right, even though they present different theoretical explanations for that right. Generally, all six authors agree that under certain conditions non-citizens have a moral right to citizenship. However, they differ on the conditions that may be imposed. Rubio-Marín and Carens argue for a right to citizenship based solely on residence, while Benhabib allows for further conditions as long as they are not discriminatory, and they do not bar access to citizenship permanently. Owen and Shachar, finally, suggest a right to citizenship based on *jus nexi*. While these are specific positions, Owen notes more generally that "[f]rom a normative standpoint, it appears that a human right to a national citizenship is robustly supported irrespective of the general approach to, or particular theoretical articulation of, human rights that one adopts".[291]

3 *Citizenship as a Legal Human Right*

The different theoretical accounts summarized in the previous section show that there are be convincing normative arguments why the right to citizenship is a moral human right. However, this study does not intend to develop another moral argument for the right to citizenship. Instead, the question is whether

289 *ibid 314.*

290 *ibid.*

291 Owen, 'Citizenship and Human Rights' (n 182) 252. See for an account that is more critical of the possible implications of recognizing nationality as a human right Kesby (n 35) 39 ff.

the right to citizenship is also a legal human right.[292] Recognizing citizenship as a legal human right has serious implications for the state and the definition of state sovereignty in international law. As Caia Vlieks, Ernst Hirsch Ballin and Maria Recalde-Vela note:

> An understanding of citizenship in the full context of human rights has the potential to turn this relationship upside down. The recognition of the right to be a citizen as a human right implies that the State is dethroned as the author and owner of citizenship.[293]

Introducing the distinction between moral and legal human rights in the previous section, I have described legal human rights as entitlements of individuals against a state that find their basis in positive law. With Walter Kälin and Jörg Künzli human rights in a legal sense can be defined as

> internationally guaranteed legal entitlements of individuals *vis-à-vis* the state, which serve to protect fundamental characteristics of the human person and his or her dignity in peacetime and in times of armed conflict.[294]

Four constitutive elements can be distinguished here: legal human rights aim to protect human dignity; they protect rights of individuals against a state; and — other than moral human rights — are guaranteed by international law.

The UN General Assembly has adopted a similar approach to the proliferation of new human rights. In Resolution 41/120 it noted that new instruments developed in the field of human rights should:

> (a) Be consistent with the existing body of international human rights law;
> (b) Be of fundamental character and derive from the inherent dignity and worth of the human person;
> (c) Be sufficiently precise to give rise to identifiable and predictable rights and obligations;

292 As Besson points out, not all moral rights are equally recognized as legal rights, (n 200) 334.

293 Vlieks, Hirsch Ballin and Recalde-Vela (n 34) 162.

294 Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd ed, Oxford University Press 2019) 29.

(d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems;
(e) Attract broad international support.[295]

The previous section has shown that the right to citizenship is of fundamental character and derived from — or rather indispensable for the protection of — the inherent dignity and worth of individuals in a state-based world order. The question, then, is how this moral-political claim to citizenship can be transposed to the legal sphere. Is the right to citizenship also consistent with international human rights law? Is it sufficiently precise to give rise to identifiable and predictable rights and obligations? Are there appropriate and effective implementation mechanisms for the right to citizenship? And does it attract broad international support?

Based on the elements set out in Resolution 41/120 these questions shall be analyzed in the following chapters. Chapter 4 will look at international human rights law and answer the questions of whether the right to citizenship is consistent with that framework and what implementation mechanisms there are in the international system that protect this right. Chapter 5 will then assess the rights and obligations under the right to citizenship and ask whether they are identifiable and predictable enough to give rise to enforceable individual entitlements. First, however, Chapter 3 will look at the international support for the right to citizenship and critically reflect on the status of the traditional doctrine of citizenship as a *domaine réservé* in current international legal theory. The normative accounts for a moral right to citizenship developed just discussed will inform the subsequent analysis of the transposition of the right to citizenship in current international human rights law.

295 UN General Assembly, 'Resolution 41/120: Setting International Standards in the Field of Human Rights' (UN General Assembly 1987) para 4 <http://digitallibrary.un.org/record/126473>.

CHAPTER 3

Domaine Réservé?

Statehood, Sovereignty and Nationality

> Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.[1]
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> PCIJ, Advisory Opinion on the Nationality Decrees Issued in Tunis and Morocco, 1923

In 1923, the PCIJ held in its seminal *Advisory Opinion on the Nationality Decrees Issued in Tunis and Morocco* that questions of nationality are within the reserved domain of states.[2] That ruling, and the underlying legal theory, influenced the concept and regulation of nationality in international law for many years to come. The recognition that citizenship forms the basis of the body politic and is, therefore, a constitutive element for every nation state did not mean that nationality matters were recognized as questions of statehood and of international law, but to the contrary, had the consequence that the acquisition and loss of citizenship were referred exclusively to the domestic jurisdiction of each individual state.[3] Consequently, international law has for a long time refrained from regulating nationality matters and thereby possibly imposing limitations on states' sovereignty. Only recently has the changed perception of the individual in international law and the international system of human rights protection challenged the exclusive competence of states over the question of nationality and membership in the state.

In the previous chapter, I discussed the concept of citizenship as a legal status and its relevance as a moral human right. This chapter now moves from this rather theoretical focus to a more doctrinal discussion of the interrelationship

1 *Nationality Decrees Issued in Tunis and Morocco* (*Advisory Opinion*) [1923] PCIJ Series B No. 4.
2 *ibid.*
3 See also *Opinion of Advocate General Maduro in Case C-135/08* (*Rottman*) [2009] CJEU C-135/08 para 17.

between statehood, sovereignty and citizenship in international law and their relevance for the regulation of nationality at the international level. The chapter first assesses how nationality relates to statehood (I.1), how statehood implies a certain extent of sovereignty (I.2) and how the concept of state sovereignty shaped the doctrine of *domaine réservé* in international law (I.3). A second section then shows how the doctrine of state sovereignty and the close connection between statehood and citizenship provided the foundation for the traditional qualification of nationality as one of such *domaines réservés* that are outside the realm of international law (II.). It critically reflects on this traditional approach and argues that nationality has always been subject to international law. This conclusion supports the argument that the recognition of a right to citizenship finds more international support than the doctrine of *domaine réservé* would imply. The third section (III.) further substantiates this claim by discussing the historical evolution of the international law on nationality throughout the 20th century.

I Statehood and Sovereignty in International Law

1 *Elements of Statehood*

Classic international law defines a state as an entity that has a population, a territory and effective power over that population and territory. These three elements of statehood trace back to the German legal scholar Georg Jellinek.[4] The definition of a state has later on been codified in the 1933 Montevideo Convention on Rights and Duties of States.[5] [6] According to Article 1 of the Montevideo Convention a state is characterized by:

a) a permanent population;
b) a defined territory;
c) government; and
d) capacity to enter into relations with the other states.

A permanent population in the sense of Article 1 Montevideo Convention is defined as a stable, organized community living within the territory in question.[7]

4 Stephan Hobe, *Einführung in das Völkerrecht* (10. Aufl., Francke 2014) 72.

5 Convention on the Rights and Duties of States of 26 December 1933, LNTS Vol. 165, p. 19 ('Montevideo Convention').

6 Matthias Herdegen, *Völkerrecht* (16. Aufl., CH Beck 2017) 79.

7 James Crawford, *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press 2019) 117.

Today, that community according to Article 1 Montevideo Convention is usually equated with the community of citizens.[8] This makes nationality one of the elements of statehood.[9]

Hence, nationality directly impacts statehood and, *vice-versa*, statehood impacts nationality.[10] The question of access to nationality and power to decide on the rules for such access is, therefore, a question that concerns the heart of the state as a political entity. As Richard Perruchoud explains:

> Migration law, including laws on nationality, is essential to the creation of States: for a State to exist, it must have both inhabitants (nationals) and borders. Migration and nationality laws establish the dividing line between nationals and non-nationals, and make the border meaningful for people attempting to cross it either way.[11]

In a scenario where no one intends or needs to cross borders, this is theoretically not problematic. However, given that populations are not static, territorial borders are not naturally formed but politically created and migratory movements across international borders are a reality, the answer to who can cross the physical, territorial border and the legally constructed boundary between nationals and non-citizens becomes highly political and controversial.[12] This crucial link between the population of nationals and statehood

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8 See James Crawford, 'State', *Max Planck Encyclopedia of Public International Law* (2011) para 21 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1473>; Herdegen (n 6) 80.

9 See also Satvinder S Juss, 'Nationality Law, Sovereignty, and the Doctrine of Exclusive Domestic Jurisdiction' (1994) 9 Florida Journal of International Law 219, 222. Article 1 of the Montevideo Convention would, however, allow for alternative interpretations, see eg James Crawford, 'The Criteria for Statehood in International Law' (1977) 48 British Yearbook of International Law 93, 114; Anne Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction' (2010) 53 German Yearbook of International Law 669 f.

10 Peters, 'Extraterritorial Naturalizations' (n 9) 670.

11 Richard Perruchoud, 'State Sovereignty and Freedom of Movement' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012) 124.

12 Galina Cornelisse, 'A New Articulation of Human Rights, or Why the European Court of Human Rights Should Think Beyond Westphalian Sovereignty' in Marie-Bénédicte Dembour and Tobias Kelly (eds), *Are Human Rights for Migrants?: Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Routledge 2011) 109. See also Vanessa Barker, 'Democracy and Deportation: Why Membership Matters Most' in Katia Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press 2013) 242.

from an international legal perspective offers an explanation as to why states were so reluctant to abandon competences in nationality matters in favor of international regulations. States were invoking their sovereignty to justify the absence of legal constrains in nationality matters to retain decision making powers in one of the crucial aspects of statehood.

2 *Statehood and Sovereignty*

Sovereignty is not in itself a precondition for statehood but is the legal consequence thereof.[13] In simple terms, an entity possessing all elements of statehood is sovereign for the purposes of international law.[14] The modern understanding of state sovereignty in international law dates back to the Westphalian peace treaty of 1648, which laid the foundation for the system of sovereign, territorially independent and formally equal nation states in Europe.[15] The concept of state sovereignty has since been central to the understanding and legitimacy of nation states as autonomous subjects of international law.[16] Nevertheless, until today, it remains highly contested.[17]

In the *Island of Palmas case,* sovereignty was famously described as follows:

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13 Samantha Besson and others, *Völkerrecht — Droit international public* (2. Auflage, Dike 2010) 110; Crawford, *Brownlie's Public International Law* (n 7) 432; Herdegen (n 6) 80; Anne Peters, 'Humanity as the A and O of Sovereignty' (2009) 20 European Journal of International Law 513, 517.

14 James Crawford, *The Creation of States in International Law* (2nd ed., Clarendon Press 2006) 32.

15 See Samantha Besson, 'Sovereignty', *Max Planck Encyclopedia of Public International Law* (2011) para 13 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472>; Bardo Fassbender, 'Peace of Westphalia (1648)', *Max Planck Encyclopedia of Public International Law* (2011) para 18 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e739>; Daniel Philpott, 'Sovereignty: An Introduction and Brief History' (1995) 48 Journal of International Affairs 353, 360 ff. See for a discussion of the link between sovereignty and migration Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff 2010). See for a critique of the notion of sovereignty from a postcolonial perspective Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (1st ed, Cambridge University Press 2007); Radhika V Mongia, 'Historicizing State Sovereignty: Inequality and the Form of Equivalence' (2007) 49 Comparative Studies in Society and History 384.

16 Hobe (n 4) 40. See also Sandra Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives* (Brill Nijhoff 2015) 25.

17 See eg Besson (n 15) para 3; Linda Bosniak, 'Multiple Nationality and the Postnational Transformation of Citizenship' in David A Martin and Kay Hailbronner (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects* (Kluwer Law International 2003) 32; David Held, 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 Legal Theory 1, 2; Juss (n 9) 224.

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.[18]

On that basis, sovereignty is defined in legal scholarship as the "supreme legitimate authority within a territory"[19] or as "a certain combination of autonomy and authority that serves as the organizing principle of the inter-state system".[20] At the domestic level, as Mantu points out, sovereignty:

> is identified with legal competence; it indicates supremacy and superiority, qualities that we tend to associate with the legal capacity of the state to act in supreme and competent manner in any field, so that no other authority can override its functions.[21]

A delineation is often made between internal and external dimensions of state sovereignty.[22] The *internal dimension* of sovereignty, on the one hand, refers to the competence of the sovereign state to establish jurisdiction within its territory. This internal perspective looks at the relationship between the state and individuals and the power the state has over individuals on its territory.[23] As such, it encompasses the people's — the sovereign's — right to self-determination and constitutional autonomy.[24] This self-determination entails the competence of states to determine who is recognized as a citizen and who belongs to the *demos*.[25] The *external dimension* of sovereignty, on the other hand, relates to the legal independence of sovereign states as subjects of international law and the immunity from external interference.[26] This dimension

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18 *Island of Palmas Case* (*United States v Netherlands*) [1928] PCA II RIAA 829 8.

19 Philpott (n 15) 357. See also Mantu (n 16) 25.

20 Mongia, 'Historicizing State Sovereignty' (n 15) 394.

21 Mantu (n 16) 11.

22 See Besson and others (n 13) 110; Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 The Modern Law Review 588, 593; Held (n 17) 3.

23 Manuela Sissy Kraus, *Menschenrechtliche Aspekte der Staatenlosigkeit* (Pro-Universitate-Verlag 2013) 154.

24 *ibid 155.* See on the notions of state sovereignty and popular sovereignty also Seyla Benhabib, 'Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times' (2007) 11 Citizenship Studies 19, 21.

25 See also Rainer Bauböck, 'Citizenship and Migration — Concepts and Controversies' in Rainer Bauböck (ed), *Migration and Citizenship, Legal Status, Rights and Political Participation* (Amsterdam University Press 2006) 16; James A Goldston, 'Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens' (2006) 20 Ethics & International Affairs 338.

26 Dauvergne, 'Sovereignty in Global Times' (n 22) 593. See also Peters, 'Humanity' (n 13) 516.

is concerned with the relationship among states at the international plane. It covers states' ability to enter into relations with other states, to be bound by international law and the duty to respect the sovereignty and internal exclusive jurisdiction of other states. The external dimension of sovereignty is based on the recognition of the equality of states as sovereign.[27]

If states make use of their external sovereignty by entering into agreements with other states, they often limit their internal sovereignty by accepting certain obligations *vis-à-vis* others. Limitations on the internal sovereignty of states through international law, however, has primarily external effects: other states do not have to recognize the national legislation or acts of a state that is in contradiction of their international obligations. This is well-illustrated by Article 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930 which states 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. (emphasis added)

The interplay of internal and external sovereignty shows that sovereignty cannot mean unfettered, discretionary power.[28] Rather sovereignty denotes the legal authority of states to govern certain questions.[29] It is a legal power within a certain framework — the framework of international law — and as such it is a relative and dynamic concept.[30] It is relative because it depends on the scope of international law and the margin that is left to states' internal jurisdiction. It is dynamic because it changes over time, in parallel to the development of international law. In parallel to the evolution of international law, the nature and scope of sovereignty is constantly changing.[31]

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27 See Crawford, *Brownlie's Public International Law* (n 7) 433. See also Article 2(1) of the Charter of the United Nations of 24 October 1945, 1 UNTS XVI ('UN Charter').

28 Christian Hillgruber, 'Souveränität — Verteidigung eines Rechtsbegriffs' (2002) 57 JuristenZeitung 1072, 1074 f. See also Anuscheh Farahat and Nora Markard, 'Forced Migration Governance: In Search of Sovereignty' (2016) 17 German Law Journal 923, 944.

29 Kraus (n 23) 154.

30 Farahat and Markard (n 28) 944; Hillgruber (n 28) 1072; Hobe (n 4) 73; Kraus (n 23) 153; Josef L Kunz, 'The Nottebohm Judgment' (1960) 54 American Journal of International Law 536, 545. See also Johannes M Chan, 'The Right to a Nationality as a Human Right' (1991) 12 Human Rights Law Journal 1, 13.

31 Catherine Dauvergne, 'Challenges to Sovereignty: Migration Laws for the 21st Century' (2003) UNHCR Working Paper No. 92 3 <http://www.unhcr.org/research/working/3f2f69e74/challenges-sovereignty-migration-laws-21st-century-catherine-dauvergne.html>.

In sum, sovereignty of states is not to be equated with the absence of obligations towards other subjects of international law. A broad understanding of sovereignty as a shield for state power against external standards or accountability must be rejected.[32] It is inherent to the concept of sovereignty that it can be and is in fact limited by the actions of, and interactions with, other states.[33] Sovereignty as a legal concept of international law is, therefore, "a quality which is both ascribed and delineated by the rules of international law and is wholly dependent on the development of international law".[34] Accordingly, as we will see in the following section, the scope and nature of state sovereignty in nationality matters has changed in parallel to the evolution of international law and particularly international human rights law.[35]

3 *State Sovereignty and the Doctrine of* Domaine Réservé

In international legal theory, the internal dimension of state sovereignty is reflected in the doctrine of *domaine réservé*.[36] The notion of *domaine réservé* traditionally refers to those spheres of state authority that are considered to fall within a state's internal jurisdiction and outside the realm of international law. Thus, the doctrine of *domaine réservé* shields certain areas of state competence from international obligations, regulations and from international intervention.[37]

The doctrine of *domaine réservé* dates back to the era of the League of Nations in the early 20th century.[38] The Covenant of the League of Nations of 1919 stated in Article 15(8) that questions found to arise out of a matter which, according to international law, is solely within the domestic jurisdiction of a state party shall not be the subject of the dispute settlement mechanism of the organization.[39] The UN Charter of 1945 echoed that approach in Article 2(7),

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See also Kim Rubenstein and Daniel Adler, 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7 Indiana Journal of Global Legal Studies 519.

32 See similarly from a migration law perspective Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 119; Bas Schotel, *On the Right of Exclusion: Law, Ethics and Immigration Policy* (Routledge 2012).

33 See also *Case of the SS Lotus* (*Lotus Case*) [1927] PCIJ Series A No. 10.

34 Juss (n 9) 225.

35 See Held (n 17) 6 ff.

36 Katja S Ziegler, 'Domaine Réservé', *Max Planck Encyclopedia of Public International Law* (2013) para 1 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1398>.

37 *ibid.*

38 Juss (n 9) 226.

39 Covenant of the League of Nations of 28 June 1919, 225 CTS 195.

according to which the UN shall not "intervene in matters which are essentially within the domestic jurisdiction of any state".

The content of a state's *domaine réservé* is determined by international law.[40] Matters not regulated by international instruments, in principle, fall within states' domestic jurisdiction. Just as state sovereignty, the scope of states' *domaine réservé* is thus relative and changes over time depending on the evolution of the international legal framework.[41] Hence, it is not for the states to determine their sphere of exclusive domestic jurisdiction. A matter only falls within a state's *domaine réservé*, "because international law allows it to".[42]

According to international law, which matters do fall within a state's *domaine réservé*? In classic international law, it was argued that the states' internal jurisdiction covered at least the essential elements of their statehood, ie the way they organize their respective government, the way they treat their citizens and the way they use their territory.[43] Today, however, the scope of domestic jurisdiction must be drawn tighter. State sovereignty has significantly been restricted in domains where it formerly was considered to be unfettered.[44] Since the founding days of modern international law after World War II, the international system has evolved from a sovereignty-centered system to one that is individual-oriented.[45] In particular, the way a state treats its citizens is no longer seen as a purely internal affair but is limited by international (human rights) law.[46]

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40 Art. 15(8) Covenant of the League of Nations. See also *Nationality Decrees* (n 1) 23.

41 *ibid 24*. See also Ziegler (n 36) para 2. The UN Charter, by contrast, leaves this question open.

42 Juss (n 9) 228 f.

43 Ziegler (n 36) para 4. See for example also the *Nicaragua* case of 1986 where the ICJ still found that "adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole international law rests, and the freedom of choice of the political, social, economic and cultural system of a State", *Nicaragua v United States of America, Military and Paramilitary Activities* [1986] ICJ Reports 1986, p. 116 para 263.

44 Namely in the domain of environmental protection, the use of natural resources, or as Perruchoud points out, the power of the state to admit and expel non-citizens, see Perruchoud (n 11) 125. Also with regard to the organization of the internal political system it is recognized that international law now imposes certain limits, see eg Article 25 ICCPR.

45 Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century General Course on Public International Law (Volume 281)' [1999] Collected Courses of the Hague Academy of International Law 237.

46 Ziegler (n 36) 5. See also Hurst Hannum, 'Reinvigorating Human Rights for the Twenty-First Century' (2016) 16 Human Rights Law Review 409.

One area that was traditionally said to be a matter of *domaine réservé,* but today is subject to increasing regulation by international law, is migration.[47] Migration control, including the claim to control the entry and residence of migrants, was often described as "the last bastion of sovereignty".[48] The ECtHR, for example, has consistently held that "as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory".[49] Todays predominant form of migration control is an invention of the late 19th century.[50] Before that, migration across international borders was largely unregulated.[51] The control over access to the territory was not necessarily seen as a corollary of state sovereignty.[52] Only with the growing power of nation states as the fundamental territorial and political entities and main subjects of international law, the development of social welfare within those states, an increasing nationalism, a growing number of newly independent former colonies, as well as larger migratory movements from the Global South to the Global North (rather than the other way round) around the turn of the last century, did the 'control' of

47 See Cornelisse (n 15) 58; David A Martin, 'Effects of International Law on Migration Policy and Practice: The Uses of Hypocrisy' (1989) 23 The International Migration Review 547; Perruchoud (n 11).

48 See Perruchoud (n 11) 124. See for a critical analysis of the nexus between sovereignty of nation states and the right to exclude E Tendayi Achiume, 'Migration as Decolonization' (2019) 71 Stanford Law Review 1509, 1530 f; Chantal Thomas, 'What Does the Emerging International Law of Migration Mean for Sovereignty?' (2013) 14 Melbourne Journal of International Law 392.

49 The ECtHR confirmed this for the first time in the case of *Abdulaziz, Cabales and Balkandali v The United Kingdom* [1985] ECtHR Application Nos. 9214/80 et al para 67. It has since repeatedly confirmed this "state control prerogative" in various cases, eg in *Moustaquim v Belgium* [1991] ECtHR Application No. 12313/86 para 43; *Boujlifa v France* [1997] ECtHR Application No. 25404/94 para 42; *Boultif v Switzerland* [2001] ECtHR Application No. 54273/00 para 46; *Jeunesse v the Netherlands* [2014] ECtHR Application No. 12738/10 para 100. See Dembour, *When Humans Become Migrants* (n 32) 3. See on the right to enter and remain Chapter 2, II.3.3.3.

50 See Vincent Chetail, 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel' (2016) 27 European Journal of International Law 901, 922.

51 See Cornelisse (n 15) 166 ff; Catherine Dauvergne, 'Irregular Migration, State Sovereignty and the Rule of Law' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 79. This is true at least for migration within the Global North or from the Global North to the Global South within Colonial regimes, see Achiume (n 48); Radhika V. Mongia, 'Race, Nationality, Mobility: A History of the Passport' (1999) 11 Public Culture 527.

52 See Chetail, 'Sovereignty and Migration' (n 50) 902; Dauvergne, 'Sovereignty in Global Times' (n 22) 589.

migration and the regulation of entry, residence and departure of foreigners increase in importance as a political issue.[53] Throughout the 20th century, this developed into a situation where the sovereign prerogative of states to control migration was taken for granted. In 'The Origins of Totalitarianism' Arendt still noted that "[s]overeignty is nowhere more absolute than in matters of emigration, naturalization, nationality and expulsion".[54] It is only with the rise of international human rights law and the processes of globalization that this slowly started to change, and international law gained increasing weight *vis-à-vis* the domestic jurisdiction of nation states. Today, the previously broad sovereignty of nation states over migration is being put into perspective. On the one hand, directly through the expansion of international regulation of migration and the emergence of a dedicated international migration law.[55] On the other, indirectly through a growing impact of international human rights standards on the treatment of non-citizens and the recognition of individuals as subjects of international law.[56] Against that background, it is recognized today that migration matters are not just a *domaine réservé* but subject to rights and obligations derived from international law.[57]

Generally, state sovereignty, and with it states' *domaine réservé*, is not absolute. As Anne Peters writes:

> Sovereignty is not only [...] limited by human rights, but is from the outset determined and qualified by humanity, and has a legal value only to the extent that it respects human rights, interests, and needs. It has thus been humanized. [...] Consequently, conflicts between state sovereignty and human rights should not be approached in a balancing process in which the former is played off against the latter on an equal footing, but should be tackled *on the basis of a presumption in favour of humanity*.[58] (emphasis added)

53 Cornelisse (n 15) 168.

54 Hannah Arendt, *The Origins of Totalitarianism* (Harcourt 1973) 278.

55 See on the development of international migration law Vincent Chetail, *International Migration Law* (Oxford University Press 2019).

56 See Vincent Chetail, 'Sources of International Migration Law' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012) 56; Perruchoud (n 11) 125. See on the role of the individual in international law also Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016).

57 See also Dembour, *When Humans Become Migrants* (n 32) 119; Perruchoud (n 11) 125.

58 Peters, 'Humanity' (n 13) 514.

What was accepted as a *domaine réservé* some decades ago, like migration, is now subject to international regulation and obligations. Where states formerly had no or few international obligations, individuals might, today, have legitimate claims based on internationally guaranteed rights. Thus, states can no longer simply refer to their domestic jurisdiction to shield themselves entirely from the scrutiny of international law.[59] It is against this background that the next section discusses the historical perception of nationality and citizenship matters as a *domaine réservé* that is left almost entirely to the internal jurisdiction of states and questions whether this traditional approach still holds true.

II The Traditional Perception of Nationality as a *Domaine Réservé* and Its Development

Just as migration, the entry and the stay of foreigners across territorial borders have been considered a stronghold of state sovereignty, nationality matters have been declared to be another bastion of state sovereignty.[60] The boundaries of membership in the state have been vigorously guarded by states as their sovereign prerogative. And while — as just discussed — limitations upon state sovereignty in migration matters are not that controversial anymore, citizenship still seems to have a different quality for many — lawyers and state representatives alike.

As mentioned above, the idea that nationality was governed exclusively by domestic law appeared in the late 19th century when the formation of nation states — and in parallel a rising nationalism — required a clear delimitation of peoples with separate national identities.[61] With the rise of nation states and the increasing tendency to control migration in the early 20th century, the regulation of nationality became more important for states. It was the PCIJ, however, that prominently qualified nationality matters to be within states' *domaine réservé*. In its opinion on the *Nationality Decrees Issued in Tunis and Morocco* of 1923 the Court held that:

59 See also Kraus (n 23) 153.

60 Peter J Spiro, 'A New International Law of Citizenship' (2011) 105 The American Journal of International Law 694. See also Conklin who describes nationality as the "primary incident" of the reserved domain, see William E Conklin, *Statelessness: The Enigma of the International Community* (Hart Publishing 2014) 94.

61 Ian Brownlie, 'The Relations of Nationality in Public International Law' (1963) 39 British Yearbook of International Law 284, 286. See for a detailed discussion of the interrelations between sovereignty, the emergence of nation states and citizenship Cornelisse (n 15) 71 ff.

> Questions of nationality are, in the opinion of the Court, in principle within this reserved domain [of a State]. [They are not] in principle, regulated by international law. As regards such matters, each State is sole judge.[62]

The 1930 Hague Convention codified this principle. According to Article 1 "it is for each State to determine under its own law who are its nationals". After World War II and the foundation of the modern human rights framework, the International Court of Justice confirmed in its *Nottebohm* ruling that "it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality".[63] Nationality, in other words, was found to fall within the domestic jurisdiction of the state.[64] 40 years later the CJEU in the *Micheletti* case still used the same wording: "Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality".[65] Even the European Convention on Nationality, which is considered to be one of the most progressive international instruments on nationality, reaffirms that "each State shall determine under its own law who are its nationals".[66]

Human rights bodies regularly assert that nationality falls within states' *domaine réservé*. The ECtHR, for example, stated that "decisions on naturalisation or any other form of granting of nationality are matters primarily falling within the domestic jurisdiction of the State".[67] The UN Human Rights Committee argued that international law does not, in general, spell out "specific criteria for the granting of citizenship through naturalization".[68] And even the Inter-American Court of Human Rights — the most progressive body regarding migrants' and nationality rights — has confirmed that "the determination

62 *Nationality Decrees* (n 1) 24.

63 *Nottebohm* (*Liechtenstein v Guatemala*) [1955] ICJ Reports 1955 20.

64 *ibid.*

65 *Micheletti and Others v Delegación del Gobierno en Cantabria* [1992] CJEU C-369/90 para 10. Even though the CJEU points out that EU member states in any case must respect their obligations under EU law.

66 Article 3(1) ECN.

67 *Petropavlovskis v Latvia* [2015] ECtHR Application No. 44230/06 para 80.

68 *Borzov v Estonia, Communication No 1136/2002* [2004] HRCttee UN Doc. CCPR/C/81/D/1136/2002 para 7.4. See also *Sipin v Estonia, Communication No 1432/2005* [2008] HRCttee UN Doc. CCPR/C/93/D/1423/2005 para 7.4; *Q v Denmark, Communication No 2001/2010* [2015] HRCttee UN Doc. CCPR/C/113/D/2001/2010 para 7.3.

of who has a right to be a national continues to fall within a State's domestic jurisdiction".[69]

The legal doctrine, in a similar vein, often posits that nationality falls within states domestic jurisdiction.[70] James Crawford, for example, points out that states have a general freedom of action in nationality matters.[71] Michelle Foster and Timnah Rachel Baker describe the tension between states' sovereignty in nationality matters and the individual rights-dimension of citizenship as "perennial" and note that "the sovereign fortress of nationality laws still seems somewhat impervious to direct attack".[72] Kay Hailbronner finds that the exclusive jurisdiction of states in nationality matters is a general principle of international law.[73] Weis even argued that the exclusive domestic jurisdiction of states on nationality was a rule of customary international law.[74]

The reason for qualifying nationality as a *domaine réservé* is its link to statehood itself.[75] The decision of who belongs to a permanent population and who, in consequence, has the right to permanently remain in the state and — at least in democratic states — determines the politics of that state, potentially has far-reaching consequences for a state. Hence, liberal nationalists defend

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69 *Case of the Girls Yean and Bosico v Dominican Republic* [2005] IACtHR Series C No. 130 (2005) para 140.

70 See eg Brownlie (n 61) 286 ff; Oliver Dörr, 'Nationality' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006) para 4; Lassa Francis Lawrence Oppenheim, Robert Yewdall Jennings and Arthur Desmond Watts, *Oppenheim's International Law* (9th ed, Longman 1993) 853; Ivan Shearer and Brian Opeskin, 'Nationality and Statelessness' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012) 93 ff; Paul Weis, *Nationality and Statelessness in International Law* (2nd ed, Sijthoff & Noordhoff 1979) 65 ff; Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press 2020) 14 f. See also Spiro, 'New Citizenship Law' (n 60) 714.

71 Crawford, *Brownlie's Public International Law* (n 7) 495.

72 Michelle Foster and Timnah Rachel Baker, 'Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?' (2021) 11 Columbia Journal of Race and Law 83, 86.

73 Kay Hailbronner, 'Nationality in Public International Law and European Law' in Rainer Bauböck and others (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries, Volume 1: Comparative Analyses* (Amsterdam University Press 2006) 52. See also Council of Europe, 'Explanatory Report to the European Convention on Nationality' (Council of Europe 1997) para 29.

74 Weis, *Nationality in International Law* (n 70) 65. See also Stephen Hall, 'The European Convention on Nationality and the Right to Have Rights' (1999) 24 European Law Review 586, 589; *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur* [2001] CJEU C-192/99 para 20; *AG Opinion Rottman* (n 3) para 18.

75 See Chapter 3, I.1.

the power to decide on membership as a central tenet of state sovereignty with reference to collective self-determination.[76] Therefore, only citizens ought to decide on the conditions of admission of newcomers. Following this line of argument, nationality matters are to be decided at the national level and not a matter for international law.[77] A committee of the League of Nations noted in a report in 1924 that:

> From the outset of its work the Committee realised that nationality is *one of the most delicate and difficult matters to regulate*, since, although it is primarily a matter for the municipal law of each State, it is nevertheless governed to a large extent by principles of international law. [...] the difficulty — indeed the impossibility — of settling this matter is due to the fact that nationality is essentially a political problem which affects the life of the State throughout the course of its development.[78] (emphasis added)

The doctrine of *domaine réservé* influenced the regulation of nationality at the international level for most of the 20th century; states' willingness to restrict their competences through international treaties was limited and few instruments that would limit state sovereignty in that domain were adopted.[79] Nevertheless, even though nationality matters were historically qualified as falling within states' *domaine réservé*, their sovereignty is not, and has never been, without limits.[80] Even in nationality matters state discretion is, in fact, limited by international law. Nationality, as a legal status linking an individual to a specific state as opposed to other states, necessarily has an external dimension. Even though nationality is regulated domestically, it is therefore never an isolated system. It is constantly interacting with other nationality regimes and has consequences for other states and international law.[81] As Vaclav Mikulka

76 See prominently David Miller, *On Nationality* (Oxford University Press 1995); Michael Walzer, *Spheres Of Justice: A Defense of Pluralism and Equality* (Basic Books 1983).

77 See on the impact of liberal nationalism on international law Achiume (n 48) 1523 ff. and more generally James Summers, *Peoples and International Law* (2nd ed, Brill Nijhoff 2014) 13 ff.

78 League of Nations, Acts of the Conference for the Codification of International Law, Annex 4, Report of the First Committee: Nationality, C.229.M.116.1930.V., p 69.

79 Peter J Spiro, 'Citizenship, Nationality, and Statelessness' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 286.

80 As Brownlie notes, the idea of unlimited sovereignty as such is "ridiculous", Brownlie (n 61) 291.

81 Shearer and Opeskin (n 70) 93. See also Brownlie (n 61) 290 ff.

noted in his report for the International Law Commission (ILC), "[a]lthough nationality is essentially governed by internal legislation, it is of direct concern to the international order".[82] Nationality has effects beyond the borders of the state concerned.[83] Against this background John Fischer Williams argued that "[t]o say that for questions of nationality there is no international law is to hand over a large mass of international matters to anarchy".[84]

An important distinction has to be made here between the competence of states to determine their own rules on the acquisition and loss of their own nationality, and the question of whether nationality is outside the realm of international law. I have just argued that nationality is not outside the realm of international law. This does not mean, however, that international law sets the rules for acquisition and loss of nationality in each state. International law, in principle, leaves the determination of rules concerning the acquisition and loss of nationality to the states.[85] If only on a practical level it would make little sense to establish universal rules on the acquisition and loss of nationality in every single state. This primary competence of states to adopt national legislation on nationality matters does not, however, exclude the existence of rules of international law establishing certain common standards on the same matter. Neither does it exclude the existence of human rights guarantees in that field. It lies in the nature of human rights as overarching principles that they complement national legislation and do not replace it. The sovereignty of states in nationality matters, in that sense, cannot be understood as a default rule granting states unlimited discretion in decisions relating to nationality.[86] In fact, state sovereignty is always subject to international law, human rights standards and the rule of law. Thus, sovereignty in nationality

82 Vaclav Mikulka, 'First Report on State Succession and Its Impact on the Nationality of Natural and Legal Persons' (International Law Commission 1995) UN Doc. A/CN.4/467 para 57 <http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_467.pdf&lang=EFSX>. See also the Report on human rights and arbitrary deprivation of nationality according to which "the regulation [of acquisition and loss of nationality] is of direct concern to the international order", Human Rights Council, 'Report 13/34 of the Secretary General on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2009) UN Doc. A/HRC/13/34 para 19.

83 Jo Shaw and Igor Stiks, 'Introduction: What Do We Talk about When We Talk about Citizenship Rights?' in Jo Shaw and Igor Stiks (eds), *Citizenship Rights* (Ashgate 2013) xiii.

84 John Fischer Williams, 'Denationalization' (1927) 8 British Year Book of International Law 45, 51.

85 Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 International Journal of Refugee Law 158 f. Also *Iran v United States* [1984] Iran-US Claims Tribunal Case No. A/17, Iran-US Claims Tribunal Report Vol. 5, 251–267, 260.

86 See by analogy Dembour, *When Humans Become Migrants* (n 32) 119.

matters is not exclusive and static, but relative and dynamic.[87] Nationality is a subject that is normally regulated at the national level, but must respect international legal standards and the human rights of individuals concerned. Therefore, the blanket qualification of nationality as a *domaine réservé* must be reconsidered.[88]

Taking this into consideration, it is not surprising that nationality is increasingly regulated on the international level.[89] Again, one can refer to the sources of international law mentioned above to illustrate this development. In the *Opinion on Nationality Decrees Issued in Tunis and Morocco*, for example, the PCIJ first noted 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*.[90] (emphasis added)

Then the Court continued to rule that, even though nationality is in principle not regulated by international law:

> the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is *limited by rules of international law*.[91] (emphasis added)

A second opinion of the Permanent Court of the same year makes this contingency of the sovereignty of states in nationality matters even more explicit. In the opinion on the *Acquisition of Polish Nationality* the PCIJ had to rule on a dispute concerning the nationality of the German minority in Poland after World War I.[92] In its opinion the Court confirmed that obligations under

87 See above Chapter 3, I.2 and I.3.

88 See also Spiro, 'New Citizenship Law' (n 60).

89 One can observe a general increase in international treaties on global, regional and bilateral level concerning migration issues, see Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross, 'Conceptualising International Migration Law' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012) 6.

90 *Nationality Decrees* (n 1) 24. While the opinion refers to "international relations" only, it obviously also depends on the development of international law.

91 *ibid.*

92 *Question Concerning the Acquisition of Polish Nationality* (*Advisory Opinion*) [1923] PCIJ Series B No. 7 16.

international treaty law always limit states' exclusive jurisdiction in nationality matters:

> Though, generally speaking, it is true that a sovereign State has the right to decide what persons shall be regarded as its nationals, it is no less true that this principle is applicable only subject to the Treaty obligations [...].[93]

The question of the limitation of states' sovereignty by international law was also discussed during the negotiations of the 1930 Convention.[94] A proposal to explicitly and exhaustively define the limitations imposed by international law was rejected.[95] Instead, the drafters adopted the general rule in the second sentence of Article 1 of the 1930 Convention according to which domestic rules on nationality matters shall only be recognized internationally as far as they are consistent with international law. As Brownlie notes, the provision thereby implicitly enshrines its own antithesis: the external impact of nationality legislation remains narrow due to the limited duty of recognition of other states.[96] In view of this development, Manley Hudson, the special rapporteur of the International Law Commission on nationality including statelessness, observed that:

> It has, therefore, to be examined whether there exist *any rules* of international law which limit the sovereign jurisdiction of a State to confer, withhold or cancel its nationality — apart from treaty obligations; such rules may either impose on States a duty to act in a certain manner or may restrict its freedom of action.[97] (emphasis added)

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93 *ibid.*

94 Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April 1930, LNTS Vol. 179, p. 89 ('1930 Convention').

95 Namely, the principles of *jus soli and jus sanguinis*, as well as acquiring nationality based on marriage, naturalization and transfer of territory and voluntary acquisition of a foreign nationality, marriage with a foreigner, *de facto* attachment to another country accompanied by failure to comply with provisions governing the retention of the nationality, and transfer of territory as concepts regarding the loss of nationality, see International Law Commission, 'Report on Nationality, Including Statelessness' (International Law Commission 1952) UN Doc. A/CN.4/50 7 <http://untreaty.un.org/ilc/documentation/english/a_cn4_50.pdf> ('Hudson Report').

96 Brownlie (n 61) 299.

97 International Law Commission, 'Hudson Report' (n 95) 7.

One hundred years after the opinion of the PCIJ in the *Nationality Decrees case* it is clear that state discretion in nationality matters may be limited by international standards. International law has evolved considerably since 1923.[98] Over the last century international law has increasingly regulated nationality — both at the bi- and the multilateral levels.[99] International human rights law has also led to an opening of the sphere of *domaine réservé* in nationality matters.[100] This underlines that state sovereignty in nationality matters is not, and in fact never was, unlimited.[101] As the IACtHR noted:

> The determination of who has a right to be a national continues to fall within a State's domestic jurisdiction. However, its discretional authority in this regard is gradually being restricted with the evolution of international law, in order to ensure a better protection of the individual in the face of arbitrary acts of States.[102]

The question becomes what precisely the content of these restrictions is. As Laura van Waas stresses,

> the question of just how free states are to determine who are their nationals, untouched by international obligations, can therefore only be answered by analyzing the developments in international law in that field and the current state of play.[103]

Due to the relative and dynamic character of sovereignty and, equally, of international law, those boundaries are shifting as time goes on. What is clear, however, is that from today's perspective the theory of *domaine réservé* in nationality matters that grants states unlimited discretion and excludes any influence of international law is no longer tenable. States do not have unfettered discretion in nationality matters. Rather, international law sets the stage for the regulation of nationality at the domestic level and draws limitations

98 Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008) 37.

99 See Mantu (n 16) 26.

100 Kraus (n 23) 157. See also Foster and Baker (n 72) 99.

101 Tamás Molnár, 'The Prohibition of Arbitrary Deprivation of Nationality under International Law and EU Law: New Perspectives' [2014] Hungarian Yearbook of International Law and European Law 67, 69.

102 *Yean and Bosico* (n 69) para 140.

103 van Waas, *Nationality Matters* (n 98) 37.

upon state sovereignty. Domestic nationality legislation cannot only have the aim of controlling access to, and loss of, citizenship. It must also respect the rights of individuals. While this conclusion is not new, the question regarding the scope of limitations imposed by international law remains open.[104] In order to identify the limits of state sovereignty, the next section looks at the evolution of the international legal framework on nationality in more detail.

III A Historical Perspective on the Regulation of Nationality in International Law

In the previous sections I have explored the relationship between the theory of state sovereignty, statehood and citizenship and the evolution of the paradigm of nationality as a *domaine réservé*. I have argued that the doctrine of *domaine réservé* in nationality matters has never been absolute and surely is no longer accurate today. In fact, international law has addressed questions concerning nationality early on and continues to do to an increasing extent. This section shall now look at how the regulation of nationality in international law evolved from order management to a more rights-oriented frame.

The earliest regulations of nationality matters at the international level date back to the 19th and early 20th century. In the 19th century states started to conclude bilateral treaties dealing with questions concerning the nationality of migrants — primarily addressed at European emigrants in the colonies.[105] These early treaties reveal that the regulation of nationality on the international plane has always been closely linked to international migration. Since nationality was at the time understood as a bond of allegiance between an individual and one particular state (and one state only), conflicts relating to nationality arose as soon as an individual had links to more than one state — most often as a consequence of crossing international borders, binational family relationships or a change in territorial sovereignty. It became obvious that the ostensibly internal matter of nationality directly affects international relations.[106] In the early 20th century, these processes ultimately led to the adoption of a number of multilateral treaties addressing nationality matters.

104 See eg Spiro, 'New Citizenship Law' (n 60); Foster and Baker (n 72) 98.

105 Gerard-René de Groot and Olivier Vonk, *International Standards on Nationality Law: Texts, Cases and Materials* (Wolf Legal Publishers 2016) 44.

106 Weis, *Nationality in International Law* (n 70) 249.

1 *Early Multilateral Regulation: Avoiding Conflicts*

A first set of multilateral instruments dealing with nationality matters emerged in the inter-war period. The collapse of the Austro-Hungarian and the Ottoman empires and the resulting changes in territorial sovereignty and the realignment of colonial power in the Global South increased the need for common standards on nationality. One of these instruments is the Treaty between the Principal Allied and Associated Powers and Poland of 28 June 1919.[107] The Treaty aimed to protect individuals belonging to minority groups on Polish territory and thereby directly touched upon the question of population, statehood and sovereignty of Poland as a newly independent state. Article 4 of the Treaty obliged Poland to recognize these minorities "*ipso facto* and without the requirement of any formality" as nationals if they were born on Polish territory to parents who were habitually resident, even if they were not habitually residing there at the time of entry into force of the treaty.[108] A dispute arose regarding the German minority population and was brought before the PCIJ for an advisory opinion.[109] The Court noted that the Treaty aimed to protect those inhabitants of the Polish territory who differ from the majority population in race, language or religion, irrespective of their nationality.[110] The Treaty intended to recognize the 'link' these minorities had to the Polish territory and prevent the newly independent state from withholding nationality from them.[111] To protect these minorities, it effectively acknowledged a right to Polish nationality based on their connection to the territory.[112] The Court found no interference with Poland's sovereign right as a state to decide on nationality.[113] It noted:

> A birth occurring in a family established in the territory, on the regular and permanent footing presupposed by habitual residence, would not be an accidental circumstance taking place during a temporary sojourn or visit. The establishment of his parents in the territory on this basis creates between the child and his place of birth a *moral link* which justifies

107 Treaty between the Principal Allied and Associated Powers (the British Empire, France, Italy, Japan and the United States) and Poland, 28 June 1919.

108 Similar provisions existed in other peace treaties concluded after the end of World War I, eg in Article 61 of the Treaty of Trianon of 4 June 1920 between Hungary and the Allied Powers. See also International Law Commission, 'Hudson Report' (n 95) 11 f.

109 *Acquisition of Polish Nationality* (n 92) 7.

110 *ibid 14 f.*

111 *ibid 15.*

112 *ibid.*

113 *ibid 16.*

> the grant to him of the nationality of this country; it strengthens and supplements the material bond already created by the fact of his birth.[114] (emphasis added)

Hence, the Treaty *de facto* guaranteed a right to nationality for former habitual residents based on a 'moral link' to the territory.[115] The Polish Minority Treaty, as interpreted by the PCIJ in its opinion, is an early example for the limitations of states' sovereignty to decide on the acquisition and loss of nationality imposed by international law. Moreover, the PCIJ's opinions on the *Polish Minorities Treaty* and the *Nationality Decrees* illustrate the central role of the League of Nations as the primary international forum to address common standards on nationality matters in the inter-war period.[116]

2 *Internationalization and Specialization: The 1930 Hague Convention*

In parallel to these developments at the level of jurisprudence, the League of Nations in the 1920ies declared nationality to be an issue for international codification.[117] It mandated a group of experts to identify common standards in the field of nationality law.[118] This so-called Harvard Draft Convention on Nationality set the basis for a multilateral conference on nationality matters in The Hague in 1930.[119] At this conference the Convention concerning Certain Questions Relating to the Conflict of Nationality Laws was adopted.[120] The 1930 Convention — with its three protocols[121] — was the first major international treaty dedicated specifically to nationality.[122] It has the aim of securing that every person has one, but only one nationality.[123] Thereby, both statelessness

114 *ibid 18.*

115 See also Chapter 6, II.

116 Mantu (n 16) 27.

117 International Law Commission, 'Hudson Report' (n 95) 5.

118 See in more detail Spiro, 'New Citizenship Law' (n 60) 700 ff.

119 Yaffa Zilbershats, *The Human Right to Citizenship* (Transnational Publishers 2002) 13.

120 See on the drafting history Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016) 13 ff.

121 Protocol Relating to Military Obligations in Certain Cases of Double Nationality, 12 April 1935, LNTS Vol. 178, p. 227; Protocol Relating to a Certain Case of Statelessness, 12 April 1930, LNTS Vol. 179 p. 115; Special Protocol Concerning Statelessness, 12 April 1930, C.27.M.16.1931.V.

122 Weis, *Nationality in International Law* (n 70) 26. See also Kay Hailbronner and others (eds), *Staatsangehörigkeitsrecht* (6. Aufl., CH Beck 2017) 40; Kraus (n 23) 149; Mantu (n 16) 27; van Waas, *Nationality Matters* (n 98) 37.

123 Preamble to the 1930 Convention, Recital 2.

and dual nationality should be prevented.[124] The 1930 Convention codified the doctrine of *domaine réservé* and the principle that nationality laws fall within the sovereign sphere of states in its Article 1.[125] The remaining provisions are primarily concerned with avoiding dual nationality and statelessness.[126] Hence, the Convention and its protocols first and foremost address unwanted consequences of nationality regulation and acknowledge the need for international standards to solve the conflicts arising from such regulation. By contrast, they do not effectively set limitations upon state sovereignty in the regulation of the acquisition and loss of nationality.[127]

The inter-war period also brought the adoption of two other multilateral treaties at the regional level — the Convention on the Nationality of Women (CNW)[128] and the Convention on Nationality[129] adopted by American states in 1933. The former was the first international treaty that effectively prescribed full equal treatment of men and women with respect to nationality rights.[130]

3 *The After-War Period: The Rise of Individual Rights*

After World War II the number of international treaties on nationality increased. With the emergence of modern human rights law, and also under the impression of the high number of individuals left stateless after the war, the focus of these instruments shifted more towards the protection of individuals.[131] At the same time, the UN became the main forum for the negotiation of international treaties on nationality and statelessness.

The two most important instruments of that period are the Convention Relating to the Status of Stateless Persons and the Convention on the Reduction

124 Preamble to the 1930 Convention, Recital 3. See also Ruth Donner, *The Regulation of Nationality in International Law* (2nd ed, Transnational Publishers 1994) 179.

125 Dörr (n 70) para 4. See also Chapter 3, II.

126 They establish safeguards in case of renunciation of nationality or the situation of persons for whom dual or even multiple nationality but also statelessness is more likely to arise, namely married women, children and adopted persons. See in more detail de Groot and Vonk (n 105) 87.

127 See also Spiro, 'New Citizenship Law' (n 60) 703.

128 Convention on the Nationality of Women, 26 December 1933, OAS Treaty Series No. 4 ('CNW').

129 Convention on Nationality, 26 December 1933, OAS Treaty Series No. 37 ('1933 Montevideo Convention on Nationality').

130 de Groot and Vonk (n 105) 101. The 1933 Montevideo Convention on Nationality complements the earlier Convention establishing the Status of Naturalized Citizens Who Again Take up Their Residence in the Country of Their Origin, adopted on 13 August 1906 in Rio de Janeiro.

131 Spiro, 'New Citizenship Law' (n 60) 709 f.

of Statelessness, which will be discussed in more detail below.[132] A third instrument, the Convention on the Nationality of Married Women (CNMW)[133] of 1957 addresses the equality of women in nationality matters. Under the impression of Article 15 of the Universtal Declaration of Human Rights adopted in 1948, the CNMW aims at securing married women's right to an independent nationality irrespective of their husbands nationality.[134] It recognizes a right to a nationality and obliges states to ensure that neither marriage or its dissolution, nor the change of nationality of her husband automatically affects the nationality of a woman (Article 1). The unity of nationality for families shall be achieved through facilitated access to naturalization for wives of nationals (Article 3). With these provisions, the Convention took important steps towards overcoming the principle of dependent nationality, which causes discriminatory nationality regimes.[135]

New instruments were also created at the regional level. Under the auspices of the Council of Europe, several instruments addressing multiple nationality and state succession were adopted. The 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality[136] is based on the idea that multiple nationality is undesirable

132 See Chapter 4, II.1.2.1 and II.1.2.2.

133 Convention on the Nationality of Married Women, 20 February 1957, 309 UNTS 65 ('CNMW').

134 Article 2 CNMW. See also Martina Caroni and Nicole Scheiber, 'Art. 9 CEDAW' in Erika Schläppi, Silvia Ulrich and Judith Wyttenbach (eds), *CEDAW: Kommentar zum UNO-Übereinkommen über die Beseitigung jeder Form der Diskriminierung der Frau: Allgemeine Kommentierung, Umsetzung in der Schweiz, Umsetzung in Österreich* (Stämpfli, Manz 2015) para 12. See on Article 15 UDHR Chapter 4, I.

135 Human Rights Council, 'Report 23/23 of the Secretary General on Discrimination Against Women on Nationality-Related Matters, Including the Impact on Children' (HRC 2013) UN Doc. A/HRC/23/23 para 10. Knop points out that the CNMW is illustrative for the first generation of instruments aiming to establish equal treatment of men and women in nationality matters: it is concerned with the equality of women as individuals and their equal right to chose their nationality, while the broader, relational factors such as transmission of nationality to children and other family relationships were not (yet) considered, see Karen Knop, 'Relational Nationality: On Gender and Nationality in International Law' in T Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001) 102.

136 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, 6 May 1963, ETS No. 43 ('1963 Convention on Multiple Nationality'). The 1963 Convention is complemented by three protocols: Protocol Amending the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, 24 November 1977, ETS No. 95; Additional Protocol to the Convention on Reduction of Cases of Multiple Nationality and Military

and should be avoided as far as possible.[137] It stands clearly in the classical tradition of international citizenship law aimed at preventing and solving conflicts between disparate nationality regimes and does not reflect the individual rights' character of citizenship.[138] While it does entail a mechanism to prevent statelessness, it allows for the automatic loss of nationality upon acquiring a new nationality to prevent dual nationality (Article 1). The second part of the Convention is concerned with mitigating one of the consequences of dual nationality: the question of military service.[139] The tendency to shift the attention away from order management and the prevention of dual and multiple nationality towards more progressive and rights-based approaches to nationality eventually resulted in the drafting of the European Convention on Nationality in 1997.[140] The youngest specific instrument on nationality adopted in the framework of CoE is the Convention on the Avoidance of Statelessness in Relation to State Succession, adopted in 2006.[141] The 2006 Convention shows that in the 21st century, the international regulation of nationality has expanded at the regional level and is more and more shaped by a rights-approach.[142] In parallel, the UNHCR has intensified its efforts aimed at the prevention, reduction and elimination of statelessness at the global level.[143]

4 *The Parallel Development: The Indirect Regulation of Nationality*

The abovementioned instruments directly concern nationality — its possession or its absence, statelessness and the impact of marriage or its dissolution on nationality. In parallel to these specific instruments, nationality is an essential element of many other subfields of international law, from private international law, the law of diplomatic protection, international investment

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Obligations in Cases of Multiple Nationality, 24 November 1977, ETS No. 96; and Second Protocol Amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, 2 February 1993, ETS No. 149. See Chapter 4, II.2.2.1.3.a.

137 Council of Europe, 'Explanatory Report ECN' (n 73) para 6.

138 The subsequent protocols to the 1963 slightly loosen the restrictive approach towards multiple nationality.

139 Articles 5 ff.

140 See on the ECN Chapter 4, II.2.2.1.1.

141 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, 19 May 2006, ETS No. 200 ('Convention on the Avoidance of Statelessness', '2006 Convention'). See Chapter 4, II.2.2.1.3.b.

142 See on the legislative developments in other regions Chapter 4, II.2.2.

143 The UNHCR #iBelong Campaign launched in 2014 with the aim to eradicate statelessness within ten years, https://www.unhcr.org/ibelong/.

law, tax law, international humanitarian law and international criminal law to migration and refugee law.[144]

In particular, nationality is an important element of the *law on diplomatic protection*.[145] The law on diplomatic protection is concerned with the right of states to intervene on behalf of its own nationals *vis-à vis* another state, if their rights are violated.[146] Nationality is a precondition for the exercise of diplomatic protection by the state.[147] Dual or multiple nationality has a disruptive potential for the system of diplomatic protection.[148] If a person has two nationalities, which state can exercise diplomatic protection on her behalf? And can a state exercise diplomatic protection against the other state of nationality? The latter can be answered in the negative: under the law of diplomatic protection states were traditionally not allowed to exercise diplomatic protection for one of its nationals against a state whose nationality the person concerned also possesses.[149] In the *Nottebohm case* — which is a landmark ruling on diplomatic protection just as much as it is one on nationality — the ICJ specified that nationality has to be effective in order for a state to exercise diplomatic protection.[150] The question at hand was whether Liechtenstein, where Mr. Nottebohm only recently acquired the nationality and has never actually lived, could exercise diplomatic protection against Guatemala, where Nottebohm was a long term resident.[151] In the judgment the ICJ coined the famous definition of nationality as a legal bond representing a genuine link.[152]

144 See de Groot and Vonk (n 105) 17; Robert D Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 Harvard International Law Journal 6.

145 Andreas Kind, *Der diplomatische Schutz: Zwischenstaatlicher Rechtsdurchsetzungsmechanismus im Spannungsfeld von Individualrechten, Ausseninteressen, Staatsangehörigkeit und Schutzpflichten: Eine schweizerische Perspektive* (Dike Verlag Zürich 2014) 47. For more details see eg also Eileen Denza, 'Nationality and Diplomatic Protection' (2018) 65 Netherlands International Law Review 463; Annemarieke Vermeer-Künzli, 'Nationality and Diplomatic Protection, A Reappraisal' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013). See on the link between nationality and diplomatic protection also Chapter 2, II.3.3.1.

146 Weis, *Nationality in International Law* (n 70) 33.

147 *Panevezys-Saldutiskis Railway* (*Estonia v Lithuania*) [1939] PCIJ Series A./B. No. 76 para 65.

148 See Weis, *Nationality in International Law* (n 70) 44.

149 Article 4 1930 Convention.

150 *Nottebohm* (n 63).

151 See also Sloane (n 144) 11 f; Ernst Hirsch Ballin, *Citizens' Rights and the Right to Be a Citizen* (Brill Nijhoff 2014) 69.

152 See also Chapter 6, II.1. Critically Sloane (n 144); Peter J Spiro, 'Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion' (2019) Investment Migration Working Paper

The Court held that nationality "only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national".[153] The requirement of a genuine link has been heavily criticized, particularly as it effectively rendered Nottebohm without protection, having no other nationality than that of Liechtenstein.[154] Today, this 'nationality-of-claims rule'[155] is no longer as strict. Article 3(1) of the Draft Articles on Diplomatic Protection of the ILC assigns the right to exercise diplomatic protection to the state of nationality without any limitation as to the genuineness or effectiveness of that nationality.[156] In case of dual or multiple nationality, the state with the predominant nationality has the competence to exercise diplomatic protection, even against a state of which that person is also a national.[157] A progressive approach is further found for stateless persons and refugees, on whose behalf diplomatic protection can be exercised in case of lawful and habitual residence.[158]

Questions relating to nationality are also inherent to the international framework governing *state succession*.[159] The main question here is how a change of territorial sovereignty affects the nationality of the individuals in the

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No 2019/1 <https://investmentmigration.org/download/nottebohm-genuine-link-anatomy-jurisprudential-illusion-imc-rp-2019-1/>.

153 *Nottebohm* (n 63) 23.

154 See eg Sloane (n 144).

155 Vermeer-Künzli (n 145) 76.

156 *ibid 78.*

157 Article 7 International Law Commission Draft Articles on Diplomatic Protection, 2006, Supplement No. 10, UN Doc. A/61/10 ('ILC Draft Articles on Diplomatic Protection'). See also International Law Commission, 'Commentary on the Draft Articles on Diplomatic Protection' (ILC 2006) Yearbook of the International Law Commission, 2006, Vol. II, Part Two 34 f.

158 Article 8 ILC Draft Articles on Diplomatic Protection (n 157). See Vermeer-Künzli (n 145) 89.

159 See generally Jeffrey Blackman, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law' (1998) 19 Michigan Journal of International Law 1141; Francesco Costamagna, 'Statelessness in the Context of State Succession, An Appraisal under International Law' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013); Jane McAdam, '"Disappearing States", Statelessness and the Boundaries of International Law' [2010] UNSW Law Research Paper; Ineta Ziemele, *State Continuity and Nationality: The Baltic States and Russia: Past, Present and Future as Defined by International Law* (Martinus Nijhoff 2005); Ineta Ziemele, 'State Succession and Issues of Nationality and Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

territory concerned.[160] According to a well-established rule of international law, nationality, in principle, follows the place of habitual residence.[161] The Draft Articles of Nationality of Natural Persons in Relation to the Succession of States of 1999[162] codify this principle in Article 5.[163]

Another area of international law where questions relating to nationality arise is the are *international investment protection law* and specifically investor-state disputes.[164] Many bilateral investment treaties base their personal scope on the nationality of the investors concerned. Under Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,[165] the exercise of jurisdiction is contingent upon the nationality of an investor. Thus, nationality — both of natural persons, companies and corporations — is, in practice, decisive for accessing international investment dispute settlement mechanisms. Tribunals and arbitrators deciding on investment disputes are often called upon to decide as a preliminary question whether an investor can be considered as being a national for the purposes of the investment treaty.[166]

Finally, nationality is an inherent element of *international migration and refugee law*.[167] Here the question of nationality is fundamental to create the delineation between 'us' and 'them', between 'nationals' and 'foreigners that allows for the application of migration legislation at the national level. In the context of international migration, nationality, moreover, has the important function of granting the right to (re-)enter and reside in a state.[168]

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160 See also Weis, *Nationality in International Law* (n 70) 135.

161 de Groot and Vonk (n 105) 25.

162 International Law Commission, Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, 3 April 1999, Supplement No. 10, UN Doc. A/54/10 ('ILC Draft Articles on Nationality').

163 See in more detail Chapter 4, I.1.3.2 and Chapter 5, III.3.3.

164 Giulia D'Agnone, 'Determining the Nationality of Companies in ICSID Arbitration' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 153. See also Peters, *Beyond Human Rights* (n 56) 282 ff; Rubenstein and Adler (n 31) 536 ff.

165 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 14 October 1966, 575 UNTS 159.

166 See eg *Siag v Egypt, Decision on Jurisdiction* [2007] ICSID Case No. ARB/05/15. See for more details Sloane (n 144) 37 ff.

167 See on the international refugee regime and in particular the 1951 Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 ('1951 Refugee Convention', 'CSR'), Chapter 4, II.1.2.3.

168 See eg Kristine Kruma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge* (Martinus Nijhoff 2014) 92 ff; Weis, *Nationality in International Law* (n 70) 45 ff.

IV Conclusion: Growing International Support

Looking at the international legal framework on nationality described in this chapter, four observations can be made: First, the traditional doctrine of nationality as a *domaine réservé* is no longer tenable in an absolute form. States' discretion in nationality matters is not, and never was, blindly shielded from international legal standards. Second, the number of instruments addressing nationality matters has increased throughout the 20th and the 21st century. These instruments form a growing body of international citizenship law and contribute to the development of common standards in nationality matters. Third, the different instruments and standards are dispersed over different fields of international law, some regulating nationality or statelessness directly, such as the 1930 Convention or the European Convention on Nationality,[169] and others merely touching upon the issue indirectly while primarily addressing other questions.[170] Thus, international citizenship law is influenced by different fields of international law, including to a growing extent international human rights law.[171] This creates a fragmented picture of international citizenship law. Fourth, under the increasing influence of human rights law, the focus of international standards on nationality has shifted from a primarily negative framework, obliging states to avoid conflicts with nationality regimes of other states and to refrain from interfering with other states' jurisdiction, to an expanding body of positive obligations and growing recognition of the individual as a bearer of rights.[172] Thus, international citizenship law increasingly evolves from order management to a system that (also) protects individual rights.[173]

Turning back to the elements set out by the UN General Assembly for the recognition of human rights in Resolution 41/120, the evolution towards individual rights described in this chapter can be seen as an indication that the right to nationality attracts more and more international support. The next chapter will turn to the other elements of Resolution 41/120 and look at the

169 European Convention on Nationality, 6 November 1997, ETS No. 166 ('ECN').

170 Fabien Marchadier, 'L'articulation des sources du droit de la nationalité' in Société française pour le droit international (ed), *Droit international et nationalité* (Editions Pedone 2012) 61.

171 Foster and Baker (n 72) 99.

172 Weis, *Nationality in International Law* (n 70) 90.

173 Spiro, 'New Citizenship Law' (n 60) 710.

expanding framework for the protection of the right to nationality in order to answer the questions of whether the right to nationality is consistent with international human rights law, and to what extent the international legal instruments grant individuals a right to nationality.

CHAPTER 4

Beyond Sovereignty

The Right to Nationality in International Law

> The right of every human being to a nationality has been recognized as such by international law.[1]
>
> IACtHR, Advisory Opinion on the Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, 1984

After analyzing the link between state sovereignty and citizenship, and critically reflecting on the traditional perception of nationality as an internal matter of sovereign states, the discussion in the previous chapter has shown that the paradigm of nationality as a *domaine réservé* no longer holds true. Even though states establish the rules for the acquisition and loss of their respective citizenship and implement them at the domestic level, this does not mean they have unlimited discretion in nationality matters. International law knows clear limitations upon that discretion and, in fact, regulates nationality in a broad number of different instruments. Against this evolution of the international legal framework on nationality, the current chapter now zooms in on the protection of the right to nationality in international law. It analyzes the different existing international standards at the universal and regional levels to identify the provisions that guarantee a right to nationality. The bases for this analysis are, in principle, the sources of international law according to Article 38 ICJ-Statute: international conventions, international custom, general principles of law and soft law — though the focus primarily lies on human rights instruments. Jurisprudence of international and regional tribunals is reviewed where it proves to be particularly pressing for the interpretation of a provision protecting the right to nationality.[2]

1 *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* [1984] IACtHR OC-4/84, Series A No. 4 (1984) para 34.

2 Article 38(1)(d) Statute of the International Court of Justice of 26 June 1945, 892 UNTS 119 ('ICJ-Statute').

The chapter begins by looking at the most basic provision in international law protecting the right to nationality: Article 15 of the Universal Declaration of Human Rights[3] (I.). It then turns to instruments at the universal (II.1) and regional (II.2) levels. The chapter concludes with a discussion of customary international legal standards protecting the right to nationality (III.). This comprehensive mapping shall provide an overview of the different sources for the right to nationality in international law. In doing so, the chapter corroborates the claim that the doctrine of *domaine réservé* in nationality matters is no longer valid and, at the same time, shows that the right to nationality, in fact, attracts broad international support. It is consistent with international human rights law, protected in a wide range of instruments and, as will be shown in this chapter, interpreted and enforced by different enforcement mechanisms. This will build the foundation for the subsequent discussion in Chapter 5, which looks at the specific rights and obligations tied to the right to nationality that can be derived from this framework.

I Article 15 Universal Declaration of Human Rights

The starting point for any discussion about the recognition of the right to nationality as a fundamental right in modern human rights law is Article 15 of the Universal Declaration of Human Rights.[4] According to Article 15 UDHR:

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.

This provision enshrines the right to nationality amidst the most basic rights protecting humanity. With Article 15 UDHR, the right to nationality has been included in the most fundamental catalogue of modern human rights law.[5] How did the right to nationality end up among the guarantees enshrined in the thirty articles of the Universal Declaration? What does the right to nationality

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

4 Jonathan Bialosky, 'Regional Protection of the Right to a Nationality' (2015) 24 Cardozo Journal of International & Comparative Law 153, 157.

5 See also Hurst Hannum, 'Reinvigorating Human Rights for the Twenty-First Century' (2016) 16 Human Rights Law Review 409, 414.

according to Article 15 UDHR entail? And what is the legal status of the right? In order to find answers to these questions, the following section will first look at the drafting history of Article 15 UDHR (I.1), explore the scope and content of Article 15 UDHR (I.2) and, finally, discuss the implications of the non-binding nature of the Declaration and ask whether Article 15 has become binding by virtue of customary international law (I.3).

1 *The Drafting History of Article 15 UDHR*

When the Universal Declaration of Human Rights was adopted by the UN General Assembly on 10 December 1948, World War II was barely over. The negotiations for the new instruments took place under the impression of the millions of people killed, displaced and made stateless during the war.[6] The question of how to effectively protect the "inherent dignity and of the equal and inalienable rights of all members of the human family" was pressing.[7] Ultimately, these discussions resulted in a catalogue of universal human rights aimed at protecting all human beings by virtue of their humanity: the Universal Declaration of Human Rights.[8] The rights enshrined in the Declaration created the foundation for the subsequent codification of modern human rights law in the decades since World War II.[9]

Including the right to nationality in the UDHR was visionary,[10] but not uncontroversial.[11] The drafting history of Article 15 UDHR shows that the state representatives had the same concerns that are still being voiced today. They feared that guaranteeing a right to nationality would limit states' discretion

6 See the estimations of the number of stateless persons in International Law Commission, 'Report on Nationality, Including Statelessness' (International Law Commission 1952) UN Doc. A/CN.4/50 7 <http://untreaty.un.org/ilc/documentation/english/a_cn4_50.pdf> ('Hudson Report') 17.

7 Preamble to the UDHR, Recital 1.

8 See also Rhona Smith, *International Human Rights Law* (8th ed, Oxford University Press 2017) 43.

9 Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law III: The Status and Future of the Customary International Law of Human Rights' (1995) 25 Georgia Journal of International and Comparative Law 287, 289. See also Mary Robinson, 'The Universal Declaration of Human Rights: A Living Document' (1998) 52 Australian Journal of International Affairs 117, 118.

10 Gunnar G Schram, 'Article 15 UDHR' in Asbjørn Eide and others (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992) 233.

11 See on the drafting process also Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 48 ff.

in nationality and migration matters too greatly and put their sovereignty in jeopardy. At the same time, there was little doubt that nationality was an issue so central to the protection of individuals that it should be covered in the new instrument.[12]

A preliminary draft for an international bill of rights prepared by the UN Secretariat proposed to include a provision on the right to nationality that would have codified the principle of *jus soli* as a default rule for the acquisition of nationality:

> Every one has the right to a nationality.
>
> Every one is entitled to the nationality of the State where he is born unless and until on attaining majority he declares for the nationality open to him by virtue of descent.
>
> No one shall be deprived of his nationality by way of punishment or be deemed to have lost his nationality in any other way unless he concurrently acquires a new nationality.
>
> Every one has the right to renounce the nationality of his birth, or a previously acquired nationality, upon acquiring the nationality of another State.[13]

The Drafting Committee, in charge of preparing an international bill of rights,[14] shortened this initial proposal in the first session of the negotiations in June 1947. It decided to only include the first paragraph on the right to nationality and deal with the rest in a separate convention.[15]

In the second session, the UK representative proposed to add a paragraph according to which persons who do not enjoy the protection of any government

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12 Lauterpacht argued in 'An International Bill of the Rights of Man', which formed a model for the UDHR, that the issue of nationality "touches so significantly upon the question of the status of human personality in international and municipal law that an International Bill of the Rights of Man would be conspicuously incomplete without an attempt to do away with that offensive anomaly", see Hersch Lauterpacht, *An International Bill of the Rights of Man* (*Reprint*) (Oxford University Press 2013) 126.

13 UN Commission on Human Rights, Drafting Committee, 'Draft Outline of International Bill of Rights' (UDHR Drafting Committee 1947) UN Doc. E/CN.4/AC.1/3, Article 32.

14 Ruth Donner, *The Regulation of Nationality in International Law* (2nd ed, Transnational Publishers 1994) 188.

15 UN Commission on Human Rights, Drafting Committee, 'Report of the Drafting Committee to the Commission on Human Rights, First Session' (UDHR Drafting Committee 1947) UN Doc. E/CN.4/21 77. See also Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 1999) 80.

shall be placed under the protection of the UN.[16] This proposal caused lengthy discussions about the consequences of an involvement of the UN in the realization of the right to nationality and the responsibility of states for the protection of stateless persons. At one point, the American delegate Eleanor Roosevelt even suggested deleting the entire provision, arguing that the problem of statelessness could be dealt with by the UN Economic and Social Council (ECOSOC).[17] The French representative René Cassin replied that:

> The purpose of the right to nationality was to express one of the general principles of mankind and to affirm that every human being should be member of a national group. The United Nations should contribute to putting an end to statelessness by urging the necessary measures upon sovereign states.[18]

Finally, the Drafting Committee decided to keep the first paragraph according to which "every one has the right to a nationality".[19] A reference to the duty of states and the UN to prevent statelessness, as suggested by Cassin, was however rejected.[20]

In the third session the provision on the right to nationality was again under discussion. An amendment submitted by the UK and India suggested to replace the previous wording by the phrase "no one shall be arbitrarily deprived of his nationality".[21] Uruguay suggested to add "or denied the right to change his nationality".[22] Both proposals were adopted.[23] The initial formulation that everyone has the right to a nationality, by contrast, was omitted. By the end of the deliberations in the Commission on Human Rights, the provision read: "No one shall be arbitrarily deprived of his nationality or denied the right to change his nationality".[24]

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16 UN Commission on Human Rights, Drafting Committee, 'Summary Record of the 37th Meeting, Second Session' (UDHR Drafting Committee 1948) UN Doc. E/CN.4/AC.1/SR.37 13.

17 UN Commission on Human Rights, Drafting Committee, 'Summary Record of the 39th Meeting, Second Session' (UDHR Drafting Committee 1948) UN Doc. E/CN.4/AC.1/SR.39 7.

18 *ibid.*

19 *ibid 8.*

20 *ibid.*

21 UN Commission on Human Rights, Drafting Committee, 'Proposed Amendments to the Draft Declaration on Human Rights/India and the United Kingdom' (UDHR Drafting Committee 1948) UN Doc. E/CN.4/99 4.

22 UN Commission on Human Rights, Drafting Committee, 'Summary Record of the 59th Meeting, Third Session' (UDHR Drafting Committee 1948) UN Doc. E/CN.4/SR.59 7.

23 *ibid 6 ff.*

24 *ibid 12.*

The draft prepared by the Commission went on to the Third Committee of the UN General Assembly. At this stage, new attempts were made to re-introduce a paragraph guaranteeing a general right to nationality for everyone.[25] This time, the proposal was no longer heavily contested.[26] At the end of the negotiation process the proposal to include a first paragraph guaranteeing everyone the right to a nationality was adopted with a clear majority.[27]

Still subject to heated discussions, however, was the question concerning the role of the UN in the realization of the right to nationality. For some delegations the possible involvement of the UN was a reason to support the inclusion of the right to nationality, whereas others opposed it for exactly the same reason.[28] Namely the US and the UK were against the introduction of an explicit reference to the duties of the UN.[29] Strong opposition was further voiced by communist states, which underlined the importance of the principle of state sovereignty and of limitations of individual rights *vis-à-vis* the state.[30] The representative of the Soviet Union, Alexei Pavlov, argued that

> the question of nationality — by which was meant a specific relationship between a State and the individual — fell entirely within the internal competence of each State. To grant nationality or to take it away was a prerogative of the sovereign States with which no third party should interfere.[31]

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25 France, Lebanon and Uruguay proposed to re-introduce the phrase "everyone/every human being has the right to a nationality", see for the French amendment UN Doc. A/C.3/244, p. 1; for the Lebanese UN Doc. A/C.3/260, p. 1; and for the Uruguayan UN Doc. A/C.3/268, p. 2. An amendment proposed by Cuba, by contrast, suggested to replace the current phrase with a provision stating "every person has a right to the nationality to which he is entitled by law and the right to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him", see UN Doc. A/C.3/232, p. 2.

26 See for the discussion the meeting records, UN Commission on Human Rights, Drafting Committee, 'Summary Record of the 123rd Meeting, Third Session' (UDHR Drafting Committee 1948) UN Doc. A/C.3/SR.123 348 ff.

27 The provision was voted on twice. In the first vote it was adopted by 21 votes to nine with six abstentions, in the second with 31 votes to one and 11 abstentions, see UN Commission on Human Rights, Drafting Committee, 'Summary Record of the 124th Meeting, Third Session' (UDHR Drafting Committee 1948) UN Doc. A/C.3/SR.124, 359 and 361.

28 See Morsink (n 15) 82.

29 UN Commission on Human Rights, Drafting Committee, 'Summary Record 123rd Meeting' (n 26) 352 ff.

30 See also Manuela Sissy Kraus, *Menschenrechtliche Aspekte der Staatenlosigkeit* (Pro-Universitate-Verlag 2013) 184.

31 UN Commission on Human Rights, Drafting Committee, 'Summary Record 123rd Meeting' (n 26) 355.

Such a right, he argued, would violate Article 7(7) of the UN Charter[32].[33] Cassin, arguing in favor of including a reference to the UN, maintained that the states:

> could not close their eyes to the fact that, in an international order based on the principle of sovereignty, the existence of persons rejected by their countries was a source of friction. The declaration should proclaim that every human being had the right to a nationality, just as it proclaimed that everyone had the right to marry; it was not called upon to implement either right.[34]

Finally, the Committee decided not to include an explicit reference to the UN in Article 15. The provision, in the wording we know today, was finally adopted by the Third Committee of the UN General Assembly with 38 votes to none and seven abstentions.[35]

This cursory examination of the *travaux préparatoires* to the Declaration is interesting for three reasons. First, it seems that the inclusion of a provision on nationality *per se* was not substantially disputed. During the 18 months of deliberation there was a wide consensus that nationality has a human rights dimension and should be covered by a bill of rights even if that entails some limitations for state sovereignty.[36] This general recognition of nationality as a human rights issue probably has to be seen in the context of World War II and the pressing consequences of mass denaturalization and statelessness.[37] Second, the discussions during the drafting process reflect some of the controversies about the characteristics of the right to nationality persisting until today. Whereas the inclusion of the prohibition of arbitrary deprivation of nationality and the right to change one's nationality were relatively uncontroversial, the right to a nationality in the sense of a general *right to acquire*

32 Charter of the United Nations of 24 October 1945, 1 UNTS XVI ('UN Charter').

33 UN Commission on Human Rights, Drafting Committee, 'Summary Record 123rd Meeting' (n 26) 355. This was supported by the representative of the Ukrainian Soviet Socialist Republic, who held that the idea of a right to nationality would violate the principle of national sovereignty, see *ibid 358*.

34 UN Commission on Human Rights, Drafting Committee, 'Summary Record 123rd Meeting' (n 26) 358.

35 UN Commission on Human Rights, Drafting Committee, 'Summary Record 124th Meeting' (n 27) 362.

36 Kraus (n 30) 185. See also Donner (n 14) 190; Schram (n 10) 233.

37 Mirna Adjami and Julia Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27 Refugee Survey Quarterly 96.

a nationality for everyone was subject to heated debates.[38] Just as in the discussions today, it was criticized that such a right would encroach upon states' sovereignty and that it would not be possible to implement it in practice.[39] With the decision not to attribute the UN a particular role in the realization of the right to nationality, the delegations effectively weakened the impact of the newly created right to nationality. Third, like discussions about the right to nationality today, the debates very much focused on the plight of statelessness and the right of stateless persons to acquire a nationality. This is also illustrated by the listing of the right to nationality as Article 15, after the guarantees on the right to freedom of movement and to leave any country in Article 13 and the right to asylum in Article 14, and before the right to marry in Article 16 UDHR.[40] The issue of access to nationality and naturalization in a migratory context for non-citizens who have a nationality, but not that of the state in which they actually live, however, attracted less attention and questions regarding access to political rights for migrants were not discussed in the way they are today.

2 *The Scope and Content of Article 15 UDHR*

The final version of Article 15 UDHR consists of two separate paragraphs and entails three different guarantees: a *right to a nationality* according to Paragraph 1 and a *prohibition of arbitrary deprivation of nationality* and a *right to change one's nationality* according to Paragraph 2. With this basic structure, Article 15 UDHR provided the basis for all subsequent codifications of the right to nationality in international law. Given this central role of Article 15 UDHR in the international legal framework it is worthwhile having a closer look at the interpretation of this provision.

The notion of 'nationality' is not defined in the Declaration. Nevertheless, it is clear from the drafting history that the term refers to legal membership in the (nation) state.[41] The terminology of 'everyone' and 'no one' indicates that Article 15 UDHR applies to all human beings irrespective of whether they have

38 Sandra Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives* (Brill Nijhoff 2015) 31.

39 Gonçalo Matias, *Citizenship as a Human Right, The Fundamental Right to a Specific Citizenship* (Palgrave Macmillan 2016) 13.

40 Initially the provision was to be listed in the chapter on liberties, after the guarantees on political rights and before the provisions on rights of aliens, see UN Commission on Human Rights, Drafting Committee, 'Plan of the Draft Outline of International Bill of Rights' (UDHR Drafting Committee 1947) UN Doc. E/CN.4/AC.1/3/Add.2.

41 Caia Vlieks, Ernst Hirsch Ballin and Maria Jose Recalde-Vela, 'Solving Statelessness: Interpreting the Right to Nationality' (2017) 35 Netherlands Quarterly of Human Rights 158, 163.

a nationality in the first place — or they are stateless — and irrespective of what nationality they have.[42] Even though it is often argued that Article 15(1) grants a right to nationality only for stateless persons and does not apply to persons who already possess a nationality, this interpretation is not supported by the wording of Article 15 itself. In that sense, Article 15 also relates to migration and must be understood in the context of Articles 13 and 14 UDHR. All three provisions guarantee special rights for migrants, forcibly displaced and stateless persons.[43] Finally, Article 15 UDHR applies without temporal or geographical limitations.[44]

The right to have a nationality according to Paragraph 1 guarantees everyone a nationality. This implies, on the one hand, that no one should be without nationality.[45] In case someone does not have a nationality they should have an opportunity to obtain a nationality.[46] Whether it should, on the other hand, be interpreted as granting an entitlement to a particular nationality or to more than one nationalities will be discussed in the following section.

The second paragraph of Article 15 UDHR covers both the right not to be arbitrarily deprived of one's nationality, as well as the right to change one's nationality. As Mirna Adjami and Julia Harrington point out, Article 15(2) entails "a distinction between the deprivation of nationality — which is the withdrawal of nationality already conferred, protected by human rights standards — and the denial of access to nationality" if one wants to change nationality.[47] Under Article 15(2) only the arbitrary deprivation of nationality is prohibited. Deprivation of nationality, as such, is allowed if it is not arbitrary. The provision itself, however, does not specify when deprivation is to be considered arbitrary. In the drafting process this sparked vivid discussions. Some delegations suggested to use "illegally" or "unjustly" instead of arbitrary.[48] A majority, however, opted for the notion of arbitrariness arguing that it would cover situations in which deprivation of nationality occurs without a legal basis or in

42 See also Chapter 5, II.1.

43 Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 52.

44 Article 29(2) UDHR, however, allows for limitations as long as they are determined by law and "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". See also Mantu (n 38) 33.

45 Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016) 256 f.

46 Yaffa Zilbershats, *The Human Right to Citizenship* (Transnational Publishers 2002) 15.

47 Adjami and Harrington (n 37) 101.

48 See Morsink (n 15) 82.

a fundamentally unjust manner.[49] Thus, Article 15(2) requires that deprivation procedures observe certain minimum procedural and substantive standards.[50] The right to change one's nationality covers individuals' right to assume a new nationality and waive their former. This implies both a right to renounce one's former nationality and a corresponding right to acquire a new nationality.[51] It is argued that test of arbitrariness also applies to the second part of Article 15(2).[52] This, however, would limit the right to change one's nationality to a prohibition of arbitrary denial to change one's nationality. Such interpretation seems too narrow. The right to change one's nationality should rather be understood as a right to give up one's nationality upon acquisition of another, except if such change of nationality itself is arbitrary.

Even though Article 15 UDHR is not binding and remains "of a promissory and rather platonic nature", its codification in the UDHR has anchored the right to nationality in modern international human rights law.[53] With its three elements, Article 15 built the model for all subsequent codifications of the right to nationality.[54] However, the provision also anticipated some of the tensions that limit the effectiveness of the right to nationality as a human right until today. The guarantees enshrined in Article 15(2) are relatively concrete, have a clear addressee and limit states' sovereignty only to a minor extent. Moreover, they are based on a situation where persons already have a nationality that can be lost or changed and which can be withdrawn. The right to a nationality according to Paragraph 1, in comparison, remains relatively vague and unspecified. Emmanuel Decaux argues that the *ex post* assumption of the possession of a nationality in Paragraph 2 without clarifying *ex ante* the acquisition of a nationality in Paragraph 1 fails to acknowledge the underlying problem of nationality and statelessness.[55] Thereby, the acquisition and possession of a specific nationality risks remaining hypothetical. The discussion in section II of this chapter will show that this is a common flaw of provisions guaranteeing

49 See for the discussions UN Commission on Human Rights, Drafting Committee, 'Summary Record 123rd Meeting' (n 26) 348 ff. See also Zilbershats (n 46) 16.

50 Adjami and Harrington (n 37) 104.

51 Donner (n 14) 190.

52 Johannes M Chan, 'The Right to a Nationality as a Human Right' (1991) 12 Human Rights Law Journal 1, 3; Zilbershats (n 46) 17.

53 Paul Weis, 'The United Nations Convention on the Reduction of Statelessness, 1961' (1962) 11 The International and Comparative Law Quarterly 1073, 1075. See also Kraus (n 30) 202.

54 Kraus (n 30) 202. See in more detail Chapter 4, II.

55 Emmanuel Decaux, 'Le droit à une nationalité, en tant que droit de l'homme' (2011) 22 Revue trimestrielle des droits de l'homme 237, 241.

the right to nationality. First, however, it shall be discussed whether Article 15 UDHR has acquired the status of customary law.

3 *The Customary Nature of Article 15 UDHR*

The main flaw of Article 15 UDHR is its non-binding nature. The UDHR is not a treaty, but purely declaratory and hence not legally binding.[56] The provisions of the UDHR, therefore, in principle are merely manifestations of intent and do not actually grant entitlements for individuals or impose obligations on states. Nevertheless, as the basic instrument of modern international human rights law, the UDHR carries particular legal weight and cannot be compared to other non-binding UN resolutions.[57] Its provisions are written in a language that suggests entitlements for individuals and obligations for states rather than just proclaiming ideals. Moreover, the rights set out in the Declaration have been found to constitute authoritative interpretation for the general obligation of UN member states to ensure the respect for, and observance of, human rights and fundamental freedoms as set out in Article 55 UN Charter.[58]

One might thus ask whether the UDHR has acquired the status of customary international law and become a binding standard. The question of whether there is a sufficient international practice of states and a corresponding *opinio juris* is subject to much debate.[59] Some authors argue that the Declaration has

56 William E Conklin, *Statelessness: The Enigma of the International Community* (Hart Publishing 2014) 86; Peter J Spiro, 'Citizenship, Nationality, and Statelessness' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 285. See already Hersch Lauterpacht, 'The Universal Declaration of Human Rights' (1948) 25 British Year Book of International Law 354, 356 ff. See already during the negotiations UN Commission on Human Rights, Drafting Committee, 'Summary Record of the 89th Meeting, Third Session' (UDHR Drafting Committee 1948) UN Doc. E/CN.4/SR.89 32.

57 See also Asbjørn Eide and Gudmundur Alfredsson, 'Introduction' in Asbjørn Eide and others (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992) 7.

58 See Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 Australian Yearbook of International Law 100 ff.

59 See eg Kay Hailbronner, 'Der Staat und der Einzelne als Völkerrechtssubjekte' in Wolfgang Graf Vitzthum (ed), *Völkerrecht* (4. Aufl., De Gruyter 2007), n 201 ff; Matthias Herdegen, *Völkerrecht* (16. Aufl., CH Beck 2017) § 47 n 3. For a definition of customary international law see International Law Commission, 'Memorandum Prepared by the Secretariat on the Formation and Evidence of Customary International Law' (ILC 2013) UN Doc. A/CN.4/659 28, Observation 19. See also *Case of the SS Lotus* (*Lotus Case*) [1927] PCIJ Series A No. 10 18; *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark and Netherlands*) [1969] ICJ Reports 1969, p. 3 para 60 ff; *Colombian-Peruvian Asylum Case* (*Colombia v Peru*) [1950] ICJ Reports 1950, p. 266 276 f.

acquired the status of customary international law.[60] They maintain that its catalogue of rights has since its adoption been codified in binding legal instruments and that there are hardly any obligations in the Declaration that states would not have to fulfill or secure anyway.[61] Others, by contrast, find that states have always insisted that the UDHR is not binding.[62] Moreover, they argue that there is hardly a coherent, universal general practice to guarantee all the rights enshrined in the Declaration.[63] Not all rights of the Declaration have been directly codified in binding, universal instruments — among them, notably, Article 15 UDHR.[64] Therefore, it is difficult to convincingly conclude that the UDHR *in toto* has become customary international law.[65]

Most scholars, however, agree that many of the provisions of the Declaration have individually become part of customary international law.[66] Is this also true for Article 15 UDHR? Some still maintain that this is not the case.[67] They argue that few sources would substantiate such a claim.[68] An increasing number of authors, however, argue that Article 15 forms the basis for a customary right to a nationality.[69] The latter position is supported by jurisprudence. Most prominently, the IACtHR has repeatedly reaffirmed the customary nature of the right to nationality. In its *Advisory Opinion on the Proposed Amendments*

60 See eg Chan (n 52) 3; Robinson (n 9) 119; Zilbershats (n 46) 10.

61 Schram (n 10) 240 f.

62 Stephan Hobe, *Einführung in das Völkerrecht* (10. Aufl., Francke 2014) 408. For the drafting process see UN Commission on Human Rights, Drafting Committee, 'Summary Record 89th Meeting' (n 56) 32.

63 See eg Simma and Alston (n 58) 90 ff.

64 Another example is Article 14, see also Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, 'The Right to Seek — Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 European Journal of Migration and Law 439.

65 According to Hannum, the UDHR 'constitutes at least significant evidence of customary international law' even though he finds that there is not enough state practice to actually conclude that the Declaration has become part of customary law, see Hannum (n 9) 332 and 340.

66 ibid 340; Mantu (n 38) 30; Robinson (n 9) 119. For example the prohibition of discrimination on the basis of race (Article 2), the right to live (Article 3), including the prohibition of genocide and mass killings, the prohibition of slavery (Article 4), or the prohibition of torture, including the principle of *non-refoulement* (Article 5).

67 See eg Ineta Ziemele, 'Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents' in Eugeen Verhellen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Brill Nijhoff 2007) para 22.

68 Hannum (n 9) 346.

69 Kay Hailbronner and others (eds), *Staatsangehörigkeitsrecht* (6. Aufl., CH Beck 2017) 37; Schram (n 10) 241.

to the Naturalization Provisions of the Constitution of Costa Rica it held that "[t]he right of every human being to a nationality has been recognized as such by international law".[70] Most recently, the African Commission on Human and People's Rights affirmed in the case of *Anudo v Tanzania* that the UDHR, including, namely, Article 15, forms part of customary international law.[71] On national level, domestic courts have equally made reference to Article 15 UDHR despite its non-binding character.[72] Overall, following the majority of scholars Article 15 UDHR has, or is at least about to become, part of customary international law.[73]

For now, we can conclude that despite the dispute about its binding nature the inclusion of the right to nationality in the Universal Declaration of Human Rights must be considered a milestone. The atrocities of World War II have shown that nationality is not only crucial to effectively access human rights, it has become apparent that having a nationality has a direct human rights' dimension. Thus, the 'right to have rights' was codified in the UDHR. Since its adoption, Article 15 UDHR frames nationality in a human rights context and signals its potential as an individual right: everyone should have a nationality, no one should be arbitrarily deprived of her nationality and everyone should have the right to change one's nationality. Therefore, Article 15 is as important as it is remarkable for the development of modern international human rights law. It has built the foundation for the inclusion of the right to nationality in countless subsequent binding instruments.[74] The following section will explore how the model of Article 15 UDHR has been transposed in binding international instruments at the universal and regional levels and assess whether these standards succeed in establishing a more robust foundation for the right to nationality.

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70 *Advisory Opinion OC-4/84* (n 1) para 34.

71 *Anudo Ochieng Anudo v United Republic of Tanzania* [2018] ACtHPR Application No. 012/2015.

72 See Chan (n 52) 3. The immediate question whether Article 15 UDHR has become customary international law in the sense of Article 25 of the German Constitution has, however, been left open by the German Bundesverwaltungsgericht in a case concerning the naturalization of an Iraqi refugee, see *Urteil 1 C 2088* [1988] BVerwG 1 C 20.88 para 35. See also *Urteil 10 C 5007* [2009] BVerwG 10 C 50.07 para 18.

73 Kraus (n 30) 205; Stefanie Schmahl, *Kinderrechtskonvention: mit Zusatzprotokollen* (2. Aufl., Nomos 2017) 132. See also below Chapter 4, III.

74 Schram (n 10) 229. See also Gerard-René de Groot and Olivier Vonk, *International Standards on Nationality Law: Texts, Cases and Materials* (Wolf Legal Publishers 2016) 363.

II The Right to Nationality in International Law

Article 15 UDHR has codified the right to nationality as one of the cornerstones of modern human rights law. Never again should individuals lose their rights because they are not nationals of a state or have lost such nationality. Nationality — as becomes apparent — is so important for the enjoyment of human rights, it itself has the character of a human right.[75] This is the promise made by Article 15 UDHR. How, then, was this promise implemented in the universal human rights treaties that were supposed to transpose the aspirations of the Universal Declaration in binding law? The following section looks at the codification of the right to nationality in treaty law at both the universal (II.1) and the regional (II.2) levels. The universal level provides the foundation for the codification of the right to nationality. The focus here lies on the instruments adopted within the framework of the of the United Nations. The regional instruments complement the international legal framework and offer the possibility of a more tightly knit web of protection and stronger enforcement mechanisms, namely in the European context with the ECtHR. The relevant instruments in the Americas (II.2.1), in Europe (II.2.2), on the African continent (II.2.3), in the Middle Eastern and North African region (II.2.4), as well as in Asia and the Pacific region (II.2.5) shall be discussed. The analysis shows that the level of protection of the right to nationality in regional instruments varies significantly. From the high standard enshrined in the American Convention of Human Rights[76] to the weak level of protection in the Asian context the legal instruments at regional level have transposed the standards set at the universal level differently.

Ultimately, this review of the relevant legal sources for the right to nationality on universal and regional levels will confirm that the human right to nationality is not new to international human rights law but has its foundation at the very core of the modern international human rights regime. While not all provisions are equally strong, overall there is a large body of provisions that grant a number of enforceable individual rights relating to nationality and set clear limits to state discretion when it comes to the regulation of acquisition and loss of citizenship. Together these standards form the basis for the human right to nationality.

75 See Chapter 2, III.

76 American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, OAS Treaty Series No. 36 ('American Convention', 'ACHR').

1 *The Right to Nationality at Universal Level*

At universal level the UDHR has been transposed in the nine core UN human rights treaties.[77] Of those nine treaties, six guarantee the right to nationality in one form or another.[78] The International Covenant on Civil and Political Rights,[79] the Convention on the Rights of the Child (CRC),[80] the Convention on the Elimination of All Forms of Discrimination against Women,[81] the Convention on the Elimination of All Forms of Racial Discrimination,[82] the Convention on the Rights of Persons with Disabilities (CRPD),[83] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)[84] all protect aspects of the right to nationality. The two UN Statelessness Conventions[85] and the 1951 Convention relating to the Status of Refugees[86] complement this system and create certain obligations for states when it comes to the protection of stateless persons and the reduction of statelessness through naturalization. Thereby, these instruments contribute to further developing the right to nationality.[87] In addition to the human rights treaties (I.1.1) and the framework for the protection of stateless persons and refugees (I.1.2), the section briefly looks at soft law instruments covering the right to nationality (I.1.3).

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77 See also the website of the UN Office of the High Commissioner on Human Rights, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx.

78 The right to nationality is not guaranteed by the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85; and the International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, 2716 UNTS 3.

79 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 ('ICCPR').

80 Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 ('CRC').

81 Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979, 1249 UNTS 13, 'CEDAW').

82 Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965, 660 UNTS 195, 'CERD').

83 Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3 ('CRPD').

84 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, 2220 UNTS 3 ('CMW').

85 The Convention Relating to the Status of Stateless Persons, 28 September 1954, 360 UNTS 117 ('1954 Convention', 'CSS') and the Convention on the Reduction of Statelessness, 30 August 1961, 989 UNTS 175 ('1961 Convention', 'CRS').

86 Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 ('1951 Refugee Convention', 'CSR').

87 See also Adjami and Harrington (n 37) 98.

1.1 The UN Core Human Rights Treaties

1.1.1 *Article 24(3) International Covenant on Civil and Political Rights*

Based on the standards set out in the UDHR, the International Covenant on Civil and Political Rights together with its sister treaty, the ICESCR, forms the foundation of today's international human rights framework.[88] Many of the civil and political rights enshrined in the UDHR were transposed to the ICCPR, but not Article 15 UDHR. During the negotiations of the two Covenants it was found to be too controversial to include a binding, general right to nationality for every person.[89] Instead, the state parties decided to only include a right to nationality for children in the ICCPR, following the model of the UN Declaration of the Rights of the Child.[90] However, not even the inclusion of a right to a nationality for children was uncontroversial.[91] It was argued that states could not be obliged to grant its nationality to all children born on their territory irrespective of the circumstances. Invoking states' sovereignty in nationality matters, delegates stressed that "naturalisation could not be a right of the individual but was accorded by the State at its discretion".[92] Moreover, the recently adopted Convention on the Reduction of Statelessness was used both as an excuse not to include a general right to nationality in the Covenant — as the Convention would provide better protection — and, at the same time, as evidence for the lack of consensus on nationality matters due to the small number of ratifications.[93] Nevertheless, the drafters ultimately adopted Article 24(3) ICCPR with the aim of addressing childhood statelessness and providing children with additional protection.[94]

According to Article 24(3) ICCPR "every child has the right to acquire a nationality". It is obvious that the personal scope of Article 24 is limited to

88 See Walter Kälin and Jörg Künzli, *Universeller Menschenrechtsschutz: der Schutz des Individuums auf globaler und regionaler Ebene* (4. Aufl., Helbing Lichtenhahn Verlag 2019) 44.

89 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, NP Engel 2005) 560.

90 See Chan (n 52) 4; Decaux (n 55) 244.

91 Nowak (n 89) 545. See for a summary of the discussions UN General Assembly, Third Committee, 'Draft International Covenants on Human Rights, Report of the 17th Session' (UN General Assembly 1963) UN Doc. A/5655 14 ff.

92 UN General Assembly, Third Committee (n 91) 19.

93 Chan (n 52) 5.

94 Human Rights Committee, 'General Comment No. 17: Article 24 (Rights of the Child)' (HRCttee 1989) UN Doc. CCPR/C/21/Rev.1/Add.9 para 2. See also Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, Oxford University Press 2013) para 21.01.

children.[95] It applies to children irrespective of their nationality, ie also to migrant and stateless children.[96] A close reading of Article 24(3) ICCPR reveals that the provision — other than Article 15(1) UDHR, which generally declares a 'right to a nationality' — speaks of the right of children to *acquire* a nationality. What does this mean? The *traveaux préparatoires* suggest that the term 'acquire' was introduced to indicate that Article 24(3) did not impose a general obligation on states to grant its nationality to all children born on their territory.[97] Hence, some authors argue that the right to *acquire* a nationality is more limited than a general right to a nationality.[98] Given that states wanted to prevent limitations on their sovereignty, the term *acquire* is supposed to indicate that the provision offers less protection — the right to acquire a nationality as a right to nationality 'light', so to speak.[99] Douglas Hodgson, for example, argues that the wording of Article 24(3) implies that "a child merely possesses a right to be considered eligible for the acquisition of a nationality upon satisfaction of domestic law requirements".[100] In other words, states are free to determine the conditions for the acquisition of nationality for children and should retain the competence to decide how to fulfill Article 24(3) ICCPR.[101] Others, by contrast, maintain that Article 24(3) should be interpreted with the overall aim of preventing statelessness. From that perspective Article 24(3) requires more than the mere possibility of a discretionary naturalization procedure. Instead, it would mean that Article 24(3) obliges states to provide for a meaningful possibility for children to acquire nationality through naturalization or by descent if they

95 *Gorji-Dinka v Cameroon, Communication No 1134/2002* [2005] HRCttee UN Doc. CCPR/C/83/D/1134/2002 para 4.10. Article 24 does not specify when a person is considered to be a minor. It is for the state parties to determine the age of majority. However, persons under the age of 18 are always to be considered as children in the sense of Article 24, see Human Rights Committee, 'General Comment No. 17' (n 94) para 4.

96 See eg Human Rights Committee, 'General Comment No. 17' (n 94) para 8. See also Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Ecuador' (HRCttee 1998) UN Doc. CCPR/C/79/Add.92 para 18.

97 See UN General Assembly, Third Committee (n 91). See also Jaap E Doek, 'The CRC and the Right to Acquire and to Preserve a Nationality' (2006) 25 Refugee Survey Quarterly 26, 26.

98 Peter Rodrigues and Jill Stein, 'The Prevention of Child Statelessness at Birth: A Multilevel Perspective' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking stock after 25 years and looking ahead* (Brill Nijhoff 2017) 396.

99 See Decaux (n 55) 245; Kraus (n 30) 218 ff; Nowak (n 89) 561; Rodrigues and Stein (n 98) 396.

100 Douglas Hodgson, 'The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness' (1993) 7 International Journal of Law, Policy and the Family 255, 258. See also Kraus (n 30) 238 f.

101 See also Kraus (n 30) 218. See similarly Decaux (n 55) 245.

would otherwise be stateless.[102] Hence, following that latter position, the term 'acquire' does not necessarily imply a limited substantive scope of application.

Apart from the scope of Article 24(3) ICCPR, the content of the provision also raises questions. Article 24(3) states that every child has the right to acquire nationality without, however, specifying which state would be under an obligation to grant its nationality and how such acquisition should be accomplished.[103] Just as Article 15 UDHR, Article 24(3) ICCPR does not directly identify the addressee of the obligation to grant nationality.[104] Manfred Nowak criticizes that wording of Article 24(3) as "so laconic that it raises serious problems of interpretation".[105] He argues that leaving the question of how nationality should be acquired entirely to the domestic legislation would render the right completely void of substance.[106] A systematic interpretation of Article 24(3) ICCPR in the context of the other provisions of the Covenant offers guidance. Under Article 24(2) ICCPR, state parties to the Covenant have an obligation to immediately register the births of all children, ie all children born on their territory.[107] Analogously, Article 24(3) should be interpreted as applying to all children born on a state's territory.[108] Such interpretation would be consistent with the position of the Human Rights Committee, according to which Article 24(3) does not "afford an entitlement to a nationality of one's own choice".[109] The state of birth is not any state of one's own choice, but a state to which a clear and unique connection exists. Hence, the addressee of the child's right to a nationality should be the state where the child is born.[110]

This raises the question whether Article 24(3) ICCPR obliges states to grant nationality to all children born in the territory?[111] The drafting history does not

102 Nowak (n 89) 561. Implicitly also William Worster, 'The Obligation to Grant Nationality to Stateless Children Under Treaty Law' (2019) 24 Tilburg Law Review 204.

103 See also Decaux (n 55) 245.

104 Nowak (n 89) 561. See also Worster, 'The Obligation to Grant Nationality under Treaty Law' (n 102) 207.

105 Nowak (n 89) 560. See also Kraus (n 30) 211.

106 Nowak (n 89) 561.

107 Human Rights Committee, 'General Comment No. 17' (n 94) para 7.

108 See also Nowak (n 89) 561. A systematic interpretation of Article 24(3) in conjunction with Article 24(2) would also clarify that ideally, a child would be given access to nationality at or immediately after its birth, see Gerard-René de Groot, 'Children, Their Right to a Nationality and Child Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 145.

109 *Gorji-Dinka v Cameroon* (n 95) para 4.10. See also Human Rights Committee, 'General Comment No. 17' (n 94) para 8.

110 See also Worster, 'The Obligation to Grant Nationality under Treaty Law' (n 102).

111 See Fripp (n 45) 265. See also Chapter 5, III.3.1.

support such a conclusion.[112] A number of states explicitly opposed an entitlement to nationality for all children on the territory.[113] The HRCttee has, so far, interpreted Article 24(3) ICCPR similarly restrictively. It found that the provision shall "not *necessarily* make it an obligation for States to give their nationality to every child born in their territory" (emphasis added).[114] Nevertheless, the HRCttee has repeatedly recommended that states confer their nationality to all children born on their territory, if they would otherwise be stateless.[115] Moreover, the HRCttee has clarified the obligations under Article 24(3) ICCPR in the recent case of *Denny Zhao v The Netherlands*.[116] The case concerned a boy born in the Netherlands to a mother who herself was born in China but had no identity documentation herself. The boy was registered by the Dutch authorities as having "unknown nationality".[117] The mother unsuccessfully tried to obtain or confirm Chinese nationality on behalf of her son.[118] At the same time, Dutch law did not allow to change the annotation of "unknown nationality" in the civil registry to "stateless". The boy effectively remained without any legal status, not able to aquire the status and protection of statelessness or to acquire any nationality. The Human Rights Committee noted in its communication on the case that the impossibility to change his registration status and be recognized as stateless or acquire anationality prevented Denny Zhao from effectively enjoying his right to acquire a nationality, amounting to a violation of Article 24(3).[119] Article 24(3) ICCPR thus obliges states to ensure that children present on their territory have access to a statelessness determination procedure and the possibility to acquire a nationality.

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112 See also Chan (n 52) 5; Zilbershats (n 46) 18.

113 See UN General Assembly, Third Committee (n 91).

114 Human Rights Committee, 'General Comment No. 17' (n 94) para 8.

115 Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Colombia' (HRCttee 1997) UN Doc. CCPR/C/79/Add.76 para 43; Human Rights Committee, 'Concluding Observations on the Third Periodic Report of the Syrian Arab Republic' (HRCttee 2005) UN Doc. CCPR/CO/84/SYR para 19; Human Rights Committee, 'Concluding Observations on the Second Periodic Report of Cambodia' (HRCttee 2015) UN Doc. CCPR/C/KHM/CO/2 para 27. See also Joseph and Castan (n 94) 21.62; Kraus (n 30) 217; Nowak (n 89) 561 f; Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008) 59.

116 *Denny Zhao v The Netherlands*, Communication No. 2918/2016 [2020] HRCttee UN Doc. CCPR/C/130/D/82918/2016. The communication is the first that deals directly with the interpretation of Article 24(3) ICCPR.

117 *ibid 2.3*.

118 *ibid*.

119 *ibid 8.5*.

Moreover, Article 24(3) ICCPR only speaks on the acquisition of nationality and does not refer to the withdrawal or the change of nationality. Is the withdrawal of nationality not covered by Article 24(3) ICCPR? In the case of *Rajan and Rajan v New Zealand* the HRCttee was able to leave the question of whether the revocation of citizenship violates Article 24(3) if it results in a child becoming stateless unanswered.[120] However, a human rights approach to nationality would imply that Article 24(3) ICCPR also prohibits the revocation or deprivation of citizenship if it occurs arbitrarily, on a discriminatory basis or if a child thereby becomes stateless, even though such a prohibition is not explicitly mentioned in the provision.[121] Finally, in the sense of a transversal obligation, Article 24(3) ICCPR, in conjunction with Article 24(1), prohibits discrimination regarding the acquisition of nationality between legitimate children, children born out of wedlock, children of stateless parents and based on the nationality status of one or both parents of a child.[122] Where domestic law foresees a right to a nationality, such right must be accessible for all children born on the territory.[123]

The absence of a general right to nationality in the ICCPR has been described as "one of the glaring omissions in the transposition of the Universal Declaration".[124] Nevertheless, the codification of the right to nationality for children in Article 24(3) of the Covenant has been an important step in the recognition of nationality as a human right. Today, the provision as such is not largely questioned anymore.[125] There is a growing consensus that Article 24(3) ICCPR — despite the term 'acquire' — obliges states to grant nationality to all

120 The child concerned did not become stateless as she still had a second nationality, see *Keshva Rajan and Sashi Kantra Rajan v New Zealand, Communication No 820/1998* [2003] HRCttee UN Doc. CCPR/C/78/D/820/1998 para 7.5. The complaint was declared inadmissible. See also *Deepan Budlakoti v Canada, Communication No 2264/2013* [2018] HRCttee UN Doc. CCPR/C/122/D/2264/2013.

121 See eg Nowak who argues that the revocation of citizenship would violate the right to acquire a nationality if a child would thereby become stateless, even if the acquisition of nationality was fraudulent, Nowak (n 89) 562.

122 Human Rights Committee, 'General Comment No. 17' (n 94) para 8; de Groot, 'Children, Their Right to a Nationality and Child Statelessness' (n 108) 146. See also Chapter 5, III.2.1.

123 See eg the Concluding Observations on Ecuador where the HRCttee found that refugee children were prevented from acquiring Ecuoadorian citizenship despite an entitlement in the domestic legislation. The Committee did however not make an explicit reference to Article 24(3). See Human Rights Committee, 'CO Ecuador 1998' (n 96) para 18.

124 Chan (n 52) 4.

125 Only the UK has reservations in place against Article 24(3) ICCPR, see the list of declarations and reservations, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>. The UK maintained that it might be necessary to "reserve the acquisition and possession of citizenship […] to those having sufficient connection with the United Kingdom".

children born on the territory if they would otherwise be stateless.[126] This conclusion is corroborated by other provisions which equally guarantee the right of the child to a nationality, starting with the CRC.

1.1.2 *Article 7 and 8 Convention on the Rights of the Child*

The Convention on the Rights of the Child, adopted in 1989, entails two provisions that touch upon the right to nationality, Articles 7 and 8. Article 7(1) CRC states that:

> 1. The child shall be registered immediately after birth and shall have the right from birth to a name, *the right to acquire a nationality* and. [sic] as far as possible, the right to know and be cared for by his or her parents. (emphasis added)

Article 7(2) CRC adds:

> 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

In addition, Article 8 guarantees the child's right to preserve his or her identity:

> 1. States Parties undertake to respect the *right of the child to preserve his or her identity, including nationality*, name and family relations as recognized by law without unlawful interference.
> 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity. (emphasis added)

The inclusion of a right to nationality for children in the CRC as such was not controversial. Already the first draft for the new instrument on children's rights proposed a provision stating that "the child shall be entitled from his birth to a name and a nationality".[127] In the subsequent discussions, however, many

126 See eg Human Rights Committee, 'CO Cambodia 2015' (n 115) para 27. See also van Waas, *Nationality Matters* (n 115) 59; Worster, 'The Obligation to Grant Nationality under Treaty Law' (n 102) 208. See in more detail Chapter 5, III.3.1.

127 UN Commission on Human Rights, 'Report on the 34th Session' (UN Commission on Human Rights 1978) UN Doc. E/CN.4/1292 124. See for a detailed discussion of the drafting of Article 7 CRC, Office of the High Commissioner for Human Rights, 'Legislative History

representatives raised the concern that including a right to a nationality would impinge on states' sovereignty if it were to grant stateless children an entitlement to the nationality of the state they were in.[128] They feared that such a right would introduce the principle of *jus soli* for all states.[129] In order to avoid extensive obligations for state parties, and to ensure that the standard adopted was compatible both with the *jus soli* and the *jus sanguinis* system, the drafters decided to follow the model of Article 24(3) ICCPR and to only speak of a right to *acquire* a nationality.[130] Article 8 CRC was only included in a later stage of the drafting process at the initiative of Argentina.[131] The new provision was supposed to provide a safeguard for children to preserve their personal, legal and family identity.[132] Today, the right to a nationality enshrined in the CRC is the right to nationality with the widest geographical reach, given that the Convention has been ratified by all states but the US. Article 7 CRC has been made subject to reservations only by Kuwait, which declared that Article 7 only applies to children of unknown parentage, as well as Monaco and the United Arab Emirates, which stated that the provision shall not affect domestic nationality legislation.[133]

The personal scope of the right to nationality in Article 7 and the right to identity in Article 8 CRC is limited to children.[134] Articles 7 and 8 CRC apply to

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of the Convention on the Rights of the Child, Volume 1' (OHCHR 1978) 370 ff <https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf>.

128 See for the discussions UN Commission on Human Rights, 'Question of a Convention on the Rights of the Child, Report of the Secretary-General' (UN Commission on Human Rights 1978) UN Doc. E/CN.4/1324. See also Rodrigues and Stein (n 98) 396.

129 See eg the concerns raised by the Federal Republic of Germany, UN Commission on Human Rights, 'Report of the Secretary-General' (n 128) 30 para 3.

130 See UN Commission on Human Rights, 'Report on the 36th Session' (UN Commission on Human Rights 1980) UN Doc. E/CN.4/1408 para 277. See further Jill Stein, 'The Prevention of Child Statelessness at Birth: The UNCRC Committee's Role and Potential' (2016) 24 The International Journal of Children's Rights 599, 604; Schmahl (n 73) 132. See also Chapter 4, II.1.1.1.

131 See UN Commission on Human Rights, 'Report of the Working Group on a Draft Convention on the Rights of the Child, 41st Session' (UN Commission on Human Rights 1985) UN Doc. E/CN.4/1408, Annex II. The provision has to be seen in the context of enforced disappearances during the time of the Argentinian military dictatorship, see Doek (n 97) 29.

132 UN Commission on Human Rights, 'Report 41st Session' (n 131) para 9.

133 See for the list of declarations and reservations the UN Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en. Several states have in recent years withdrawn their reservations to Article 7 which underlines the growing acceptance of the right to nationality for children.

134 Article 1 CRC defines children as human beings below the age of eighteen, unless the domestic law foresees a lower age of majority. This is one of the differences to Article 24(3) ICCPR, see above Chapter 4, II.1.1.1, note 95.

all children within the jurisdiction of a member state, including non-national, refugee, irregular migrant or stateless children.[135]

Article 7(1) CRC enshrines the child's right to acquire a nationality. Article 7(2) complements this and specifies the obligations states have when implementing the right to acquire a nationality.[136] The rationale is to prevent statelessness and to oblige states to take all necessary measures to ensure that every child has a nationality.[137] As in the case of Article 24(3) ICCPR, it is difficult to identify the addressee of the right to nationality and to specify concrete obligations.[138] Usually, Article 7(1) CRC was interpreted as not amounting to a general right to a nationality for children.[139] Accordingly, the CtteeRC found that the provision does not oblige states to grant their nationality to every child born in their territory.[140] Nevertheless, the Committee also stressed that granting nationality automatically to every child born on the territory if they would otherwise be stateless would be the ideal solution.[141] Moreover, states generally have to ensure that all children acquire a nationality in order to comply with

135 See eg Committee on the Rights of the Child, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Chile' (CtteeRC 2015) UN Doc. CRC/C/CHL/CO/4-5 para 32; Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Report of Gabon' (CtteeRC 2016) UN Doc. CRC/C/GAB/CO/2 para 26 f; Committee on the Rights of the Child, 'Concluding Observations on the Combined Third to Fifth Periodic Reports of Kenya' (CtteeRC 2016) UN Doc. CRC/C/KEN/CO/3-5 para 29; Committee on the Rights of the Child, 'Concluding Observations on the Fourth Periodic Report of Georgia' (CtteeRC 2017) UN Doc. CRC/C/GEO/CO/4 para 19.

136 Stein (n 130) 607.

137 Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child, 'Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return' (CtteeMW and CtteeRC 2017) UN Doc. CMW/C/GC/4-CRC/C/GC/23 paras 23 and 24.

138 Rodrigues and Stein (n 98) 397.

139 Doek (n 97) 26.

140 Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 137) para 24. So far, the CtteeRC has only interpreted Article 7 and 8 CRC in General Comments and Concluding Observations but not decided any cases. Two cases invoking Article 8 were rejected as inadmissible, see *AHA v Spain, Communication No 001/2014* [2015] CtteeRC UN Doc. CRC/C/69/D/1/2014; *JABS v Costa Rica, Communication No 005/2016* [2017] CtteeRC UN Doc. CRC/C/74/D/5/2016. See also Doek (n 97) 28.

141 Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 137) para 24. See also Committee on the Rights of the Child, 'Concluding Observations on the Third to Fifth Periodic Reports of Latvia' (CtteeRC 2016) UN Doc. CRC/C/LVA/CO/3-5 para 35.

the aim of preventing and reducing statelessness.[142] This means that states are obliged to take proactive measures to ensure that a child can exercise its right to a nationality.[143] This includes an obligation to ensure that a child can either acquire a nationality elsewhere or, alternatively, can establish its statelessness in a statelessness determination procedure. As a consequence, as the CRCttee held in the case of *A.M.* (*on behalf of M.K.A.H.*) *v Switzerland*, states may not deport a child if its nationality is not established.[144] Hence, the obligation to respect, protect and fulfill the child's right to acquire a nationality under Article 7 CRC does not only fall on the state of birth, but on all states with which the child has a sufficient link, be it based on decent, residence or another connecting factor.[145] In conjunction with Article 2(1), Article 7 CRC prohibits discrimination in nationality matters.[146] Nationality legislation must be implemented in a non-discriminatory manner.[147] Finally, Article 7 CRC must be interpreted in a manner that respects the best interests of the child (Article 3 CRC).[148]

142 Committee on the Rights of the Child, 'General Comment No. 11 (2009) on Indigenous Children and Their Rights Under the Convention' (CtteeRC 2009) UN Doc. CRC/C/GC/11 para 41. See also Doek (n 97) 28.

143 *A.M.* (*on behalf of M.K.A.H.*) *v Switzerland, Communication No 95/2019* [2021] CtteeRC UN Doc. CRC/C/88/D/95/2019 para 10.10.

144 ibid.

145 See de Groot, 'Children, Their Right to a Nationality and Child Statelessness' (n 108) 147.

146 Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 137) para 25. On the prohibited ground of ethnicity, see Committee on the Rights of the Child, 'Concluding Observations on the Fifth Periodic Report of Pakistan' (CtteeRC 2016) UN Doc. CRC/C/PAK/CO/5 para 66. On the prohibited ground of disability, see 'Concluding Observations on the Combined Third to Fifth Periodic Reports of Senegal' (CtteeRC 2016) UN Doc. CRC/C/SEN/CO/3-5 para 33. On the ground of (irregular) migrant status, see 'CO Chile 2015' (n 135) para 32; 'Concluding observations on the fourth period report of the Netherlands' (CtteeRC 2015) UN Doc. CRC/C/NLD/CO/4 para 33.

147 See also Doek (n 97) 27. Namely on grounds such as residence status or gender, Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 137) para 25; Committee on the Rights of the Child, 'Concluding Observations on the Combined Third to Fifth Periodic Report of Nepal' (CtteeRC 2016) UN Doc. CRC/C/NPL/CO/3-5 para 26 f; Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Report of Barbados' (CtteeRC 2017) UN Doc. CRC/C/BRB/CO/2 para 29.

148 Committee on the Rights of the Child, 'Concluding Observations on the Initial Report of Myanmar' (CtteeRC 1997) UN Doc. CRC/C/15/Add.69 para 14; Committee on the Rights of the Child, 'Concluding Observations on the Combined Second to Fourth Periodic Reports of Turkmenistan' (CtteeRC 2015) UN Doc. CRC/C/TKM/CO/2-4 para 21. See also Tamás

The obligation to undertake specific measures to protect and fulfill the child's right to a nationality is reinforced by Article 8(1) CRC. That provision safeguards the right of a child to preserve an identity. The Convention itself does not define precisely the notion of 'identity', but it states that the child's nationality, name and family relations are part of their identity.[149] In scholarship Article 8 CRC has been interpreted as requiring states to adopt measures to ensure that the relevant elements of a child's identity, including his or her nationality, are registered, that the child has access to such information and is issued with identity documents.[150] Donner even interprets Article 8(1) as granting the child an independent right to a nationality.[151] It is argued that Article 8(1) CRC, moreover, obliges states to ensure that the loss of nationality by a parent has no automatic effect on the nationality of a child. A child should be allowed to retain his or her nationality, especially if he or she would otherwise be stateless.[152] Article 8(2) CRC, therefore, protects the child against arbitrary deprivation of its identity, including nationality. In combination with the principle of best interests of the child, this amounts to a prohibition of deprivation of nationality for children if such deprivation would result in statelessness.[153]

In combination, Articles 7 and 8 CRC grant the child a right to nationality, irrespective of the status of their parents.[154] Overall, the right of the child to acquire a nationality under the CRC overlaps with the sister provision in the ICCPR.[155] However, with the combination of Articles 7 and 8 the CRC goes beyond Article 24(3) ICCPR and clearly also protects the right not to be deprived of one's nationality. Moreover, the universal application of the CRC gives the child's right to a nationality under Articles 7 and 8 a particular weight. Virtually every state must respect the right of the child to a nationality.[156]

Molnár, 'The Prohibition of Arbitrary Deprivation of Nationality under International Law and EU Law: New Perspectives' [2014] Hungarian Yearbook of International Law and European Law 67, 81; Ziemele, 'Article 7 CRC' (n 67) para 50.

149 See also Schmahl (n 73) 135.

150 Doek (n 97) 29.

151 Donner (n 14) 200.

152 Doek (n 97) 30.

153 See also Molnár (n 148) 81.

154 See Donner (n 14) 200.

155 Fripp (n 45) 273; Worster, 'The Obligation to Grant Nationality under Treaty Law' (n 102) 210.

156 Worster, 'The Obligation to Grant Nationality under Treaty Law' (n 102) 207.

1.1.3 *Article 29 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

The third universal human rights instrument that guarantees a child's right to nationality is the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[157] Article 29 CMW states that:

> Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality.

The obligations under Article 29 CMW are similar to those under Article 24(3) ICCPR and Article 7 CRC.[158] Like Article 24(3) ICCPR and Article 7 CRC, the scope of Article 29 CMW is limited to children. In addition, the personal scope of the CMW is limited to migrant workers and their families.[159] In contrast to the ICCPR and the CRC, Article 29 CMW does not refer to *acquiring* a nationality. It plainly states that "each child of a migrant worker shall have the right [...] to a nationality".[160]

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has interpreted Article 29 as obliging state parties to "take all appropriate measures to ensure that children are not deprived of a nationality".[161] One dimension of Article 29 CMW is to protect access to

157 The practical impact of the CMW, however, is limited. So far, it has been ratified by 51 states, most of them migrant sending countries. All of them are also state parties to the CRC and the ICCPR. See also Paul De Guchteneire and Antoine Pécoud, 'Introduction: The UN Convention on Migrant Workers' Rights' in Ryszard Cholewinski, Antoine Pécoud and Paul De Guchteneire (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Paris : UNESCO Publishing ; Cambridge, England : Cambridge University Press 2009) 1. The only reservation made to Article 29 by Sri Lanka has been withdrawn in 2016, see the list of declarations and reservations <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&clang=_en>.

158 Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 137) para 23.

159 A migrant worker is a "person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national" (Article 2(1) CMW).

160 See Nevena Vučković Šahović, Jaap E Doek and Jean Zermatten, *The Rights of the Child in International Law: Rights of the Child in a Nutshell and in Context: All About Children's Rights* (Stämpfli 2012) 123.

161 Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'General Comment No. 1 (2011) on Migrant Domestic Workers' (CtteeMW 2011) UN Doc. CMW/C/GC/1 para 58; Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'General Comment No. 2 (2013) on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families' (CtteeMW 2013) UN Doc. CMW/C/GC/2 para 79.

nationality for children of migrant workers, especially if the parents are in an irregular situation.[162] The CtteeMW has repeatedly underlined the importance of ensuring the rights of migrant children to nationality and citizenship.[163] Naturalization procedures should be simple and quick in order to allow migrant children to acquire the nationality of the state of residence within a reasonable period of time.[164] Moreover, the CMW equally prohibits discrimination regarding the transmission or acquisition of nationality and states that nationality laws should be implemented in a non-discriminatory manner.[165]

1.1.4 *Article 9 Convention on the Elimination of All Forms of Discrimination against Women*

The Convention on the Elimination of All Forms of Discrimination against Women turns the focus to discrimination and the right to nationality.[166] According to Article 9

> 1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that

162 See Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Second Periodic Report of Mexico' (CtteeMW 2011) UN Doc. CMW/C/MEX/CO/2 para 39. See also the first draft of the Convention which only stated that a child shall not be deprived of its right to a nationality due to "the irregularity of its own situation or that of its parents, […] with a view to reducing statelessness", see UN General Assembly, Third Committee, 'Text of the Preamble and Articles of the International Convention on the Protection of the Rights of All Migrant Workers and Their Families to Which the Working Group Provisionally Agreed During the First Reading' (UN General Assembly 1983) A/C.3/38/WG.1/CRP.2/Rev.1, Article 30.

163 See eg Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Initial Report of Timor-Leste' (CtteeMW 2015) UN Doc. CMW/C/TLS/CO/1 para 39; Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Initial Report of Turkey' (CtteeMW 2016) UN Doc. CMW/C/TUR/CO/1 para 65.

164 Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Combined Second and Third Periodic Reports of Senegal' (CtteeMW 2016) UN Doc. CMW/C/SEN/CO/2-3 para 22 f.

165 Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 137) para 25. See also Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Initial Report of Nigeria' (CtteeMW 2017) UN Doc. CMW/C/NGA/CO/1 para 28.

166 The CEDAW, just as the CERD, is a discrimination treaty which does not directly enshrine new rights, but guarantees that persons affected by certain categories of discrimination, namely gender and race, can effectively exercise their general human rights without any discrimination.

neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Thus, Article 9 CEDAW does not grant a right to nationality as such, nor does it directly obligate states to facilitate the acquisition of nationality for women.[167] Instead, it prohibits discrimination on the basis of sex or gender in the acquisition and transmission of nationality, or more generally, on equality in the application of nationality laws.[168] Hence, Article 9 CEDAW has the character of an equality norm.[169]

Article 9 CEDAW is based on the CNW[170] and the CNMW.[171] [172] During the negotiations for the CEDAW, the inclusion of a provision on nationality was proposed by the Philippine delegation.[173] Again, a controversy arose around

167 Savitri WE Goonesekere, 'Article 9' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press 2012) 238; Karen Knop and Christine Chinkin, 'Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law' (2001) 22 Michigan Journal of International Law 523, 573.

168 See also Committee on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women' (CtteeEDAW 2014) UN Doc. CEDAW/C/GC/32 para 51.

169 Peter J Spiro, 'A New International Law of Citizenship' (2011) 105 The American Journal of International Law 694, 714.

170 Convention on the Nationality of Women, 26 December 1933, OAS Treaty Series No. 4 ('CNW').

171 Convention on the Nationality of Married Women, 20 February 1957, 309 UNTS 65 ('CNMW').

172 Radha Govil and Alice Edwards, 'Women, Nationality and Statelessness' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 184; Vučković Šahović, Doek and Zermatten (n 160). See also Chapter 3, III.3.

173 See Commission on the Status of Women, 'Consideration of Proposals Concerning a New Instrument or Instruments of International Law to Eliminate Discrimination Against Women: Working Paper by the Secretary-General' (CSW 1973) UN Doc. E/CN.6/573 para 67 ff. See also Martina Caroni and Nicole Scheiber, 'Art. 9 CEDAW' in Erika Schläppi, Silvia Ulrich and Judith Wyttenbach (eds), *CEDAW: Kommentar zum UNO-Übereinkommen über die Beseitigung jeder Form der Diskriminierung der Frau: Allgemeine Kommentierung, Umsetzung in der Schweiz, Umsetzung in Österreich* (Stämpfli, Manz 2015) para 16; Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff 1993) 103.

the question whether the interests of *jus soli* and *jus sanguinis* states could be reconciled.[174] Moreover, the potential creation of dual nationality due to equal transmission rights for women caused concerns among states.[175] Ultimately, the states agreed that women should be granted equal rights with men regarding the nationality of their children without, however, specifying how nationality is to be transmitted from parents to children.[176] An issue of concern remains the high number of reservations to Article 9 CEDAW.[177] The CtteeEDAW has repeatedly criticized these reservations and called upon states to withdraw them.[178] It argued that the reservations undermine the core object and purpose of the Convention and have limited validity and legal effect considering the range of international human rights instruments that enshrine rights to nationality and non-discrimination.[179] In its individual communication procedure the CtteeEDAW has, however, so far never found a violation of Article 9 CEDAW.[180]

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174 Goonesekere (n 167) 236. See also Caroni and Scheiber (n 173) para 15.

175 Rehof (n 173) 108 f.

176 Caroni and Scheiber (n 173) para 18. A proposal for a right for both spouses to acquire each other's nationality which was supposed to guarantee the unity of the nationality of the family was heavily criticized and rejected, see *ibid 19.*

177 Monaco, Korea and the United Arab Emirates have made a reservation concerning the entire Article 9. The Bahamas, Bahrain, Brunei Darussalam, Democratic People's Republic of Korea, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia and Syria have made a reservation with regard to the obligation to grant women equal rights in the transmission of nationality according to Article 9(2) CEDAW. In addition, France and UK made a declaration on the interpretation of Article 9 in consistence with their domestic law. See for the list of reservations, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en. Several states have withdrawn their reservations, for instance Algeria, Ireland, Liechtenstein, Thailand or Iraq. See further Goonesekere (n 167) 249 ff; van Waas, *Nationality Matters* (n 115) 66 n 76.

178 CtteeEDAW, 'General Recommendation No. 32' (n 168) para 58; Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Lebanon' (CtteeEDAW 2015) UN Doc. CEDAW/C/LBN/CO/4-5 para 16; Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Initial to Fourth Periodic Reports and the Fifth Periodic Report of the Bahamas' (CtteeEDAW 2012) UN Doc. CEDAW/C/BHS/CO/1-5 para 30; Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Combined Second and Third Periodic Reports of the United Arab Emirates' (CtteeEDAW 2015) UN Doc. CEDAW/C/ARE/CO/2-3 para 36.

179 CtteeEDAW, 'General Recommendation No. 32' (n 168) para 58.

180 *Constance Ragan Salgado v The United Kingdom, Communication No 11/2006* [2007] CtteeEDAW UN Doc. CEDAW/C/37/D/11/2006; *G.M.N.F. v The Netherlands, Communication No. 117/2017* [2020] CtteeEDAW UN Doc. CEDAW/C/75/D/117/2017; *M.A.M.N. v The United*

Article 9 CEDAW is the first provision in an international treaty that actually takes a rights' approach on the question of women's nationality.[181] While it does not grant women a general right to nationality, it protects women's right to equal treatment in nationality matters.[182] It stipulates that nationality laws and policies may not discriminate on the basis of sex, sexual orientation or gender identity, culture, marital status or any combination thereof.[183] It also prohibits indirectly discriminatory regulations such as, for example, naturalization requirements that are more difficult to meet for women than for men. Article 9 further obliges states to actively protect women against discrimination in nationality matters.[184] Finally, states should promote women's equality in nationality matters and undertake necessary measures to achieve full formal and substantive gender equality.[185] This can include proactive measures aimed at supporting women's right to nationality such as, for example, measures to support migrant women in accessing nationality through naturalization.[186]

Article 9(1) CEDAW guarantees equal rights of women and men in acquiring, changing or retaining one's nationality. Neither marriage to a foreign national nor change of nationality by the husband during the marriage shall automatically lead to a change in a woman's nationality, render her stateless or force upon her the nationality of her husband.[187] Thus, Article 9(1) rejects the principle of dependent nationality that links the women's nationality to that of her father or husband, which has historically governed women's citizenship.[188] As the CtteeEDAW stated in General Recommendation No. 21 "nationality should be capable of change by an adult woman".[189] In case of binational couples or children of binational parents, this can imply the recognition and acceptance of dual nationality.[190]

Kingdom, Communication No. 141/2019 [2020] CtteeEDAW UN Doc. CEDAW/C/76/D/151/2019.

181 Knop and Chinkin (n 167) 557; Spiro, 'New Citizenship Law' (n 169) 713.

182 Goonesekere (n 167) 237.

183 Knop and Chinkin (n 167) 583. See also Caroni and Scheiber (n 173) para 23.

184 This includes, eg, an obligation to secure unhindered access of women to identity documents irrespective of a possible consent of the husband as well as unrestricted access to justice, see Caroni and Scheiber (n 173) para 24 f.

185 *ibid 26.*

186 Goonesekere (n 167) 246.

187 CtteeEDAW, 'General Recommendation No. 32' (n 168) para 60.

188 See Goonesekere (n 167) 237.

189 Committee on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 21 on Equality in Marriage and Family Relations' (CtteeEDAW 1994) UN Doc. A/49/38 para 6.

190 Knop and Chinkin (n 167) 583 f. It can also entail an obligation for states to grant resident permits to non-nationals for purposes of family reunification if the spouses or family

Article 9(2) CEDAW obliges states to grant women equal rights with men with respect to the nationality of their children.[191] Women shall have the same right to transmit their nationality to their children. This applies both to biological and adopted children or children born in surrogate arrangements, as well as children born in and out of wedlock.[192] Article 9(2) rejects patrilinear systems of nationality attribution, which was a significant innovation at the time of adoption of the Convention.[193] The provision has a twofold aim. On the one hand it aims at achieving full equality for women and men in nationality matters. On the other hand, it also aims at protecting children against statelessness.[194] This illustrates the close linkage between the right of women to a nationality and the right of children to a nationality.[195] The Committee has, furthermore, repeatedly stressed that dual nationality cannot be raised as an argument against giving women equal rights in the transmission of nationality.[196]

Thus, while Article 9 CEDAW does not guarantee a right to nationality for women as such, it grants women equal rights with men in nationality matters, requires non-arbitrary methods of transmission of nationality and prohibits any discrimination in law, or in fact, against women in nationality matters.[197] For that reason, Article 9 CEDAW provides a central additional safeguard for women's nationality rights.[198]

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members do not have the same nationality, see also Caroni and Scheiber (n 173) para 28; Goonesekere (n 167) 242.

191 Karen Knop, 'Relational Nationality: On Gender and Nationality in International Law' in T Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001).

192 Human Rights Council, 'Report 23/23 of the Secretary General on Discrimination Against Women on Nationality-Related Matters, Including the Impact on Children' (HRC 2013) UN Doc. A/HRC/23/23 para 11.

193 Caroni and Scheiber (n 173) para 47; Goonesekere (n 167) 243; Govil and Edwards (n 172) 186. See also Alice Edwards, 'Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women' (UN High Commissioner for Refugees (UNHCR) 2009) PPLAS/2009/02 40 <http://www.refworld.org/docid/4a8aa8bd2.html>.

194 CtteeEDAW, 'General Recommendation No. 32' (n 168) para 61.

195 Goonesekere (n 167) 243. See also Knop and Chinkin (n 167) 557.

196 Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Fourth Periodic Report of Singapore' (CtteeEDAW 2011) UN Doc. CEDAW/C/SGP/CO/4/Rev.1 para 75; Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Ninth Periodic Report of Norway' (CtteeEDAW 2017) UN Doc. CEDAW/C/NOR/CO/9 para 33. See also Goonesekere (n 167) 244.

197 Goonesekere (n 167) 238.

198 Caroni and Scheiber (n 173) para 29.

1.1.5 *Article 5 Convention on the Elimination of All Forms of Racial Discrimination*

The 1965 Convention on the Elimination of All Forms of Racial Discrimination also addresses nationality from a non-discrimination perspective. However, nationality has a dual role in the CERD-system.[199] On the one hand, the Convention prohibits discrimination against a particular nationality and protects the right to a nationality.[200] On the other, the Convention itself allows for a distinction between citizens and non-citizens on the basis of nationality. According to Article 1(2) CERD, provisions of the Convention do not apply to distinctions, exclusions, restrictions or preferences made by a state party *between citizens and non-citizens*. Thus, the CERD allows for preferential treatment of a state's own citizens. Article 1(3) adds that nothing in the Convention may be interpreted as affecting domestic legislation concerning nationality, citizenship or naturalization, confirming states' competence to legislate on nationality matters.[201] Hence, states may also privilege certain groups or even ethnicities or nationalities in nationality matters. Because of this, Foster and Baker describe Article 1(3) CERD as a "lingering remnant of state discretion".[202] However, as Article 1(3) clarifies, such provisions may not discriminate against any particular nationality.[203] In other words, Article 1(3) CERD does not generally prohibit differential treatment on the basis of nationality, but it prohibits discrimination *against any particular* nationality in nationality, citizenship or naturalization matters.[204] While states may treat their own citizens differently from all other non-citizens, any differential treatment of a particular nationality compared to another nationality is in violation of CERD if such differential

199 See also E Tendayi Achiume, 'Governing Xenophobia' (2018) 51 Vanderbilt Journal of Transnational Law 333, 356 f.

200 See also Roberta Clerici, 'Freedom of States to Regulate Nationality: European Versus International Court of Justice?' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law* (T MC Asser Press 2013) 846; Goonesekere (n 167) 238.

201 See for a thorough discussion of Article 1(3) CERD Michelle Foster and Timnah Rachel Baker, 'Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?' (2021) 11 Columbia Journal of Race and Law 83; Drew Mahalic and Joan Gambee Mahalic, 'The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination' (1987) 9 Human Rights Quarterly 74, 79. See also Spiro, 'New Citizenship Law' (n 169) 716.

202 Foster and Baker (n 201) 103.

203 Mahalic and Mahalic (n 201) 79. See also Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Seventeenth to Nineteenth Periodic Reports of France' (CtteeERD 2016) UN Doc. CERD/C/FRA/CO/17-19 para 11.

204 Committee on the Elimination of Racial Discrimination, 'General Recommendation No. XXX on Discrimination Against Non-Citizens' (CtteeERD 2002) para 1.

treatment cannot be justified.[205] This is the case, "if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim".[206] Ion Diaconu points out that the term 'nationality' in Article 1(3) CERD also includes the ethnic origin of a person so that

> the three terms 'nationality, citizenship or naturalisation' should be understood as meaning all norms on issues related to citizenship (conditions, modalities of acquisition, withdrawal, loss and others) which must not discriminate on grounds of national origin.[207]

Following this approach, the provision has to be interpreted broadly.[208] It also covers discrimination based on nationality status, eg against citizens with dual citizenship.[209]

Article 5(d)(iii) CERD specifies that states have an obligation to guarantee the right to equality before the law in the enjoyment of the right to nationality.[210] The prohibition of discrimination in nationality matters obliges states to prevent any discrimination against non-citizens that denies access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization.[211] The right to nationality under Article 5(d)(iii) also covers

205 Foster and Baker (n 201) 104 ff. See also Achiume (n 199) 357.

206 CtteeERD, 'General Recommendation No. XXX' (n 204) para 4.

207 Ion Diaconu, *Racial Discrimination* (Eleven International Publishing 2011) 166.

208 See for a thorough justification of that interpretation Foster and Baker (n 201) 83 ff.

209 Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Rwanda' (CtteeERD 2016) UN Doc. CERD/C/RWA/CO/18-20 para 8; Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Eighth to Eleventh Periodic Reports of Turkmenistan' (CtteeERD 2017) UN Doc. CERD/C/TKM/CO/8-11 para 16. See eg also Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Eighteenth and Nineteenth Periodic Reports of Togo' (CtteeERD 2017) UN Doc. CERD/C/TGO/CO/18-19 para 27.

210 As the CtteeERD noted in General recommendation XX that while the CERD does not of itself create that right, it assumes its existence and recognizes it, see Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 20 on Article 5 of the Convention' (CtteeERD 1996) para 1.

211 CtteeERD, 'General Recommendation No. XXX' (n 204) para 13; Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 34 on Racial Discrimination Against People of African Descent' (CtteeERD 2011) UN Doc. CERD/C/GC/34 para 47. See also Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Seventeenth to Twenty-Second Periodic Reports of Cyprus' (CtteeERD 2013) UN Doc. CERD/C/CYP/CO/17-22 para 18.

deprivation of nationality.[212] Deprivation of citizenship on the basis of race, color, descent, or national or ethnic origin is a breach of the obligation to ensure non-discriminatory enjoyment of the right to nationality.[213] If denial of citizenship results in a disadvantage, or in discrimination that impedes access to employment, education, health care or social benefits, this too could amount to a violation of the Convention's anti-discrimination principles.[214] Furthermore, Article 5(d)(iii) also entails an implicit obligation to prevent and reduce statelessness, particularly childhood statelessness.[215] Stateless persons and persons of undetermined nationality should be allowed to register and regularize their status, as the CtteeERD has pointed out repeatedly in its Concluding Observations on state parties' reports.[216] Finally, the Committee

212 See for a historical perspective Schwelb who argued in 1966 that Article 5(d)(iii) CERD only covered deprivation of nationality on racial grounds and not acquisition or change of nationality, Egon Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15 International and Comparative Law Quarterly 996, 1008.

213 CtteeERD, 'General Recommendation No. XXX' (n 204) para 14; Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 34' (n 211) para 48. See also Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Twelfth to Sixteenth Periodic Reports of the Sudan' (CtteeERD 2015) UN Doc. CERD/C/SDN/CO/12-16 para 19; Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Second to Fifth Periodic Reports of Oman' (CtteeERD 2016) UN Doc. CERD/C/OMN/CO/2-5 paras 25 and 26.

214 CtteeERD, 'General Recommendation No. XXX' (n 204) para 15; 'General Recommendation No. 34' (n 211) para 49. See also Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Eighteenth to Twenty-First Periodic Reports of the United Arab Emirates' (CtteeERD 2017) UN Doc. CERD/C/ARE/CO/18-21 para 27; Committee on the Elimination of Racial Discrimination, 'CO Turkmenistan 2017' (n 209) paras 16 and 18.

215 Committee on the Elimination of Racial Discrimination, 'CO Sudan 2015' (n 213) para 19; Committee on the Elimination of Racial Discrimination, 'CO Turkmenistan 2017' (n 209) para 18; Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Twenty-Second to Twenty-Fifth Periodic Reports of Iraq' (CtteeERD 2019) UN Doc. CERD/C/IRQ/CO/22-25 para 36. See also CtteeERD, 'General Recommendation No. XXX' (n 204) para 16.

216 Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Ninth to Twelfth Periodic Reports of the Dominican Republic' (CtteeERD 2008) UN Doc. CERD/C/DOM/CO/12 para 14; Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Ninth to Eleventh Periodic Reports of Tajikistan' (CtteeERD 2017) UN Doc. CERD/C/TJK/CO/9-11 para 17. The CtteeERD has been more reluctant to acknowledge racial discrimination in individual communications concerning Article 5(d)(iii) CERD, Foster and Baker (n 201) 115.

on the basis of Article 5(d)(iii) calls upon states to regularize the status of former citizens residing in the territory in cases of state succession.[217]

Foster and Baker criticize that the Committee's approach to nationality matters is not consistent enough.[218] Nevertheless, its practice allows us to draw certain conclusions regarding the the protection of a right to nationality under the CERD. It can be argued that the provisions in the Convention reinforce the right to nationality by obliging states to prohibit and eliminate racial discrimination in all its forms in nationality matters and to guarantee the full enjoyment of the right to nationality. While states may make a distinction between nationals and non-citizens, and may also treat certain groups more favorably in nationality matters, Articles 1(3) and 5(d)(iii) CERD prohibit any discrimination against a particular nationality or a specific person on the grounds of race, color or national or ethnic origin.[219]

1.1.6 *Article 18 Convention on the Rights of Persons with Disabilities*

The Convention on the Rights of Persons with Disabilities, the youngest of the nine UN core human rights treaties, goes beyond a mere non-discrimination approach and enshrines among its catalogue of rights a general right to nationality.[220] Article 18 CRPD recognizes the right of persons with disabilities to liberty of movement and to nationality on an equal basis with others.[221] Paragraph 1 states that:

> States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:
>
> Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of their disability;

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217 CtteeERD, 'General Recommendation No. XXX' (n 204) para 17. See also Committee on the Elimination of Racial Discrimination, 'CO Sudan 2015' (n 213) para 19.

218 Foster and Baker (n 201) 126.

219 *ibid* 144.

220 Anna Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn' (2007) 34 Syracuse Journal of International Law and Commerce 563, 590.

221 See also Rachele Cera, 'Article 18 [Liberty of Movement and Nationality]' in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer International Publishing 2017) 344.

> Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, [...].

Article 18(2) adds that children with disabilities shall have the right to acquire a nationality.

Article 18 CRPD was only included at a late stage in the drafting process.[222] However, other than with previous instruments, the proposal for a right to a nationality in principle was not controversial.[223] Drawing on the models established by Article 24(3) ICCPR and Article 7 CRC, the drafters highlighted the importance of the right to liberty of movement and to nationality for persons with disabilities for the full enjoyment of their rights.[224] Moreover, they noted that the rights to liberty of movement and to nationality are interlinked and mutually dependent, as free movement and choice of residence in practice require a nationality and identity documents.[225] Discussions, however, arose again around the question of which state would be obliged to grant a nationality. Some countries argued that the right to acquire a nationality should only refer to the nationality acquired at birth and not a nationality acquired later in life.[226] Nevertheless, Article 18 CRPD was broadly accepted. Only two reservations are in plave against Article 18 CRPD: one by Kuwait and one by

222 Lauri Philipp Rothfritz, *Die Konvention der Vereinten Nationen zum Schutz der Rechte von Menschen mit Behinderungen: Eine Analyse unter Bezugnahme auf die deutsche und europäische Rechtsebene* (Peter Lang 2010) 455. See also Draft Article 20 Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the, 'Sixth Session, Revisions and Amendments, Contribution by Kenya' (Ad Hoc Committee CRPD 2005) <https://www.un.org/esa/socdev/enable/rights/ahc6kenya.htm>.

223 Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 'Seventh Session, Daily Summary of Discussions, Afternoon Session' (Ad Hoc Committee CRPD 2006) <https://www.un.org/esa/socdev/enable/rights/ahc7sum19jan.htm>.

224 Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the, 'Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on Its Sixth Session' (Ad Hoc Committee CRPD 2005) UN Doc. A/60/266 para 76 <https://www.un.org/esa/socdev/enable/rights/ahc6reporte.htm>.

225 Rothfritz (n 222) 456.

226 Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 'Seventh Session, Daily Summary' (n 223).

Malaysia.[227] Interestingly, a number of states have objected the reservations arguing that Article 18 codifies fundamental principles and denying the right to nationality is incompatible with the object and purpose of the CRPD.[228]

Article 18(1)(a) CRPD enshrines a general right to nationality covering acquisition, change and deprivation of nationality. The aim of the provision is to ensure that persons with disabilities can enjoy their right to nationality on an equal basis with others.[229] The right to nationality applies to all persons with disabilities. It goes beyond other instruments and establishes a general right to nationality for adults and children. Article 18(1)(a) not only explicitly prohibits arbitrary deprivation of nationality, but also deprivation of nationality based on a person's disability. The right of children with disabilities to a nationality is dealt with specifically in Article 18(2) CRPD. States must register children with disabilities immediately after their birth and to safeguard the acquisition of a nationality to prevent statelessness.[230]

Article 18 CRPD primarily entails a negative obligation for states not to interfere with the right to nationality; not to hinder persons with disabilities from accessing a nationality — for example, by setting naturalization

227 Monaco has lodged a declaration that the Convention does not imply that persons with disabilities should be afforded rights superior to those afforded to persons without disabilities, especially in terms of nationality. Thailand withdrew its reservation in 2015. See the list of reservations <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en>.

228 Namely Austria, Belgium, Germany, Hungary, Ireland, the Netherlands, Portugal, the Slovak Republic, Sweden and Switzerland. See also Cera (n 221) 351.

229 *ibid 344.*

230 See Committee on the Rights of Persons with Disabilities, 'General Comment No. 1 — Article 12: Equal Recognition Before the Law' (CtteeRPD 2014) UN Doc. CRPD/C/GC/1 para 43. See also Committee on the Rights of Persons with Disabilities, 'Concluding Observations Gabon' (CtteeRPD 2015) UN Doc. CRPD/C/GAB/CO/1 para 42; Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Bolivia' (CtteeRPD 2016) UN Doc. CRPD/C/BOL/CO/1 para 47; Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of the United Arab Emirates' (CtteeRPD 2016) UN Doc. CRPD/C/ARE/CO/1 para 35; Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Uganda' (CtteeRPD 2016) UN Doc. CRPD/C/UGA/CO/1 para 36; Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Guatemala' (CtteeRPD 2016) UN Doc. CRPD/C/GTM/CO/1 para 51; Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Ethiopia' (CtteeRPD 2016) UN Doc. CRPD/C/ETH/CO/1 para 41. Similarly also Committee on the Rights of the Child, 'General Comment No. 9 (2006) on the Rights of Children with Disabilities' (CtteeRC 2007) UN Doc. CRC/C/GC/9 para 35 f.

requirements that persons with disabilities face particular difficulties fulfilling.[231] Naturalization procedures must be accessible for persons with disability on an equal basis.[232] This puts limits on the increasingly wide-spread use of language and civic knowledge tests in naturalization procedures.[233] Similarly, requirements relating to participation in the labor market or a minimum income must not restrict equal opportunities of persons with disabilities to apply for naturalization.[234] Access to nationality in the sense of Article 18, however, not only covers acquiring citizenship through naturalization but also birthright acquisition. States have a negative obligation to refrain from any measures that limit the right of persons with disabilities to acquire a nationality at birth.[235] Second, Article 18 obliges states not to impede the right of persons with disabilities to change their nationality, to allow for dual nationality on an equal basis and not to arbitrarily or on the ground of disability deprive a person of his or her nationality.[236] Third, full enjoyment of the right to nationality under Article 18 entails unrestricted access to documentation for persons with disabilities.[237] Finally, Article 18 obliges states to put in place specific

231 A provision like in the Ecuadorian Naturalization Act which excludes persons with chronic illnesses generally from naturalization overtly discriminates against persons with disabilities and is contrary to Article 18 CRPD, see Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Ecuador' (CtteeRPD 2014) UN Doc. CRPD/C/ECU/CO/1 para 32. Similarly also Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Peru' (CtteeRPD 2012) UN Doc. CRPD/C/PER/CO/1 para 6(c). See on the Ecuadorian Naturalization Act Gabriel Echeverría, 'Report on Citizenship Law: Ecuador' (GLOBALCIT 2017) GLOBALCIT Country Report 2017/5 <http://cadmus.eui.eu/bitstream/handle/1814/45373/GLOBALCIT_CR_2017_05.pdf>.

232 See also Committee on the Rights of Persons with Disabilities, 'CO UAE 2016' (n 230) 35.

233 Cera (n 221) 347.

234 See also the respective case law of the Swiss Federal Court according to which the special circumstances of persons with disabilities have to be taken into account, *BGE 135 I 49*; *BGE 139 I 169*.

235 The CtteeRPD eg expressed concern that the practice in the Dominican Republic not to apply *jus soli* to children of Haitian descent might violate Article 18, see Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of the Dominican Republic' (CtteeRPD 2015) UN Doc. CRPD/C/DOM/CO/1 para 36.

236 For example, the CtteeRPD expressed concern about legislation in Uganda which denies persons with psychosocial or intellectual disabilities the possibility of dual citizenship, see Committee on the Rights of Persons with Disabilities, 'CO Uganda 2016' (n 230) para 36.

237 See eg Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Armenia' (CtteeRPD 2017) UN Doc. CRPD/C/ARM/CO/1 29. See eg also Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Thailand' (CtteeRPD 2016) UN Doc. CRPD/C/THA/CO/1 para 37.

positive measures to ensure the effective access of persons with disabilities to a nationality.[238]

Article 18 CRPD can be subject to limitations.[239] Any restriction must, however, be provided by law, be necessary to protect national security, public order, public health or morals or the rights of freedoms of others, and must be consistent with the other rights recognized in the Convention.[240] Moreover, it must be proportionate to the aim pursued.[241] One guarantee in Article 18, however, is absolute: a deprivation of nationality that is arbitrary or that is based on disability can never be justified.[242] Depriving a person of his or her nationality because that person has a disability would amount to a direct discrimination and aim at directly excluding persons with disabilities as such.[243]

Creating a strong right to nationality covering access to nationality, access to proof of nationality in the form of documents, change of nationality and deprivation of nationality for both adults and children, Article 18 CRPD goes beyond most other provisions codifying the right to nationality.[244] It foresees the limitations of the right to nationality but, at the same time, recognizes that deprivation of nationality on the basis of disability, as well as arbitrary deprivation of nationality, can never be justified. Considering, moreover, that the introduction of Article 18 was not particularly disputed and that the CRPD is relatively young, the provision shows that the right to nationality is to be recognized as an international human right that imposes — depending on the legal source — specific duties and obligations for states.[245]

The analysis of the different UN human rights treaties shows how the codification of the right to nationality has evolved. While the general right to nationality of Article 15 UDHR was not transposed in the ICCPR, but instead reduced to a rather vague right for children to acquire a nationality, the subsequent instruments have contributed to its consolidation. The almost universally applicable Article 7 CRC — and its sister provisions in Article 24(3) ICCPR and Article 29 CMW — is increasingly interpreted as imposing an obligation on

238 See also Cera (n 221) 346.

239 Rothfritz (n 222) 460.

240 The state representatives were referring to the qualifications for restrictions provided for in Article 12(3) ICCPR. See Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 'Seventh Session, Daily Summary' (n 223).

241 Rothfritz (n 222) 460 f.

242 *ibid 461.*

243 *ibid.*

244 *ibid 459.*

245 See also Cera (n 221) 340; Rothfritz (n 222) 462.

states to grant nationality. Or at least, to children born on their territory if they would otherwise be stateless. Article 9 CEDAW and Article 5 CERD exemplify the prohibition of discrimination that applies in nationality matters — be it regarding discriminatory naturalization requirements, gender discrimination in the transmission of nationality or discriminatory grounds for loss of citizenship. Article 18 CRPD, finally, goes beyond the equality aspect and reinforces a general right to nationality, which should apply to everyone irrespective of disability and secure equal, non-discriminatory and non-arbitrary access to nationality, enjoyment of nationality regarding access to identity documents and protection from loss of nationality. Thus, the core UN human rights treaties manifest that states have repeatedly, and for many years now, accepted limitations upon their sovereignty in nationality matters and recognized nationality as a human right.[246] The UN treaty bodies on their part have contributed to concretizing the scope and content of that right under the respective legal source. Overall, the UN human rights framework provides a solid basis for the right to nationality as an internationally recognized human right.

1.2 The Statelessness Conventions and the Refugee Convention

The previous section looked at the codification of the right to nationality in the core UN human rights treaties. Hence, it has shown that the right to nationality is firmly anchored in the international human rights protection regime. This section shall analyze the two Statelessness Conventions and the Refugee Convention and discuss in how far they contribute to the protection of the right to nationality at the universal level, which developed as a parallel protection regime for stateless persons and refugees.[247]

1.2.1 *The Convention Relating to the Status of Stateless Persons*

The Convention relating to the Status of Stateless Persons of 1954 was negotiated in parallel to the 1951 Refugee Convention with the aim of adopting one

246 See also Kraus (n 30) 215 f.

247 See eg CtteeEDAW, 'General Recommendation No. 32' (n 168) para 9, identifying the Refugee and Statelessness Conventions as additional protection regimes. See on the refugee (and stateless) rights regime as a distinct protection regime Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014); Molnár (n 148) 72 f; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 454 ff.

single instrument to protect both refugees and stateless persons.[248] Ultimately, however, the CSS was adopted as a self-standing instrument.[249] Nevertheless, the CSS follows the model of the Refugee Convention.[250] By and large the articles in the CSS mirror the guarantees enshrined in the Refugee Convention, even though they fall below the standards for refugees in some respects.[251] While the Refugee Convention quickly became the central instrument for the protection of refugees and was ratified by a majority of states, the number of ratifications of the 1954 Convention remained much lower.[252] Moreover, 35 states currently still have a reservation to the Convention.[253] Only since the 1990s has there been a renewed interest in the CSS and an increase of ratifications.[254]

Article 1(1) CSS defines a stateless person as "a person who is not considered as a national by any State under the operation of its law". This definition is recognized as customary international law.[255] The subsequent provisions list the rights of persons who are stateless, prohibit discrimination and establish

248 See on the drafting history generally Katia Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons across EU States* (Brill Nijhoff 2018) 75 ff; Guy Goodwin-Gill, *Introduction to the 1954 Convention Relating to the Status of Stateless Persons, from the United Nations Audiovisual Library of International Law* (2010) <https://legal.un.org/avl/ha/cssp/cssp.html>; Nehemiah Robinson, *Convention Relating to the Status of Stateless Persons. Its History and Interpretation* (UNHCR 1955) <https://www.refworld.org/docid/4785f03d2.html>; Paul Weis, 'The Convention Relating to the Status of Stateless Persons' (1961) 10 International and Comparative Law Quarterly 255.

249 Robinson (n 248) 3 f; Weis, 'Statelessness Convention' (n 248) 256.

250 See Bianchini (n 248) 78; Laura van Waas, 'The UN Statelessness Conventions' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 68; Weis, 'Statelessness Convention' (n 248) 256.

251 Goodwin-Gill (n 248) 4. See also Robinson (n 248) 1; Weis, 'Statelessness Convention' (n 248) 259.

252 Today, the CSR has 146 state parties, the CSS 91. The CRS has been ratified by 73 states. Van Waas interprets this as a consequence of the perception of nationality as a sovereign, internal and highly political matter, see van Waas, *Nationality Matters* (n 115) 17.

253 See the list of declarations and reservations, <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en>. The 1954 Convention only allows reservations to certain provisions, and not to the most important guarantees in Articles 1, 3, 4, 16(1) and 33–42 (Article 38(1) CSS). See also van Waas, *Nationality Matters* (n 115) 232.

254 Roughly a third of the state parties to the CSS only ratified the Convention in the last decade.

255 See International Law Commission, 'Commentary on the Draft Articles on Diplomatic Protection' (ILC 2006) Yearbook of the International Law Commission, 2006, Vol. II, Part Two 36 49. See also Bianchini (n 248) 74; van Waas, 'Statelessness Conventions' (n 250) 72.

minimum standards of treatment for stateless persons. As Batchelor points out, the CSS:

> Attempts to resolve the legal void in which the stateless person often exists, by identifying the problem of statelessness, promoting the acquisition of a legal identity, and providing for a legal status which will serve as a basis for access to basic social and economic rights.[256]

The 1954 Convention tries to mitigate the most severe consequences of statelessness and grant stateless persons a number of essential rights.[257] However, though the acquisition of a nationality provides the only sustainable legal solution for stateless persons, the CSS does not directly codify a right to nationality.[258] Instead, it merely calls upon states to facilitate naturalization for stateless persons. Article 32 provides that states

> shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.[259]

The provision applies to all persons recognized as stateless in the sense of Article 1 of the Convention and does not require lawful status or even habitual residence.[260] It is disputed whether Article 32 grants stateless persons a right to be naturalized in the state of protection. Often the provision is interpreted as not imposing a strict obligation on states to facilitate the naturalization of stateless persons, or as granting individuals an enforceable right to naturalization.[261] It is argued that the provision merely recommends to facilitate, to the extent possible, the naturalization of stateless persons and leaves states a wide

256 Carol A Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation Within the European Union Member States and Recommendations for Harmonization' (2005) 22 Refuge 31, 31.

257 See also Adjami and Harrington (n 37) 97.

258 Bianchini (n 248) 106.

259 Article 32 CSS corresponds to Article 34 Refugee Convention. See on the discussion regarding the direct applicability of the parallel provision in the Refugee Convention below Chapter 4, II.1.2.3.

260 Bianchini (n 248) 107; van Waas, *Nationality Matters* (n 115) 366.

261 In Germany, for example, the Federal Administrative Court has interpreted Article 32 CSS as merely a requirement of benevolence, a 'Wohlwollensgebot', see Hailbronner and others (n 69) 106.

discretion.[262] Adjami and Harrington, therefore, criticize that the CSS fails to acknowledge the right to nationality.[263] Van Waas argues that:

> From the phraseology chosen for this article it is immediately clear that it is not a *right* to (be considered for) naturalisation that is envisaged for the stateless but, at most, an *opportunity* to enjoy *facilitated* naturalisation. Stateless persons cannot demand access to a naturalisation procedure or even insist upon the lowering of the requisite conditions in their favour.[264] (original emphasis)

Moreover, as pointed out by Katia Bianchini, the provision "does not mention other ways to acquire a nationality, such as automatically by operation of law or through simple procedures of registration, declaration or option" that would facilitate the procedures compared to a naturalization.[265] The wording of Article 32 makes it difficult to find a directly applicable right for stateless persons to be granted citizenship of a particular state. Calling upon states ('shall') to facilitate naturalization does not amount to an individual right to nationality or an obligation to grant nationality to stateless persons within its jurisdiction for the state concerned. The addition 'as far as possible', moreover, leaves states a wide discretion. Nevertheless, Article 32 CSS obliges states to provide stateless persons, at a minimum, an opportunity to naturalize and to ensure that such naturalization procedures are less burdensome compared to ordinary naturalization.[266] Hence, Article 32 according to van Waas at least provides for the "crucial right of solution by considering access to citizenship" — and thus is perhaps the most important provision of the Convention.[267] Similarly, Batchelor finds that while states are under no absolute obligation to naturalize

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262 Robinson (n 248) 64, referring to the first sentence of Article 32 as a recommendation or general moral obligation. See also Bianchini (n 248) 106; van Waas, 'Statelessness Conventions' (n 250) 73. *ibid 73.*

263 Adjami and Harrington (n 37) 97.

264 van Waas, *Nationality Matters* (n 115) 365.

265 Bianchini (n 248) 106.

266 Bianchini argues that not allowing the possibility of acquiring citizenship without a good faith explanation would breach Article 32, see *ibid 107.* Regulations such as one currently discussed in Germany according to which naturalization is excluded if the identity and nationality of a person is not established are highly problematic against that background since they risk disadvantaging stateless persons disproportionately, see Deutsche Welle, 'Bundesregierung verschärft Einbürgerungsregeln' *DW.COM* (17 April 2020) <https://www.dw.com/de/bundesregierung-versch%C3%A4rft-einb%C3%BCrgerungsregeln/a-53161205>.

267 van Waas, *Nationality Matters* (n 115) 364.

based on Article 32, they are obliged to facilitate the naturalization in order to provide for a truly effective national protection and durable solution to statelessness through the acquisition of nationality.[268]

In addition, the second sentence of Article 32 entails a more specific obligation by specifying that naturalization should be facilitated.[269] Such facilitation can occur by means of procedural facilitations, such as reduced fees or expedited or simplified procedures, and through substantive facilitations, such as reduced naturalization requirements.

To sum up, the CSS protects the fundamental human rights of stateless persons and, importantly, enshrines the legal definition of statelessness. With the growing number of ratifications, the importance of the Convention is increasing. While an actual right to a nationality is not protected by the Convention, Article 32 CSS obliges states to grant stateless persons access to a naturalization procedure and to facilitate such naturalization.

1.2.2 *The Convention on the Reduction of Statelessness*

The 1954 Convention is complemented by the Convention on the Reduction of Statelessness, adopted in 1961.[270] Similar to the CSS, the number of ratifications was initially low, but has doubled over the last decade.[271] While the CSS intends to secure the most basic rights of stateless persons, the CRS aims at preventing and eradicating statelessness. The CRS is "the leading international instrument that sets rules for the conferral and non-withdrawal of citizenship to prevent cases of statelessness from arising".[272] In order to achieve the aim of reducing and preventing statelessness the Convention obliges states to grant nationality under certain circumstances to stateless persons.[273] The 1961

268 Carol A Batchelor, 'The International Legal Framework Concerning Statelessness and Access for Stateless Persons, Contribution to the European Union Seminar on the Content and Scope of International Protection' (UNHCR 2002) para 16.

269 See also Robinson (n 248) 64.

270 See on the drafting history generally Guy Goodwin-Gill, *Introduction to the 1961 Convention on the Reduction of Statelessness, from the United Nations Audiovisual Library of International Law* (2011) <https://legal.un.org/avl/ha/crs/crs.html>; Weis, 'Convention on the Reduction of Statelessness' (n 53).

271 Today the 1961 Convention has 73 state parties, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5. See also van Waas, *Nationality Matters* (n 115) 42.

272 UNHCR, 'Introductory Note to the Convention on the Reduction of Statelessness' (UNHCR 2014) <https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf>.

273 Donner (n 14) 194.

Convention is thus sometimes described as the instrument that realizes the promise of Article 15 UDHR.[274]

The 1961 Convention addresses situations in which statelessness[275] can occur — at birth, due to loss, deprivation or voluntary renunciation of nationality and in the context of state succession[276] — and obliges states to eliminate and prevent statelessness in their national legislation.[277] The central provisions of the Convention for the elimination of statelessness are Articles 1 and 4 on the acquisition of nationality based on birth in the territory and descent.[278] Article 1 maintains that "a contracting state shall grant its nationality to a person born in its territory who would otherwise be stateless". Such nationality can be granted automatically at birth, by operation of law or upon application.[279] However, state parties may impose additional conditions for the acquisition of nationality by application based on the length of residence, national security, good character or the reason for statelessness.[280] In practice, this amounts to a contingent right to nationality based on ties implicitly held with the state in which one is born or the state of which a parent was a national at the time of birth, provided a person would otherwise be stateless.[281] De Groot argues that:

> the exhaustive character of the list [in Article 1(2)] implies that the state *does not have any discretionary* power to deny nationality if the conditions mentioned under domestic law in conformity with Article 1(2) are met. To provide for a discretionary naturalization procedure for otherwise stateless children is thus not in conformity with the 1961 Convention.[282] (emphasis added)

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274 *Ibid*. See also Chan (n 52) 4; Goodwin-Gill (n 270) 6; Smith (n 8). Molnár argues that the avoidance of statelessness has acquired the status of a general principle of international law, Molnár (n 148) 80.

275 The notion of statelessness in the 1961 Convention is based on the definition in Article 1 CSS.

276 See van Waas, 'Statelessness Conventions' (n 250) 74 f. Bloom, by contrast, identifies four contexts, namely not obtaining citizenship, voluntarily renouncing one's citizenship, having one's citizenship removed and extinction of a state, see Tendayi Bloom, 'Problematizing the Conventions on Statelessness' (United Nations University Institute on Globalization, Culture and Mobility (UNU — GCM) 2013) Policy Report No. 02/01 <http://collections.unu.edu/eserv/UNU:1969/pdf0201BLOOM.pdf>.

277 Adjami and Harrington (n 37) 96 f.

278 See also Weis, 'Convention on the Reduction of Statelessness' (n 53) 1080.

279 Article 1(1)(a) and (b) CRS.

280 Article 1(1)(b) in conjunction with 1(2) 1961 Convention.

281 Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 International Journal of Refugee Law 161.

282 de Groot, 'Children's Right to Nationality' (n 108) 149.

In principle, Article 1 CRS thus reflects the idea of a right to acquire a nationality by virtue of being born in the territory.[283] Nevertheless, the possibility for states to impose certain conditions upon that acquisition of nationality leaves children, at least for a certain period, at risk of statelessness. Therefore, the provision still seems to fall short of the protection required by the child's right to a nationality as protected by Article 24(3) ICCPR and Article 7 CRC.[284]

Article 4 adds that states shall grant their nationality to a person who was not born on their territory if she would otherwise be stateless and if one of the parents had that state's nationality at the time of birth. Such attribution of nationality based on descent again can be granted automatically at birth or upon application. According to Article 4(2), states may foresee several conditions for such application. In combination the two provisions aim to ensure that otherwise stateless persons have access to a nationality and are not left statelessness. Weis notes that

> a balance has been struck between the obligations to be undertaken by *jus soli* and *jus sanguinis* countries: original statelessness is to be remedied by the subsidiary application of *jus soli* in *jus sanguinis* countries and, where this does not lead to acquisition of nationality, by the application of *jus sanguinis* by *jus soli* countries.[285] (original emphasis)

The remaining substantive provisions of the 1961 Convention aim at ensuring that state parties grant citizenship to persons fulfilling the criteria for acquisition and limiting the possibilities of loss of citizenship that could render an individual stateless.[286] An important provision is Article 8, which prohibits deprivation of nationality if such deprivation would render the person concerned stateless.[287] Exceptions to that principle are possible — if nationality was obtained by misrepresentation or fraud, or if domestic legislation provides for deprivation of nationality for breach of loyalty or allegiance and the state party made a declaration to retain such right at the time of signature, ratification or accession to the Convention.[288] Hence, Article 8 does not prohibit the deprivation of nationality resulting in statelessness *per se*. However, Article 9

283 Weis, 'Convention on the Reduction of Statelessness' (n 53) 1079.
284 See van Waas, 'Statelessness Conventions' (n 250) 84. Less critical Goodwin-Gill (n 270) 6.
285 Weis, 'Convention on the Reduction of Statelessness' (n 53) 1082.
286 Articles 2 ff. See also van Waas, 'Statelessness Conventions' (n 250) 75.
287 Schram finds it to be the key article of the Convention, Schram (n 10) 234.
288 Article 8(2) and (3) CRS.

CRS absolutely prohibits deprivation of citizenship on the grounds of race, ethnicity, religion or politics.[289]

The 1961 Convention provides a solid framework to avoid future statelessness and reducing statelessness that currently exists. As such it is the most elaborated and detailed instrument at universal level on the avoidance of statelessness.[290] It imposes a positive obligation on states to attribute nationality in certain situations and prohibits its withdrawal in certain situation. While it does not directly guarantee a general right to nationality, the Convention indirectly protects the right to nationality and is one of the few instruments that specifies which state has an obligation to grant nationality.[291] Thereby, the CRS thereby fills to a certain extent the gap left open by Article 15 UDHR. As Chan claims, it provides "the right to have a nationality with a substantive content, and is indicative of the extent of obligations of, or the international expectation on, the states in the elimination and reduction of statelessness".[292] Moreover, it identifies the factors of birth and descent as connections that "are sufficient to establish a link between the individual and the State, a foundation upon which it is legally sound to grant nationality, in particular, to a person who has received none".[293] This recognition of the importance of an "individual's genuine and effective *existing* connection" (original emphasis) with a state adds new contours to the right to nationality.[294] Nevertheless, the Convention neither obliges states to unconditionally grant access to nationality if a person is otherwise stateless, nor does it absolutely prohibit the withdrawal of nationality resulting in statelessness. As the title of the Convention indicates, the main focus is on the *reduction* of *statelessness*, and not on its complete eradication, nor generally the protection of the right to nationality as such.[295]

1.2.3 *The Convention Relating to the Status of Refugees*

The Convention relating to the Status of Refugees and its Protocol[296] address the situation and rights of refugees in the state of asylum.[297] As elaborated

289 See van Waas, 'Statelessness Conventions' (n 250) 75. See also Donner (n 14) 195.
290 van Waas, 'Statelessness Conventions' (n 250) 83.
291 See also Goodwin-Gill (n 270) 4.
292 Chan (n 52) 4. See also Carol A Batchelor, 'Transforming International Legal Principles into National Law: The Right to a Nationality and the Avoidance of Statelessness' (2006) 25 Refugee Survey Quarterly 8, 11.
293 Batchelor, 'Resolving Nationality Status' (n 281) 161.
294 See also *ibid 162*. See also Chapter 6.
295 van Waas, 'Statelessness Conventions' (n 250) 75. See also van Waas, *Nationality Matters* (n 115) 44.
296 Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 ('1967 Protocol').
297 Ruvi Ziegler, *Voting Rights of Refugees* (Cambridge University Press 2017) 37.

above, the provisions of the 1951 Refugee Convention and the 1954 Convention are to a large extent congruent.[298] The Refugee Convention protects the rights of those individuals who are seeking protection from a well-founded fear of persecution in a state of which they are not a national of, whereas the 1954 Convention guarantees the rights of stateless persons.

For the discussion on the legal foundations of the right to nationality in international law the 1951 Refugee Convention is relevant because it entails a provision on naturalization for refugees within the definition of Article 1.[299] Just as Article 32 CSS, Article 34 of the 1951 Refugee Convention states that:

> The Contracting States shall as far as possible facilitate the assimilation and naturalization 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.

Article 34 Refugee Convention envisages naturalization (and assimilation)[300] as one of the durable solutions for refugees foreseen in the Convention, or even more so, as an end to refugee status.[301] James Hathaway even refers to it as a "true solution".[302]

Just as Article 32 1954 Convention, Article 34 is mostly interpreted as a recommendation for states, rather than an individual right for refugees to be

298 See above Chapter 4, II.1.2.1.

299 Even though one could thus just refer to the interpretation of Article 32 CSS, a short discussion of Article 34 CSR seems opportune as there is much more literature as well as case law on the provision for refugees than for the provision for stateless persons.

300 The term 'assimilation' in Article 34 CSR is to be understood in the sense of integration in the host soceity, see Reinhard Marx, 'Article 34, Naturalization' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 1447 ff.

301 Article 1(C)(3) 1951 CSR which maintains that the Convention ceases to apply to persons who have acquired a new nationality and enjoy the protection of the country of that nationality. See also Atle Grahl-Madsen, *Commentary of the Refugee Convention 1951* (UNHCR 1997), Article 34 N 1; James C Hathaway, *The Rights of Refugees Under International Law* (2nd ed, Cambridge University Press 2021) 1210. One example where refugees were actually granted the option of naturalization as a form of durable solution is Tanzania, which granted citizenship to more than 150'000 Burundian refugees as part of a strategy to find durable solutions for the refugee community present in the country since the 1970s, see Amelia Kuch, 'Naturalization of Burundian Refugees in Tanzania: The Debates on Local Integration and the Meaning of Citizenship Revisited' (2017) 30 Journal of Refugee Studies 468.

302 Hathaway (n 301) 1209.

granted the nationality of their state of asylum.[303] It is said to merely promote access to naturalization rather than establishing an entitlement to naturalization for persons with refugee status. Hathaway, for example, argues that Article 34 "sets an obligation only to 'facilitate' naturalization, not an obligation of result".[304] The duty to facilitate naturalization neither entails a strict obligation to waive or reduce naturalization requirements. Rather, it is understood as a general recommendation to put mechanisms in place that allow refugees to acquire citizenship with as little difficulty as possible. Ruvi Ziegler refers to Article 34 as a "soft" obligation to facilitate naturalization.[305] Reinhard Marx notes with regard to the drafting history that naturalization as such, was considered "a matter of such a delicate nature that in every case the final decision must rest with the organs of the State concerned".[306] Thus, he argues, naturalization is not more than an option that should, in principle, be made available to refugees.[307] Atle Grahl-Madsen, by contrast, writes that "the word 'shall' makes it clear that Article 34 imposes a duty on the Contracting States, not only a recommendation".[308] In that sense it imposes a "qualified duty" as it does not oblige states to naturalize refugees, but instead creates a duty to facilitate it as far as possible.[309] Today, Article 34 is increasingly interpreted as obliging states to provide for for refugees the possibility of naturalization and to facilitate such naturalization.[310] At a very least, Article 34 CSR prohibits to generally exclude refugees from access to citizenship without justification.[311] The arbitrary denial of nationality to refugees would therefore violate Article 34.[312]

The second sentence of Article 34 lists possible ways to facilitate naturalization: through reduced fees and expedited procedures. Other facilitation measures could consist of support for the integration process, leeway in the

303 See Marx (n 300) 1451, para 43.

304 Hathaway (n 301) 1218.

305 Ziegler (n 297) 205. The Swiss Federal Court, for example, has found Article 34 to be legally binding. Nevertheless, it argued that the provision does not grant individual refugees an entitlement to acquire the nationality of the state of protection. The wording of the provision, so the Court, clearly demonstrates states' wide discretion how to facilitate naturalization, see *1D_3/2014, Urteil vom 11 März 2015* [2015] BGer 1D_3/2014 para 4.2.

306 Marx (n 300) 1443.

307 *ibid 1451.*

308 Grahl-Madsen (n 301), Article 34 N 2.

309 *ibid,* Article 34 N 2.

310 *ibid* N 2; Marx (n 300) 1451; Ziegler (n 297) 205.

311 Hathaway (n 301) 1219. See also Grahl-Madsen (n 301), Article 34 N 2.

312 Hathaway (n 301) 1219 f.

assessment of criteria relating to language skills or labor market participation, or the acceptance of dual or multiple citizenship.[313]

The discussion in this section has shown that two Statelessness Conventions and the Refugee Convention do not directly guarantee a general right to nationality. Nevertheless, in particular the 1961 Convention establishes important limitations upon state sovereignty: by defining certain circumstances under which a person should be able to acquire nationality if she would otherwise be stateless and by limiting the competence to deprive an individual of citizenship. Thus, the 1961 Convention thus indirectly gives the right to nationality substantive content. Article 32 of the 1954 Convention and Article 34 Refugee Convention suggest that states should facilitate the naturalization of stateless persons and refugees as far as possible. Overall, the three instruments reinforce the impression that nationality can no longer be described as a *domaine réservé* and provide guidelines for the identification of the scope and content of the right to nationality.

1.3 Soft Law Instruments at Universal Level

In addition to treaty law, soft law instruments play an important role for the development of the right to nationality at the international level.[314] These instruments reinforce and complement existing standards and support the creation of customary international law, as well as the codification of new binding legal instruments.[315] Nationality is a good example to illustrate how soft law can play an important role in domains where states are reluctant to adopt binding norms but, at the same time, agree on the need for international cooperation or even regulation.[316] The following section looks at the

313 See similarly also Grahl-Madsen (n 301), Article 34 N 4.

314 Soft law instruments are legally non-binding instruments, principles, rules or standards such as resolutions, recommendations, declarations or decisions created by subjects of international law, mostly international organizations, see Daniel Thürer, 'Soft Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) para 8 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1469>. See also Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone, 'Introduction: Tracing the Roles of Soft Law in Human Rights' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016) 5.

315 Lagoutte et al distinguish a norm-filling and a norm-creating function of soft law, Lagoutte, Gammeltoft-Hansen and Cerone (n 314) 6 ff. See also *Legality of the Threat or Use of Nuclear Weapons* (*Advisory Opinion*) [1996] ICJ Reports 1996, p. 226 para 70.

316 See also Thomas Gammeltoft-Hansen, 'The Normative Impact of the Global Compact on Refugees' (2019) 30 International Journal of Refugee Law 605, 607; Hobe (n 62) 231; Thürer (n 314) para 6. For the role of soft law in the development of international migration law

most important soft law instruments dealing with the right to nationality at international level. It focuses on instruments adopted at the UN level — the UN General Assembly and the UN Human Rights Council (HRC), as well as instruments of the International Law Commission in particular.

1.3.1 *Resolutions by UN Bodies*

1.3.1.1 The UN General Assembly

The Third Committee of the UN General Assembly has on several occasions dealt with questions relating to nationality. Most of these resolutions concern the mandate of the UNHCR to address the situation of stateless persons.[317] These resolutions express concern about the situation of stateless persons, highlight the connection between statelessness and displacement, call upon states to reduce statelessness and reinforce the mandate of UNHCR to support and assist stateless persons. Implicitly, all these resolutions recognize the right to nationality.[318] Nevertheless, the UNGA remains careful to acknowledge states' domestic jurisdiction in nationality matters. Resolution 50/152, for example, calls upon states to adopt nationality legislation to reduce statelessness and to prevent arbitrary deprivation of nationality, while acknowledging "the right of States to establish laws governing the acquisition, renunciation or loss of nationality".[319] Other resolutions address the issue of state succession,

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see David A Martin, 'Effects of International Law on Migration Policy and Practice: The Uses of Hypocrisy' (1989) 23 The International Migration Review 547.

317 Namely UN General Assembly, 'Resolution 3274 (XXIV)' (UN General Assembly 1974); UN General Assembly, 'Resolution 31/36' (UN General Assembly 1976) UN Doc. A/RES/31/36; UN General Assembly, 'Resolution 49/169' (UN General Assembly 1995) UN Doc. A/RES/49/169; UN General Assembly, 'Resolution 50/152 on the Office of the United Nations High Commissioner for Refugees' (UN General Assembly 1996) UN Doc. A/RES/50/152; UN General Assembly, 'Resolution 61/137 on the Office of the United Nations High Commissioner for Refugees' (UN General Assembly 2007) UN Doc. A/RES/61/137; UN General Assembly, 'Resolution 66/133' (UN General Assembly 2012) UN Doc. A/RES/66/133; UN General Assembly, 'Resolution 67/149' (UN General Assembly 2013) UN Doc. A/RES/67/149; UN General Assembly, 'Resolution 69/152' (UN General Assembly 2015) UN Doc. A/RES/69/152; UN General Assembly, 'Resolution 70/135' (UN General Assembly 2016) UN Doc. A/RES/70/135; UN General Assembly, 'Resolution 72/150' (UN General Assembly 2018) UN Doc. A/RES/72/150; UN General Assembly, 'Resolution 73/151' (UN General Assembly 2019) UN Doc. A/RES/73/151.

318 See also Worster who observes that "specifically, the UNGA has on multiple occasions observed that there is a right to nationality", William Worster, 'The Presumption of Customary International Law: A Case Study of Child Statelessness' (2017) 10 <https://ssrn.com/abstract=3091912 or http://dx.doi.org/10.2139/ssrn.3091912>.

319 General Assembly, 'Resolution 50/152' (n 317) para 16.

and call upon states to take into account the standards elaborated by the ILC and implement them.[320]

Overall, the UN General Assembly has shied away from recognizing the right to nationality as a human right that imposes duties on states and grants individuals enforceable legal claims. It has mostly addressed questions relating to nationality in the context of statelessness and reaffirmed states' discretion in nationality matters. While statelessness is addressed, directly or indirectly, in many of the major initiatives at UN level — such as for example the Sustainable Development Goals[321] or the Global Compacts on Migration and Refugees[322] — the UN General Assembly has been reluctant to take on a leading role in strengthening the right to nationality as an individual human right.

1.3.1.2 The UN Human Rights Council

The UN Human Rights Council and its predecessor, the UN Commission on Human Rights, have repeatedly dealt with nationality issues. The resolutions of the Human Rights Council and the Commission address the right to nationality directly — namely regarding arbitrary deprivation of nationality, the principle of non-discrimination and birth registration.[323]

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320 UN General Assembly, 'Resolution 54/112' (UN General Assembly 1999) UN Doc. A/RES/54/112; UN General Assembly, 'Resolution 59/34' (UN General Assembly 2004) UN Doc. A/RES/59/34. On the work of the ILC see below Chapter 4, I.1.3.1.3.

321 The Sustainable Development Goals (SDG) do not explicitly refer to statelessness or the right to nationality. However, considerations relating to statelessness and access to a nationality are raised under SDG Target 5.1 which relates to the elimination of gender discrimination and SDG Target 16.9 which calls for legal identity for all, including birth registration, see UN General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development, Resolution 70/1' (UN General Assembly 2015) UN Doc. A/RES/70/1.

322 See below Chapter 4, II.1.3.1.3.

323 See eg Human Rights Council, 'Resolution 12/6 on Human Rights of Migrants: Migration and Human Rights of the Child' (HRC 2009) UN Doc. A/HRC/RES/12/6; Human Rights Council, 'Resolution 28/13 on Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law' (HRC 2015) UN Doc. A/HRC/RES/28/13; Human Rights Council, 'Resolution 34/15 on Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law' (HRC 2017) UN Doc. A/HRC/RES/34/15. Other resolutions relating to nationality concern the human rights situation for particular minority groups in certain countries, eg Human Rights Council, 'Resolution S-27/1 on the Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar' (HRC 2017) UN Doc. A/HRC/RES/S-27/1 para 17, calling upon the government of Myanmar to address the issue of the statelessness of the Rohingya population by ensuring their equal access to full citizenship.

Several resolutions of the HRC deal with *arbitrary deprivation of nationality*.[324] These resolutions stress that state sovereignty in nationality matters is limited by international law and "reaffirm the right to a nationality of every human person as *a fundamental human right*" (emphasis added).[325] Arbitrary deprivation of nationality is criticized as a violation of human rights and fundamental freedoms, especially when it occurs on discriminatory grounds.[326] Deprivation of nationality shall not impede the full enjoyment of all human rights and fundamental freedoms and expose the persons concerned to poverty, social exclusion and legal incapacity.[327] The Human Rights Council also repeatedly confirmed the right of the child to acquire a nationality and derives a special need of children for protection against arbitrary deprivation of nationality.[328]

Resolution 20/4, adopted in 2012, addresses the right to a nationality with a focus on women and children.[329] The Resolution reaffirms "that the right to a nationality is a universal human right enshrined in the Universal Declaration of Human Rights, and that every man, woman and child has the

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324 In particular Human Rights Council, 'Resolution 7/10 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2008) UN Doc. A/HRC/RES/7/10; Human Rights Council, 'Resolution 10/13 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2009) UN Doc. A/HRC/RES/10/13; Human Rights Council, 'Resolution 20/4 on the Right to a Nationality: Women and Children' (HRC 2012) UN Doc. A/HRC/RES/20/4; Human Rights Council, 'Resolution 20/5 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2012) UN Doc. A/HRC/RES/20/5; Human Rights Council, 'Resolution 26/14 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2014) UN Doc. A/HRC/RES/26/14; Human Rights Council, 'Resolution 32/5 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2016) UN Doc. A/HRC/RES/32/5. The former Human Rights Commission issued on the topic of human rights and arbitrary deprivation of nationality UN Commission on Human Rights, 'Resolution 1997/36 on Human Rights and Arbitrary Deprivation of Nationality' (UN Commission on Human Rights 1997); UN Commission on Human Rights, 'Resolution 1998/48 on Human Rights and Arbitrary Deprivation of Nationality' (UN Commission on Human Rights 1998); UN Commission on Human Rights, 'Resolution 1999/28 on Human Rights and Arbitrary Deprivation of Nationality' (UN Human Rights Commission 1999) UN Doc. E/CN.4/RES/1999/28 U; UN Commission on Human Rights, 'Resolution 2005/45 on Human Rights and Arbitrary Deprivation of Nationality' (UN Human Rights Commission 2005) UN Doc. E/CN.4/RES/2005/45.

325 Human Rights Council, 'Resolution 7/10' (n 324) para 1.

326 *ibid* 2.

327 See Human Rights Council, 'Resolution 10/13' (n 324) para 7.

328 Human Rights Council, 'Resolution 13/2 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2010) UN Doc. A/HRC/RES/13/2 para 8. See also Chapter 5, III.6.2.

329 Human Rights Council, 'Resolution 20/4' (n 324).

right to a nationality".[330] While it is up to each state to determine by law who its nationals are, such determination has to be consistent with obligations under international law.[331] The Resolution also reinforces the right of the child to a nationality at birth, the prohibition of discrimination in the application of nationality laws and spells out procedural obligations for all decisions concerning acquisition, deprivation, loss or change of nationality, including the right to effective and timely judicial review of such decisions and to effective and appropriate remedies.[332]

Thus, the Human Rights Council resolutions on nationality consistently recognize the right to nationality as a fundamental universal human right. They provide important guidance for the obligations that can be derived from the different legal sources at the international level that guarantee a right to nationality.

1.3.1.3 The Global Compacts on Migration and Refugees

The youngest initiative at the UN level was the adoption of the New York Declaration for Refugees and Migrants on 19 September 2016.[333] The Declaration resulted in the Global Compact on Migration — the Global Compact for Safe, Orderly and Regular Migration (GCM)[334] — and the Global Compact on Refugees.[335] [336] The New York Declaration recognizes statelessness as a cause and consequence of forced migration and calls for its reduction.[337] On that basis, both the Compacts address statelessness and nationality.[338]

The Global Compact for Safe, Orderly and Regular Migration calls in Objective 4 to "ensure that all migrants have proof of legal identity and adequate documentation".[339] States should be committed to "fulfil[ling] the right

330 *ibid 1.*

331 *ibid 2.*

332 *ibid 4 ff.*

333 UN General Assembly, 'New York Declaration for Refugees and Migrants, Adopted by General Assembly Resolution 71/1' (UN General Assembly 2016) UN Doc. A/RES/71/1.

334 UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration,General Assembly Resolution 73/195' (UN General Assembly 2018) UN Doc. A/RES/73/195.

335 Global Compact on Refugees, adopted on 10 December 2018, see UNHCR, 'Official Record of the 73rd Session: Global Compact on Refugees' (UNHCR 2018) UN Doc. A/73/12 (Part II).

336 For an analysis of the legal status of the Compacts, see Gammeltoft-Hansen (n 316).

337 UN General Assembly, 'New York Declaration' (n 333) para 72.

338 See on statelessness in the Global Compacts Tendayi Bloom, 'Are the Global Compacts on Refugees and for Migration Addressing Statelessness Appropriately?' (*European Network on Statelessness Blog*, 7 February 2018) <https://www.statelessness.eu/blog/are-global-compacts-refugees-and-migration-addressing-statelessness-appropriately>.

339 UN General Assembly, 'Global Compact on Migration' (n 334), Objective 4, para 20.

to all individuals to a legal identity by providing all nationals with proof of nationality and relevant documentation" and to

> strengthen measures to reduce statelessness, including by registering migrants' births, ensuring that women and men an equally confer their nationality on their children, and providing nationality to children born in another State's territory, especially in situations where a child would otherwise be stateless, fully respecting the human right to a nationality and in accordance with national legislation [and to] review and revise requirements to prove nationality at service delivery centres to ensure that migrants without proof of nationality or legal identity are not precluded from accessing basic services nor denied their human rights.[340]

Moreover, the Compact calls upon states to issue registration cards to all persons living in a municipality, including migrants, to realize this commitment.[341] Objective 4, thereby implicitly recognizes the right to nationality. However, the GCM also reiterates that nationality matters are a matter for domestic legislation, especially that of the country of origin, and fails to reinforce any specific obligation to prevent statelessness or to grant nationality.[342] In the GCM, statelessness and nationality are closely linked to questions of documentation and legal identity and, in turn, to questions of migration control, ensuring effective migration procedures, preventing irregular migration and facilitating return procedures, thereby failing to take a comprehensive rights-approach to nationality in the migration context.[343]

The Global Compact on Refugees recognizes that statelessness may be a cause and a consequence of refugee movements.[344] It calls upon states, the UNHCR and other actors to support the sharing of good practices for the prevention and reduction of statelessness and the development of instruments on national, regional and international levels to end statelessness.[345] It further encourages states to ratify the 1954 and the 1961 Conventions.[346]

340 *ibid, Objective 4, para 20, let. e and f.*

341 *ibid, Objective 4, para 20.*

342 See also Amal de Chickera, 'GCM Commentary: Objective 4: Ensure That All Migrants Have Proof of Legal Identity and Adequate Documentation' (*Refugee Law Initiative Blog*, 8 November 2018) <https://rli.blogs.sas.ac.uk/2018/11/08/gcm-commentary-objective-4/>.

343 See UN General Assembly, 'Global Compact on Migration' (n 334), Objective 4, para 20.

344 UNHCR, 'Official Record of the 73rd Session' (n 335) para 83.

345 *ibid.*

346 *ibid.*

Moreover, the Refugee Compact suggests improving civil and birth registration, *inter alia* to help establish legal identity and prevent the risk of statelessness.[347] It also points at the need for identification and referral mechanisms, including statelessness determination procedures, for stateless persons and those at risk of statelessness to address their specific needs.[348] Interestingly, however, the Refugee Compact does not promote integration and naturalization in host states as foreseen by Article 34 Refugee Convention, but instead promotes the objectives of easing pressure on host countries and supporting return.[349]

The fact that statelessness and access to citizenship are addressed in the two Global Compacts in the first place shows that statelessness is recognized as an issue that is inherently linked to migration, especially forced migration. It also acknowledges the obligation to prevent and reduce statelessness where possible. This is not obvious.[350] Nevertheless, the Compacts fail to establish mechanisms for the protection of individual rights and to recognize effective obligations for states relating to statelessness and nationality. Thereby, the Global Compacts are very much in line with the traditional doctrine of nationality as a matter of domestic legislation and take a cautious approach to recognizing nationality and statelessness as human rights issues.[351] Neither the Global Compact on Migration nor the Compact on Refugees take an ambitious approach to reinforcing the right to nationality as an effective, enforceable human right.

1.3.2 *Draft Articles of the International Law Commission*

A third set of soft law instruments dealing with the right to nationality have been adopted under the auspices of the International Law Commission. From its establishment in 1947, the ILC has regularly dealt with nationality matters. As Weis wrote already in 1979:

347 *ibid 82.*

348 *ibid 60.* Critically, especially when compared to the wording of the Zero Draft of the GCM, also de Chickera (n 342).

349 See also BS Chimni, 'Global Compact on Refugees: One Step Forward, Two Steps Back' (2018) 30 International Journal of Refugee Law 630, 631.

350 See also Bloom, 'Global Compacts' (n 338).

351 This is probably not surprising as the Compacts avoid adopting a clear human rights perspective and instead primarily focus on migration and refugee flow management, see Chimni (n 349); Elspeth Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?' (2018) 30 International Journal of Refugee Law.

> [F]rom the aspect of the role of nationality in international law the proceedings of the International Law Commission are of particular importance. The views on the subject of nationality expounded by the members of the International Law Commission (…) are significant, not only as opinions of international law; they can also be regarded (…) as indications of the tendencies of its development.[352]

In fact, the ILC decided at its first session to make nationality and statelessness some of its central topics. This early work resulted in the CRS.[353] Thereafter, the ILC resumed its work on nationality only in the 1990ies.[354] At that time, the issue of nationality in relation to state succession caught its particular attention.[355] The Commission started to prepare an instrument to deal with the impact of state succession on the nationality of natural persons.[356] As a result, the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States were adopted in 1999.

The Draft Articles reinforce existing international legal standards and provide authoritative guidance for the interpretation of the right to nationality in the context of state succession. They build on the assumption that nationality is essentially governed by domestic law but — being of direct concern to the international order — is not without the limitations imposed by international

352 Paul Weis, *Nationality and Statelessness in International Law* (2nd ed, Sijthoff & Noordhoff 1979) 29.

353 See above Chapter 4, II.1.2.2.

354 Nationality matters are also addressed in the International Law Commission Draft Articles on Diplomatic Protection, 2006, Supplement No. 10, UN Doc. A/61/10 ('ILC Draft Articles on Diplomatic Protection') and the International Law Commission Draft Articles on the Expulsion of Aliens, UN Doc. A/69/10 ('Draft Articles on Expulsion').

355 See Analytical Guide to the Work of the International Law Commission on Nationality in relation to the succession of States, Summaries of the Work of the International Law Commission, <http://legal.un.org/ilc/summaries/3_4.shtml>. See on the historical context also Vaclav Mikulka, 'First Report on State Succession and Its Impact on the Nationality of Natural and Legal Persons' (International Law Commission 1995) UN Doc. A/CN.4/467 para 57 <http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_467.pdf&lang=EFSX>.

356 See International Law Commission, 'Commentary on the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States' (ILC 1999) Yearbook of the International Law Commission, 1999, Vol. II, Part Two 23 <http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/3_4_1999.pdf&lang=EF>. See generally on the development Ineta Ziemele, 'State Succession and Issues of Nationality and Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 228 ff in particular.

law.[357] Of particular importance are the limitations imposed by human rights law, especially the right to nationality.[358] The right to nationality, according to the Commission, is "a central element of a conceptual approach to the topic, which (…) should aim at the protection of the individual against any detrimental effects resulting from State succession".[359] While the ILC admits that the right to nationality as a concept does not "belong to the realm of *lex lata*" (original emphasis), the Draft Articles are generally seen to provide, at least, moral guidance for states in situations of state succession.[360] They represent a certain consensus about the rights of individuals in nationality matters in situations of state succession and, ultimately, the right to nationality.[361]

The ILC Draft Articles on Nationality have taken the most comprehensive and nuanced approach, so far, to identifying criteria that allow for the attribution of nationality in situations of state succession while, at the same time, respecting the right to nationality and preventing the creation of statelessness.[362] Bronwen Manby argues that the ILC Draft Articles:

> remain the most powerful and detailed statement of the principles that should apply, and, in particular, are the strongest global level statement on the obligation of a state to grant its nationality to a person with the strongest links to that state or on the basis of option.[363]

Article 1 of the Draft Articles codifies a general right to a nationality:

> Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of

357 See Mikulka, 'First Report' (n 355) para 57 ff.

358 Even though the Commission recognized the reluctance of states to recognize the right to nationality as a general rule, see Vaclav Mikulka, 'Second Report on State Succession and Its Impact on the Nationality of Natural and Legal Persons' (International Law Commission 1996) UN Doc. A/CN.4/474 para 17 <http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_474.pdf&lang=EFSX>. See also Spiro, 'New Citizenship Law' (n 169) 721.

359 Mikulka, 'Second Report' (n 358) para 19; see also Jeffrey Blackman, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law' (1998) 19 Michigan Journal of International Law 1141, 1144.

360 Mikulka, 'Second Report' (n 358) para 19.

361 See also van Waas, *Nationality Matters* (n 115) 136; Blackman (n 359) 1144.

362 Ziemele, 'State Succession' (n 356) 245. See also Preamble to the International Law Commission, Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, 3 April 1999, Supplement No. 10, UN Doc. A/54/10 ('ILC Draft Articles on Nationality'), Recitals 3, 4 and 5.

363 Bronwen Manby, *Citizenship in Africa: The Law of Belonging* (Hart Publishing 2018) 19.

> acquisition of that nationality, *has the right to the nationality* of at least one of the States concerned, in accordance with the present draft articles. (emphasis added)

Article 1 is a "key provision, the very foundation of the present draft articles".[364] It aims at applying the general principle of Article 15 UDHR to the specific context of state succession.[365] Jeffrey Blackman even argues that this provision is the most significant general elaboration of the right to nationality since its introduction in Article 15 UDHR.[366] Thus, the right to nationality is the main principle on which all other provisions in the Draft Articles are based.[367] The right to a nationality under Article 1 ILC Draft Articles aims to guarantee the continuing enjoyment of a nationality despite a change in territorial sovereignty.[368] Every person whose nationality might be affected by a state succession has the right to the nationality of at least one of the states involved in the succession.[369] Importantly, the right to nationality under Article 1 is not limited to stateless persons.[370]

The approach to safeguarding the right to a nationality and preventing statelessness foreseen in Article 1 of the ILC Draft Articles addresses one of the main flaws of Article 15 UDHR: the lack of an addressee. Article 1 determines which state has a positive obligation to fulfill the right to a nationality and defines the scope of the right to nationality.[371] The ILC Draft Articles oblige the successor state, or one of the successor states, to grant its nationality to the individual affected by the succession, and the predecessor state not to deprive an individual of nationality as a consequence of the succession.[372] The state that is obliged to attribute its nationality is then identified based on the type of

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364 International Law Commission, 'Commentary Draft Articles on Nationality' (n 356) 25, para 1.

365 *ibid*, para 1.

366 Blackman (n 359) 1173.

367 International Law Commission, 'Commentary Draft Articles on Nationality' (n 356) 25, para 1. See also van Waas, *Nationality Matters* (n 115) 137.

368 See also van Waas, *Nationality Matters* (n 115) 137.

369 Vaclav Mikulka, 'Third Report on Nationality in the Relation to the Succession of States' (International Law Commission 1997) UN Doc. A/CN.4/480 38 <http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_480.pdf&lang=EFSX>.

370 See Matias (n 39) 63.

371 Mikulka, 'Second Report' (n 358) para 21.

372 International Law Commission, 'Commentary Draft Articles on Nationality' (n 356) 25, para 2; Mikulka, 'Third Report' (n 369) 36.

succession that is taking place and the links the person concerned has to the states involved in the succession.[373]

Article 1 is complemented by Article 4 on the prevention of statelessness.[374] This provision reflects the negative duty of states to avoid statelessness. It calls upon states to take all appropriate measures to prevent persons from becoming stateless as a result of the succession. The states involved in the succession do not have to attribute their nationality to all affected individuals (all persons having an appropriate connection to a state[375]), but instead must take all appropriate measures within their competence to prevent individuals from becoming stateless as a consequence of the state succession.[376]

Another interesting provision is Article 11 of the ILC Draft Articles which deals with the will of persons concerned.[377] Article 11(1) calls upon states to consider the will of persons concerned whenever they can choose which nationality to acquire. Paragraph 2 grants individuals involved in the succession a right to opt for the nationality of a particular state if they have an appropriate connection to that state and would otherwise become stateless. This right to opt aims at "eliminating the risk of statelessness in situations of succession of states" by having the right to ask for the nationality of a state to which an appropriate connection exists.[378] According to the Commentary to the Draft Articles the right to opt provided for by Article 11 is not limited to a choice between different nationalities, but refers more broadly to a right to opt-in, that means to voluntarily acquire a particular nationality by declaration, or to opt-out, ie to be free to renounce a nationality acquired *ex lege*.[379] This respect for the will of the individual concerned is an expression of the

373 International Law Commission, 'Commentary Draft Articles on Nationality' (n 356) 25, para 4. See also Blackman (n 359) 1174. See on this idea of nationality reflecting the actual ties Chapter 6, II.1. See also International Law Commission, 'Commentary Draft Articles on Nationality' (n 356) 29, para 4.

374 International Law Commission, 'Commentary Draft Articles on Nationality' (n 356) 27, para 1.

375 *ibid 28, para 3.*

376 *ibid 28, para 6.*

377 The Commentary notes that the consideration for the will of individuals in matters of acquisition and loss of nationality in cases of succession of states is an issue of debate among scholars, see *ibid 33, para 5.*

378 *ibid 34, para 9.* The notion of 'appropriate connection' in that context is to be understood broader than the term 'genuine link' covering different *nexi*, such as habitual residence, birth in the territory, but also being descendant of a national or former residence, see also *ibid, para 10.*

379 International Law Commission, 'Commentary Draft Articles on Nationality' (n 356) 34, para 7.

recognition of nationality as an individual human right touching upon fundamental aspects of a person's identity.[380]

To sum up, the ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States of 1999 codify progressive international standards on nationality. Even if their scope is limited to the situation of state succession and they are not being formally binding, they are indicative of the developments in international law over the last few decades.[381] The ILC Draft Articles enshrine a right to nationality for individuals involved in a state succession. States involved in a succession have the positive obligation to grant their nationality to individuals who have effective links to their territory, or to not deprive them of their nationality in the course of the succession.[382] As Matias maintains:

> There is an emerging right to an effective nationality in the State with which an individual possesses genuine and effective links, at least in the context of state successions. It is also clear that these principles are inquiringly general and indistinguishable. They are not exclusive to State successions but increasingly applicable in general international citizenship law.[383]

Thus, the ILC Draft Articles provide interesting guidance as to how the right to nationality could be interpreted in order to identify more specific rights and obligations. In particular, the approach that the right to nationality applies *vis-à-vis* the state to which an individual has the closest connection provides an interesting model of how the right to nationality could be re-interpreted which shall be discussed in more detail in Chapter 6.

2 *The Right to Nationality at Regional Level*

The previous section has analyzed the codification of the right to nationality in legal instruments at the universal level. In addition, the right to nationality is also addressed in regional human rights treaties. Some of these regional instruments offer important additional layers of protection for the right to nationality.[384] The following section discusses these regional protection frameworks in more detail, starting with the Americas (II.2.1), then turning to Europe

380 *ibid, para 6.* See also Ziemele, 'State Succession' (n 356) 230.

381 Blackman argued in 1998 that the Draft Articles illustrate the rapid development of international law in the area of nationality, Blackman (n 359) 1170.

382 *ibid* 1191 f.

383 See Matias (n 39) 63. See also Bialosky (n 4) 154.

384 See generally Bialosky (n 4).

(II.2.2) and the African continent (II.2.3), before looking at the regulations in the Middle East and Northern Africa (II.2.4), as well as the Asian and Pacific region (II.2.5).

2.1 The Americas

The most elaborated framework for the protection of the right to nationality is found on the American continent — more precisely within the framework of the Organization of American States (OAS).[385] Already, the *American Declaration on the Rights and Duties of Man* of 1948[386] — adopted six months before the Universal Declaration of Human Rights — included a right to nationality. Article XIX of the non-binding Declaration, however, limited the right to nationality to those who already had an entitlement to nationality based on domestic law. This left the decision on the attribution of nationality entirely within the competence of states.

The guarantees of the American Declaration were reaffirmed in the *American Convention on Human Rights*, adopted by the member states of the OAS on 22 November 1969.[387] The limitations of Article XIX of the American Declaration were not reproduced in the ACHR. In fact, the ACHR is the only binding international legal instrument that actually grants a general right to the nationality of a particular state.[388] Article 20 ACHR, currently, is the most far-reaching guarantee of the right to nationality in a binding human rights instrument.[389] It provides that:

1 Every person has the right to a nationality.
2 Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.

385 See Amaya Ubeda de Torres, 'The Right to Nationality' in Laurence Burgorgue-Larsen and Amaya Ubeda de Torres (eds), *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011) para 22.23. See on the rights of migrants in South America extensively Diego Acosta, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (Cambridge University Press 2018) 19 in particular.

386 American Declaration on the Rights and Duties of Man, 2 May 1948, OAS Res. XXX ('American Declaration').

387 See also Dembour, *When Humans Become Migrants* (n 43) 56. Even though the ACHR largely supersedes the American Declaration, the Declaration remains in force and is applied by the IACHR and the IACtHR with regard to those states who have not ratified the ACHR, namely Cuba, the US and Canada.

388 See Chan (n 52) 5.

389 van Waas, *Nationality Matters* (n 115) 60. It is noteworthy that none of the member states of the ACHR has lodged a reservation against Article 20 ACHR.

> 3 No one shall be arbitrarily deprived of his nationality or the right to change it.

The personal scope of Article 20 ACHR covers every person irrespective of age, nationality (or dual/multiple nationalities) or statelessness. The content of Article 20 is built around the obligation of states to avoid statelessness and on the prohibition of discrimination. Article 20(1) maintains generally that everyone has the right to a nationality. Article 20(2) adds a specific right to acquire nationality *jure soli* in case a person would otherwise be stateless.[390] Article 20(3) prohibits any arbitrary deprivation of nationality and denial of the right to change one's nationality.[391] According to the case law of the IACtHR, Article 20 guarantees two main aspects: on the one hand, the right to nationality as protection of the individual through the link of nationality and, on the other, protection against arbitrary deprivation of that nationality.[392] As the IACtHR held in its *Advisory Opinion 4/84 on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica,* Article 20 ACHR represents first:

> [A] minimal measure of legal protection in international relations through the link [one's] nationality establishes between him and the state in question; and, second the protection therein accorded the individual against the arbitrary deprivation of his nationality, without which he would be deprived for all practical purposes of all of his political rights as well as of those civil rights that are tied to the nationality of the individual.[393]

Thus, Article 20 establishes a right to nationality that protects the individual and all her political and civil rights tied to the status of nationality. It is a "basic right that is closely allied to other fundamental liberties".[394] It not only obliges states to refrain from interferences with the right to nationality, but also imposes positive obligations to actively guarantee the rights it secures.[395]

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390 As Chan points out, Article 20(2) fails to protect stateless persons of unknown place of birth as the state bearing the duty to fulfill under Article 20(2) cannot be identified in such a situation, Chan (n 52) 5.

391 Torres (n 385) para 22.17.

392 See also *ibid* 22.05.

393 *Advisory Opinion OC-4/84* (n 1) para 34.

394 Bialosky (n 4) 166.

395 *Case of the Girls Yean and Bosico v Dominican Republic* [2005] IACtHR Series C No. 130 (2005) para 173.

Comparing Article 20 ACHR to Article 15 UDHR, one notes that the provision in Article 20(2) goes beyond the latter: it guarantees a right to acquire the nationality of the state on whose territory a person is born, provided the person concerned does not have the right to another nationality.[396] This amounts to a right to nationality for persons born on the territory of a member state if they would otherwise be stateless. By virtue of this identification mechanism based on a person's place of birth, Article 20 ACHR becomes the only provision in a binding international instrument — so far — to grant an enforceable right to the nationality of a specific state.[397] Hall describes this default *jus soli*-mechanism as the "law of last resort", which is the only reliable way to, ultimately, eliminate statelessness: "everyone has a place of birth, but not everyone has parents who possessed a nationality".[398] As de Groot and Vonk suggest "this clear choice for a default *ius soli* rule can be explained by the strong preference for *ius soli* for the acquisition of nationality at birth in the Americas" (original emphasis).[399]

Interpreting Article 20 ACHR, the IACtHR and the Inter-American Commission on Human Rights have developed a rich and nuanced case law on the right to nationality.[400] Already in its first advisory opinion on Article 20 ACHR, the *Advisory Opinion 4/84 on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* of 1984, the IACtHR has taken a rights-based approach to the right to nationality.[401] The Court was asked to interpret an amendment of the provisions on nationality in the Costa Rican Constitution aimed at restricting the conditions for acquiring Costa Rican nationality. The

396 See also Bialosky (n 4) 160; See Matias (n 39) 64.

397 Dembour, *When Humans Become Migrants* (n 43) 136.

398 Stephen Hall, 'The European Convention on Nationality and the Right to Have Rights' (1999) 24 European Law Review 586, 602.

399 de Groot and Vonk (n 74) 237. See already Chan (n 52) n 44.

400 Bialosky (n 4) 160; Torres (n 385) 570 f. Within the Inter-American system individuals can only lodge a petition with the Commission (Article 44 ACHR). If the settlement procedure before the Commission fails, it can refer the case to the Court. States can refer cases directly to the Court (Article 61 ACHR). Moreover, the Court has jurisdiction to deliver advisory opinions (Article 64 ACHR). The IACmHR has mainly focused on cases concerning arbitrary deprivation of nationality, see Bialosky (n 4) 167.

401 *Advisory Opinion OC-4/84* (n 1). See also Bialosky (n 4) 168. See on the IACtHR's *pro homine* approach André de Carvalho Ramos, 'Immigration and Human Rights: The Impact of the Inter-American Court of Human Rights Precedents (Towards a "Latin American Migration Policy"?)' (2018) 56 Archiv des Völkerrechts 155, 165; Dembour, *When Humans Become Migrants* (n 43) 7 f. See also *Advisory Opinion on Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* [2014] IACtHR OC-21/14 para 53 f.

IACtHR found the new provisions to be compatible with Article 20, since they do not exclude the possibility of naturalization as such, nor withdraw nationality from current citizens or deny the right to change nationality. Nevertheless, the Opinion is remarkable.[402] The Court noted at the outset:

> It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity.[403]

The landmark case relating to Article 20 of the American Convention is the case of the *Girls Yean and Bosico v Dominican Republic* of 2005.[404] The case concerned the situation of two girls, Dilcia Oliven Yean and Violeta Bosico Cofi, who were born in the Dominican Republic to persons of Haitian descent[405] and left stateless; extremely burdensome birth registration procedures prevented them from obtaining birth certificates.[406] The lack of a birth certificate prevented the girls from attending public schools, accessing healthcare or social assistance and also from acquiring Dominican nationality and identity documents.[407] Assessing whether the Dominican Republic violated Article 20 ACHR, the IACtHR first reiterated that nationality is a non-derogable, fundamental human right.[408] Therefore, states' sovereignty:

> at the current stage of the development of international human rights law, [...] is limited, on the one hand, by their obligation to provide individuals with the equal and effective protection of the law and, on the other hand, by their obligation to prevent, avoid and reduce statelessness.[409]

402 See Matias (n 39) 64. More critical, however, is Dembour who fears that the IACtHR's affirmation of nationality as a human right is far from uncontroversial and criticizes that "declaring the right to nationality to be 'generally accepted today' as a human right is simply unconvincing", Dembour, *When Humans Become Migrants* (n 43) 136.

403 *Advisory Opinion OC-4/84* (n 1) para 32.

404 *Yean and Bosico* (n 395).

405 Both girls had a mother of Dominican nationality and a father of Haitian nationality, ibid 109(6) and (7).

406 This is a widespread practice as the Court notes in its judgment, *ibid 109(11)*.

407 *ibid.*

408 *ibid 136.*

409 *ibid 140.*

Based on these two obligations, states must abstain from producing regulations on nationality matters that are discriminatory or have discriminatory effects, and prevent the creation of statelessness.[410]

The IACtHR then applied these general considerations to the specific case of Yean and Bosico and scrutinized the rule in the Dominican constitution that excluded children born to "foreigners in transit" from acquiring nationality *jure soli*.[411] It concluded with regard to the right to nationality that:

> (a) The migratory status of a person cannot be a condition for the State to grant nationality, because migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights.
> (b) The migratory status of a person is not transmitted to the children, and
> (c) The fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born.[412]

In casu, the exclusion of the two girls from Dominican nationality, according to the IACtHR, was not justified as the parents of the girls were not just passing through the Dominican Republic but lived there permanently.[413] The state applied the criteria for obtaining nationality in an arbitrary manner, without using reasonable and objective criteria and with disregard to the best interests of the child in a discriminatory way. The children were deliberately left outside the juridical system and placed in a situation of extreme vulnerability.[414] This lay contrary to the obligation the Dominican Republic would have had under Article 20 ACHR to grant nationality to those born on its territory and to guarantee access to birth registration on an equal and non-discriminatory basis without unreasonable evidentiary requirements.[415] Thus, the Dominican Republic:

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410 *ibid 141 and 142.*

411 On the policy to declare persons of Haitian origin as 'foreigners in transit' to exclude them from *jus soli* see in more detail Inter-American Commission of Human Rights, 'Report on the Situation of Human Rights in the Dominican Republic' <http://www.oas.org/en/iachr/reports/pdfs/DominicanRepublic-2015.pdf>.

412 *Yean and Bosico* (n 395) para 156.

413 *ibid 156 and 157.*

414 *ibid 166.*

415 *ibid 171.*

> failed to comply with its obligation to guarantee the rights embodied in the American Convention, which implies not only that the State shall respect them (negative obligation), but also that it must adopt all appropriate measures to guarantee them (positive obligation), owing to the situation of extreme vulnerability in which the State placed the Yean and Bosico children [...].[416]

This failure amounted to an arbitrary deprivation of nationality in violation of Article 20 and other Convention rights.[417]

The judgment of the IACtHR in *Yean and Bosico Case* is dense and gives a lot of content and weight to the right to nationality under Article 20 ACHR.[418] According to a separate opinion of Judge A.A. Cançado Trinidade, the judgment is to be understood as a warning for states "that discriminatory administrative practices and legislative measures on nationality are prohibited (starting with its attribution and acquisition)".[419] The judgment clarifies that the migratory status of a person cannot be a condition for the possibility to acquire a nationality.[420] Moreover, it reaffirms that in cases of persons who cannot acquire a nationality based on any other link than the place of birth, the only fact that needs to be established in order to claim the right to nationality under Article 20 ACHR is the fact that the person is actually born on the territory of a member state.[421] It is also interesting that the Court found a violation of the prohibition of arbitrary deprivation of nationality even though the girls never acquired a nationality in the first place. The Court assumed that an arbitrary denial of the acquisition of nationality amounts to an arbitrary deprivation of nationality.[422] Finally, the judgment illustrates how closely the right to nationality

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416 *ibid 173.*

417 *ibid 174.* The Court also found a violation of Article 24 in relation to Article 19 and 1(1), Articles 3 and 18, in relation to Article 19 and 1(1) with regard to the children, and with regard to the mothers a violation of Article 5 in relation to Article 1(1).

418 Bialosky (n 4) 170.

419 *Girls Yean and Bosico v Dominican Republic, Separate Opinion Judge Cançado Trinidade* [2005] IACtHR Series C No. 130 (2005) para 13.

420 *Yean and Bosico* (n 395) para 156. See also Dembour, *When Humans Become Migrants* (n 43) 327.

421 See also Carvalho Ramos (n 401) 167; Dembour, *When Humans Become Migrants* (n 43) 327.

422 See also Jorunn Brandvoll, 'Deprivation of Nationality' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 203. Similarly also the case law of the ECtHR, see below Chapter 4, II.2.2.1.2

is connected to the enjoyment of other rights, namely those relating to equal treatment, to one's legal identity and to social rights.[423]

The situation of persons of Haitian descent in the Dominican Republic was again the subject of a contentious procedure in the case of *Expelled Dominicans and Haitians v Dominican Republic*.[424] Assessing a possible violation of Article 20 ACHR, the Court noted that:

> Nationality, as it is mostly accepted, should be considered a natural condition of the human being. This condition is not only the very basis of his political status but also part of his civil status.[425]

The IACtHR found that "the moment at which the State's obligation to respect the right to nationality and to prevent statelessness can be required [...] is at the time of an individual's birth".[426] Thus, Article 20(2) ACHR must be interpreted as obliging states to ensure that every child born on its territory may effectively acquire the nationality of the state of birth or another state immediately after birth.[427] If the state is not sure, it has "the obligation to grant it nationality (*ex lege*, automatically), to avoid a situation of statelessness at birth pursuant to Article 20(2) of the American Convention" (original emphasis).[428] This obligation — so the Court stated — also applies if parents are, for factual reasons, not able to register their children in their state of nationality.

Another case that concerned the right to nationality is the case of *Baruch Ivcher Bronstein v Peru* of 2001.[429] Mr. Ivcher Bronstein acquired Peruvian nationality in 1984. In 1997 Peru decided to annul the naturalization in order to prevent Bronstein from criticizing the government through his media companies.[430] While the case primarily concerned the lawfulness of political retaliation measures, the Court also found a violation of Article 20 ACHR.[431] According to Torres, it was the first judgment "which really afforded protection

423 See also *Yean and Bosico, Separate Opinion* (n 419) para 14.
424 *Case of Expelled Dominicans and Haitians v Dominican Republic* [2014] IACtHR Series C No. 282.
425 *ibid 255.* The Courts presents this as a citation of para 32 of *Advisory Opinion OC-4/84*, even though the wording of that passage is slightly different.
426 *ibid 258.*
427 *ibid 259.*
428 *ibid 261.*
429 *Baruch Ivcher Bronstein v Peru* [2001] IACtHR Series C No. 74.
430 *ibid 3.* See also Bialosky (n 4) 168 f.
431 Dembour, *When Humans Become Migrants* (n 43) 148.

under Article 20".[432] The IACtHR pointed out that both the ACHR and Peru's domestic legislation recognize a right to nationality and do not allow for a distinction based on how nationality was acquired (by birth, by naturalization or by any other way foreseen by domestic law).[433] Declaring Bronstein's Peruvian nationality to be annulled by way of a "directorial resolution" amounted to an arbitrary deprivation of nationality, as it did not comply with the requirements for annulment under Peruvian law and because the authorities ordering the annulment had no competence to do so.[434] Hence, the order violated Article 20(1) and 20(3) ACHR.[435] This judgment makes clear that a deprivation of nationality that contradicts domestic law is *per se* arbitrary and violates Article 20 ACHR.[436]

The jurisprudence of the IACtHR on Article 20 ACHR is consistent. Whether it found a violation[437] or not,[438] it builds on a human rights' approach, prioritizes the needs of the individual and interprets states' discretion in nationality matters in a limited manner. Moreover, it consistently stresses the importance of nationality not only as the basis for one's political status but also the full enjoyment and exercise of all other rights — as well as its close link to the principle of non-discrimination. With that approach the case law of the Inter-American Court has proven to be extremely important for the development of a rights-based approach to nationality that is unique compared to other regions.[439] Thus, in the Americas, Article 20 ACHR and the jurisprudence of the IACtHR provide for a strong protection of the right to nationality. In the

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432 Torres (n 385) para 22.16.

433 *Ivcher Bronstein* (n 429) para 90.

434 *ibid 95 and 96.*

435 *ibid 97.* The Court, however, primarily reasoned the violation of Article 20(3) ACHR and did not motivate further why it concluded that Paragraph 1 was also violated.

436 The Court, however, did not assess if it was relevant for the case whether Bronstein was rendered stateless and whether deprivation of nationality as retaliation for political activities is as such arbitrary, see also Bialosky (n 4) 169.

437 Interesting is also the case of *Gelman v Uruguay* which concerned an enforced disappearance of a pregnant woman. The IACtHR found that the abduction and transfer of the mother to another state *inter alia* violated the child's right to nationality because it prevented the birth of the child in the mother's country of origin and, thereby — as it is a *jus soli* country — the acquisition of the nationality of that country. This arbitrary obstruction of the acquisition of nationality amounted to an arbitrary deprivation of nationality as guaranteed by Article 20(3) ACHR, *Gelman v Uruguay* [2011] IACtHR Series C No. 221 para 128. See also Bialosky (n 4) 174 f.

438 In the case of *Castillo Petruzzi et al v Peru*, for example, the Court denied a violation of Article 20 ACHR considering that the right was never questioned or impugned, see *Castillo Petruzzi et al v Peru* [1999] IACtHR Series C No. 52.

439 Bialosky (n 4) 161. See also Torres (n 385) 578 f.

states that have ratified the ACHR, individuals, in principle, have an effective and enforceable right to nationality.[440]

2.2 Europe

Compared to the Americas, Europe lags behind when it comes to recognizing and safeguarding the right to nationality. The most important regional instrument, the European Convention on Human Rights, does not include a right to nationality at all. The reasons why, as well as the timid attempts of the ECtHR to introduce a right to nationality through the back door, shall be discussed below (II.2.2.1.2). First, however, a closer look shall be had at the European Convention on Nationality, the most specific instrument on nationality in the European context (II.2.2.1.1). A third subsection discusses other instruments within the framework of the Council of Europe (II.2.2.1.3). Going beyond the framework of the Council of Europe, a brief look shall then be held at standards developed by the Organization for Security and Co-Operation in Europe (OSCE) (II.2.2.2) and at citizenship in the European Union (II.2.2.3).[441]

2.2.1 *Council of Europe*

2.2.1.1 European Convention on Nationality

The central instrument concerning nationality in the European context is the European Convention on Nationality, adopted under the auspices of the Council of Europe on 6 November 1997.[442] It was drafted after the collapse of the Soviet Union and the dissolution of the former Yugoslavia with the aim of creating a comprehensive and contemporary instrument on nationality matters for Europe.[443] The idea was "to promote the progressive development of

440 The ACHR is not ratified by the US, Canada, Guyana, Cuba and a few smaller Carribean states.

441 Instruments within the framework of the Commonwealth of Independent States, namely Article 24 of the CIS Convention on Human Rights and Fundamental Freedoms, are not discussed due to their limited impact. See de Groot and Vonk (n 74) 261.

442 European Convention on Nationality, 6 November 1997, ETS No. 166 ('ECN').

443 Council of Europe, 'Explanatory Report to the European Convention on Nationality' (Council of Europe 1997) paras 4 and 11. See also Adjami and Harrington (n 37) 99; Gerard-René de Groot, 'The European Convention on Nationality: A Step towards a Ius Commune in the Field of Nationality Law' (2000) 7 Maastricht Journal of European and Comparative Law 117, 199; Brigitte Knocke, *Das europäische Übereinkommen über die Staatsangehörigkeit als Schranke für die Regelung des nationalen Staatsangehörigkeitsrechts: Stand der Vereinbarkeit des Staatsangehörigkeitsrechts der Schweiz, der Bundesrepublik Deutschland, des Vereinigten Königreichs und Frankreichs mit den Vorgaben des Übereinkommens* (GCA-Verlag 2005) 56 f; Vlieks, Hirsch Ballin and Recalde-Vela (n 41) 163.

legal principles concerning nationality".[444] However, its impact is limited by the relatively low number of ratifications.[445] Moreover, many state parties to the Convention have deposited reservations limiting the application of the ECN in their jurisdiction.[446] Nevertheless, the ECN increasingly gains traction. The ECtHR regularly refers to the Convention and the principles it sets out.[447] Internationally, the ECN seems to increasingly influence other instruments on nationality.[448] This is reinforced by the fact that the ECN is also open to ratification by non-Council of Europe states and hence has a potentially universal scope of application.[449]

Today, the European Convention on Nationality is the most comprehensive treaty specifically on nationality.[450] It codifies all major aspects relating to nationality and, according to Article 1, "establishes principles and rules relating to the nationality of natural persons".[451] As noted on the occasion of the 1st European Conference on Nationality in 2000:

> [I]ts purpose is to make acquisition of a new nationality and recovery of a former one easier, to ensure that nationality is lost only for good reason and that it cannot be arbitrarily withdrawn, and to guarantee that the

444 *Ramadan v Malta* [2016] ECtHR Application No. 76136/12 para 41.

445 The ECN is currently ratified by 21 states. The number of ratifications has increased in the last few years. While the ECN would be open for signature by non-member states it has not been ratified by any so far, see <https://www.coe.int/de/web/conventions/full-list/-/conventions/treaty/166/signatures?p_auth=tAScI311>.

446 Overall, there are 10 reservations and 17 declarations limiting the scope of the ECN. Reservations must be compatible with the object and purpose of the Convention and may not concern the provisions contained in Chapters I, II and VI of the Convention, ie also not Article 4 (Article 29(1) ECN). Critical with regard to the lawfulness of the reservations deposited de Groot, 'The European Convention on Nationality' (n 443) 121; Lisa Pilgram, 'International Law and European Nationality Laws' [2011] EUDO Citizenship Observatory 11 <http://cadmus.eui.eu/handle/1814/19455>.

447 See eg *Riener v Bulgaria* [2006] ECtHR Application No. 46343/99 para 89; *Tănase v Moldova* [2010] ECtHR Application No. 7/08 para 47; *Kurić and Others v Slovenia* (*Chamber*) [2010] ECtHR Application No. 26828/06 para 260; *Fehér and Dolnik v Slovakia* [2013] ECtHR Application No. 14927/12 para 36; *Petropavlovskis v Latvia* [2015] ECtHR Application No. 44230/06 para 39 ff and 80; *Ramadan v Malta* (n 444) para 41; *Biao v Denmark* (*Grand Chamber*) [2016] ECtHR Application No. 38590/10 para 47 f.

448 de Groot and Vonk (n 74) 262 referring to the AU Draft Protocol, see below Chapter 4, II.2.3.1.3.

449 Hall (n 398) 600.

450 Kay Hailbronner, 'Rights and Duties of Dual Nationals: Changing Concepts and Attitudes' in David A Martin and Kay Hailbronner (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects* (Kluwer Law International 2003) 21; Hall (n 398) 586; Pilgram (n 446) 6.

451 Knocke (n 443) 40.

> procedures governing applications for nationality are just, fair and open to appeal.[452]

Despite these ambitious goals, the baseline for the Convention codified in Article 3 remains the sovereign competence of states to determine under their own law the rules for acquisition and loss of nationality, as long as these rules are consistent with international law and principles.

The European Convention on Nationality does not grant individuals enforceable rights against states.[453] As van Waas writes, it is rather "a consolidation of developments in municipal and international law with regard to nationality" that aims to prevent conflicts between domestic nationality legislations.[454] Nevertheless, the Convention reinforces the basic human rights principles in the field of nationality and gives weight not only to the legitimate interests of states, but also to those of individuals.[455]

The ECN does not directly guarantee an individual right to nationality. As Horst Schade writes, the drafters of the Convention had two options:

> [They] could opt for a concrete, individually enforceable right or [they] could hold the view that the right to a nationality is vague because it does not specify *who* has the right to *which* nationality. As it stands, therefore, this 'right' is virtually unenforceable.[456] (original emphasis)

Ultimately, they opted for the latter alternative and codified the right to a nationality as a general principle in Article 4(a) ECN. Article 4(a) recognizes the right to nationality as a human right and obliges member states to realize it in their domestic legislation.[457] Article 4 lists three other general principles: the obligation to avoid statelessness (let. b), the prohibition of arbitrary

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452 Hans Christian Krüger, 'Opening Speech' in Council of Europe (ed), *Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality* (Council of Europe 1999) 10.

453 See Council of Europe, 'Explanatory Report ECN' (n 443) para 20. Critical Michael Autem, 'The European Convention on Nationality: Is a European Code of Nationality Possible?' in Council of Europe (ed), *Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality* (Council of Europe 1999) 29.

454 van Waas, *Nationality Matters* (n 115) 61.

455 Preamble to the ECN, Recital 4. See also van Waas, *Nationality Matters* (n 115) 61; Autem (n 453) 23 ff; Knocke (n 443) 62 ff.

456 Horst Schade, 'The Draft European Convention on Nationality' (1995) 49 Austrian Journal of Public and International Law 99, 100.

457 See Council of Europe, 'Explanatory Report ECN' (n 443) para 30 ff.

deprivation of nationality (let. c) and the principle of equality between women and men (let. d). Additionally, Article 5 ECN enshrines the principle of non-discrimination. As Judge Paulo Pinto de Albuquerque wrote in a dissenting opinion in the case of *Ramadan v Malta*, these principles are "of such importance for ensuring social interaction of human beings in a democratic society that they must be seen as well-established principles of international law".[458] They build the foundation for the substantive provisions of the ECN.[459] Still, the principles enshrined in the ECN are imperative international standards, but not enforceable individual rights.[460]

With the reduction of the right to nationality to a general principle merely guiding the member states, the ECN falls behind the protection established under Article 20 ACHR. Nevertheless, even the codification of the right to nationality as a general principle strengthens the protection of the right to nationality as a human right and solidifies its status in international law, As Batchelor argues, the ECN "has further developed the right to a given nationality, based on the principles of genuine and effective link".[461] This, to quote Kristin Henrard, "has an undeniable signaling function".[462] Hence, the ECN strengthens the right to nationality, not only directly through the codification as a general principle, but also in the remaining substantive provisions, which all build on the right to nationality.

The substantive provisions in Articles 6 ff. ECN deal with the acquisition and the loss of nationality, procedural questions and special situations — such as multiple nationality and state succession. Article 6 addresses the acquisition of nationality. It stipulates that all member states shall provide for the *ex lege* acquisition of nationality for children based on descent (Paragraph 1), and foresee a mechanism for children born on the territory, who do not acquire any other nationality at birth, to acquire nationality either *ex lege* or upon application if they would otherwise remain stateless (Paragraph 2). The provision combines the principles of *jus sanguinis* and *jus soli* to ensure that no child born in a member state becomes stateless.[463] Moreover, Article 6 ECN obliges

458 European Court of Human Rights, 'Dissenting Opinion of Judge Pinto de Albuquerque in Ramadan v Malta' (European Court of Human Rights 2016) Application No. 76136/12 para 7.

459 Council of Europe, 'Explanatory Report ECN' (n 443) para 32.

460 Autem (n 453) 24. See also Adjami and Harrington (n 37) 100.

461 Batchelor, 'Resolving Nationality Status' (n 281) 164.

462 Kristin Henrard, 'The Shifting Parameters of Nationality' (2018) 65 Netherlands International Law Review 289.

463 See also Hall (n 398) 595.

states to provide for the possibility of naturalization for persons lawfully and habitually resident on the territory for a maximum period of residence of ten years (Paragraph 3). This rule is extraordinary in two respects: it not only requires the availability of naturalization in states' domestic nationality legislation, it also limits the requirements for such naturalization by restricting the residence requirement to a maximum of ten years of lawful and habitual residence.[464] Other conditions may be imposed as long as they are not arbitrary.[465] It illustrates the particular weight the ECN gives to the requirement residence in the territory.[466] As Michael Autem writes, "lawful and habitual residence is no longer considered as one of the conditions that has to be fulfilled for acquiring the nationality of a State Party, but almost as a ground for becoming entitled to the right to acquire that nationality".[467] Lawful and habitual residence, in principle, is enough to naturalize.[468] Implicitly, this amounts to a right to naturalization.[469] Additionally, certain categories of persons should be granted facilitated access to nationality (Paragraph 4). This includes, amongst others, spouses, children, second generation migrants, migrant children, as well as stateless persons and recognized refugees.[470] Facilitated access to nationality can be granted by means of facilitated naturalization,

464 See also Carol A Batchelor, 'Developments in International Law: The Avoidance of Statelessness Through Positive Application of the Right to a Nationality' in Council of Europe (ed), *Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality* (Council of Europe 1999) 56 f. Ten years is the common standard in Europe where most states require between five and ten years of residence, see Council of Europe, 'Explanatory Report ECN' (n 443) para 51. See also Global Citizenship Observatory (GLOBALCIT), 'Global Database on Modes of Acquisition of Citizenship, Version 1.0' (GLOBALCIT 2017) <https://globalcit.eu/modes-acquisition-citizenship/>. Switzerland, which was the last country who required a residence period of twelve years, reduced it to ten years with a revision of the Swiss Citizenship Act in 2014, Federal Act on Swiss Citizenship, 20 June 2014, SR 141.0 ('SCA'). Liechtenstein reduced its residence requirement from 30 to ten years after the CtteeERD declared that a residence period of 30 years was excessively lengthy, see 'Concluding Observations on the Third Periodic Report of Liechtenstein' (CtteeERD 2007) UN Doc. CERD/C/LIE/CO/3 para 17.

465 The Convention remains silent on these other conditions due to the complexity of possible combinations, see Autem (n 453) 28; Knocke (n 443) 289.

466 See Pilgram (n 446) 7.

467 Autem (n 453) 32. See also Batchelor, 'Developments in International Law' (n 464) 56; Knocke (n 443) 289; van Waas, *Nationality Matters* (n 115) 367.

468 Batchelor, 'Developments in International Law' (n 464) 56.

469 Spiro, 'Citizenship' (n 56) 288.

470 See also Knocke (n 443) 291.

by ensuring favorable conditions or based on *ex lege* forms of acquisition or through reduced requirements.[471]

The ECN also limits states' right to withdraw nationality. Article 7 lists the acceptable grounds for deprivation of nationality exhaustively.[472] In addition, Article 8 ECN allows individuals to renounce their nationality, provided they do not become stateless. This implies a right to change one's nationality even if it is not expressly provided for in the Convention.[473] Articles 10–13 ECN provide an important concretization of the procedural aspect of the right to nationality.[474] They proscribe that decisions concerning nationality must be processed within a reasonable time, contain reasons in writing and must be open to review by an administrative or judicial authority.[475] Moreover, fees must be reasonable and may not be an obstacle for applicants.[476] So far, these procedural standards are unique. No other instrument sets up rules relating to procedures in nationality matters.[477] Finally, the ECN takes a neutral stance on dual and multiple citizenship.[478]

The analysis of the substantive provisions of the ECN shows that the Convention with its pragmatic approach to the right to nationality, in fact, contributed to its international recognition. The standards enshrined in the Convention impose concrete obligations for states to implement in their internal nationality legislation.[479] One of the central deficiencies of the ECN is, however, the lack of a supervisory body that could monitor the implementation and enforcement of the Convention standards in the member states.[480] The initial idea that the Committee of Experts on Nationality in charge of drafting

471 Council of Europe, 'Explanatory Report ECN' (n 443) para 52. The ECN itself does, however, not define the notion of 'facilitated naturalization'.

472 Legitimate grounds for withdrawal of nationality are, amongst others, the voluntary acquisition of another nationality, fraudulent acquisition, violation of vital state interests, the lack of a genuine link due to habitual residence abroad, see Article 7(1) ECN. See also *ibid 58*.

473 de Groot, 'The European Convention on Nationality' (n 443) 126.

474 See Autem (n 453) 26; Knocke (n 443) 453. See also van Waas, *Nationality Matters* (n 115) 117. See in more detail Chapter 5, III.7.

475 Articles 10, 11, 12 ECN.

476 Article 13 ECN.

477 See, however, the Draft Protocol on Nationality of the AU, Chapter 4, II.2.3.2.

478 Article 15 ECN. See also de Groot and Vonk (n 74) 262.

479 Knocke (n 443) 551. See also Pilgram (n 446) 6.

480 Eva Ersbøll, 'The Right to a Nationality and the European Convention on Human Rights' in Stéphanie Lagoutte, Hans-Otto Sano and Scharff Smith (eds), *Human Rights in Turmoil: Facing Threats, Consolidating Achievements* (Martinus Nijhoff 2007) 253. See also Hall (n 398) 601.

the Convention could serve as a supervisory body, was not upheld in practice.[481] Because of the lack of jurisdiction the ECtHR has to apply and interpret the ECN directly, individuals have no independent international body to call upon in case of a violation of their rights derived from the Convention.[482] An enforcement mechanism for the Convention could significantly strengthen its effective implementation on domestic level. Nevertheless, the ECN, overall, is "a significant and welcome advance in the process of transforming the Universal Declaration's call for a right of all persons to possess a nationality into a substantive legal norm".[483] Notably, its focus is not only on the prevention and reduction of statelessness, but also on the integration of settled migrants into the citizenry through the availability of naturalization and the stipulation of non-discretionary procedures.[484]

2.2.1.2 European Convention on Human Rights

The European Convention on Human Rights[485] and its Protocols do not comprise a right to nationality among its substantive provisions.[486] The *travaux préparatoires* to the Convention do not elaborate why the right to nationality was not included.[487] In 1988, the Committee of Experts for the Development of

481 See Autem (n 453) 33.

482 See Hall (n 398) 601.

483 *ibid 600.*

484 See also Pilgram (n 446) 7.

485 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5 ('European Convention on Human Rights', 'ECHR').

486 See eg *X v Austria* (*Decision*) [1972] ECtHR Application No. 5212/71; *Kafkasli v Turkey* [1997] ECtHR Application No. 21106/92 para 33; *Karassev v Finland* (*Decision*) [1999] ECtHR Application No. 31414/96; *Slivenko v Latvia* [2003] ECtHR Application No. 48321/99 para 77; *Savoia and Bounegru v Italy* [2006] ECtHR Application No. 8407/05. See also Ersbøll, 'The Right to a Nationality' (n 480) 249; William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 378.

487 Even though according to Recital 5 of the preamble of the ECHR the UDHR served as a model for the new European Convention. During the negotiations for Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16 September 1963, ETS No. 046 ('Protocol No. 4') there were discussions whether Article 3 on the prohibition of expulsion of nationals should include a prohibition of deprivation of nationality for the purpose of expulsion. However, the experts in the drafting committee decided against it, arguing that the question of deprivation of nationality was too delicate and that such a right was difficult to implement in practice, see Council of Europe, Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Strasbourg 1963, para 23.

Human Rights of the Council of Europe considered the possibility of creating an additional protocol to the ECHR on the right to a nationality.[488] However, this endeavor was not successful. States feared the perspective of the ECtHR having jurisdiction over a right to nationality.[489] Instead, the Council of Europe drafted the European Convention on Nationality.[490] Despite the absence of a Convention-based right to nationality, the ECtHR has, relatively early on, recognized that nationality matters might, under certain circumstances, raise an issue under other rights of the Convention. In other words, it can be argued that the ECtHR effectively introduced a right to nationality through the backdoor. It did based on Articles 3, 6, 8 and 14 ECHR as well as Article 4 of Protocol No. 4 to the Convention.[491]

In particular, the case law on the right to private life under Article 8 ECHR has proven to be important for the development of a right to nationality under the Convention. The Court found that arbitrary denial of nationality[492] and arbitrary revocation of nationality,[493] the confiscation of passports or identity documents,[494] the erasure of register data with the result of statelessness[495] and the denial of a right to residence for stateless persons[496] can give rise to an interference with Article 8 ECHR.[497] The jurisprudence of the Court under Article 8 ECHR has been taken up by domestic courts.[498]

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488 Ersbøll, 'The Right to a Nationality' (n 480) 252.

489 *ibid*; Andreas Zimmermann and Sarina Landefeld, 'Europäische Menschenrechtskonvention und Staatsangehörigkeitsrecht der Konventionsstaaten' [2014] Zeitschrift für Ausländerrecht und Ausländerpolitik 97, 98.

490 See Knocke (n 443) 538.

491 Council of Europe, 'Explanatory Report ECN' (n 443) para 16.

492 *Karassev v Finland* (n 486); *Slivenko v Latvia* (n 486); *Ahmadov v Azerbaijan* [2020] ECtHR Application No. 32538/10.

493 *Ramadan v Malta* (n 444); *K2 v The United Kingdom* (*Decision*) [2017] ECtHR Application No. 42387/13; *Said Abdul Salam Mubarak v Denmark* (*Decision*) [2019] ECtHR Application No. 74411/16.

494 *Smirnova v Russia* [2003] ECtHR Application No. 46133/99, 48183/99; *M v Switzerland* [2011] ECtHR Application No. 41199/06; *Alpeyeva and Dzhalagoniya v Russia* [2018] ECtHR Application Nos. 7549/09 and 33330/11.

495 *Slivenko v Latvia* (n 486); *Kurić and Others v Slovenia* (*Grand Chamber*) [2012] ECtHR Application No. 26828/06.

496 *Sisojeva and others v Latvia* (*Chamber*) [2005] ECtHR Application No. 60654/00; *Kurić and Others v Slovenia* (GC) (n 495); *Hoti v Croatia* [2018] ECtHR Application No. 63311/14; *Sudita Keita v Hungary* [2020] ECtHR Application No. 42321/15.

497 See also Fripp (n 45) 276.

498 Eg the Supreme Court of the United Kingdom in *R* (*on the application of Johnson*) (*Appellant*) *v Secretary of State for the Home Department* (*Respondent*) [2016] UK Supreme Court [2016] UKSC 56; the Council of State of the Netherlands (Raad van State), Judgment

In the 1995 case of *Kafkasli v Turkey*, the ECtHR acknowledged that the status of statelessness can have an effect on a person's right to private and family life.[499] In the case of *Karassev v Finland* it stated for the first time explicitly that:

> Although right to a citizenship is not as such guaranteed by the Convention or its Protocols [...], the Court does *not exclude* that an *arbitrary denial of a citizenship might in certain circumstances raise an issue under Article 8* of the Convention because of the impact of such a denial on the private life of the individual [...].[500] (emphasis added)

The Court refined this approach in a series of cases. It discussed, for example, different criteria for the acquisition of nationality and examined whether they amounted to arbitrary denial of citizenship.[501] In the case of *Riener v Bulgaria* the ECtHR added that not only the arbitrary denial of citizenship, but also the arbitrary refusal of a request to renounce citizenship might, in certain circumstances, raise an issue under Article 8, if such refusal has an impact on the individual's private life.[502] As the Court denied a violation of the Convention in that case, Judge Rait Maruste argued in a dissenting opinion:

> I see nationality (citizenship) as part of someone's identity. If Article 8 covers the right to self-determination in respect of, for example, sexual orientation and so forth, it undoubtedly also covers the right to self determination [*sic*] in respect of nationality and citizenship.[503]

Five years later, the ECtHR adopted this argument. In the case of *Genovese v Malta* it had to decide whether Maltese nationality laws, according to which children born out of wedlock were only eligible for Maltese citizenship if their mother was Maltese, violated Article 14 in conjunction with Article 8 ECHR.[504] The Court found that such a rule discriminated between children born to

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of 2 November 2016, ECLI:NL:RVS:2016:2912 [2016]; the Swiss Federal Administrative Court in *F-7013/2017*, Urteil vom 6. Februar 2020 [2020].

499 It did, however, not find a violation, see *Kafkasli v Turkey* (n 486) para 33.

500 *Karassev v Finland* (n 486).

501 See eg *Savoia and Bounegru v Italy* (n 486); *Petropavlovskis v Latvia* (n 447) para 83 ff. However, it so far never found specific naturalization criteria to violate Article 8 ECHR.

502 *Riener v Bulgaria* (n 447) para 154.

503 European Court of Human Rights, 'Dissenting Opinion Judge Maruste in *Riener v Bulgaria*' (2006) Application No. 46343/99.

504 *Genovese v Malta* [2011] ECtHR Application No. 53124/09.

married parents and children born out of wedlock.[505] The denial of citizenship, so the Court stated, "may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person's social identity".[506] Thus, the question whether the applicant could acquire the Maltese nationality from his father fell within the scope and ambit of Article 8.[507] In combination with the prohibition of discrimination under Article 14, the Court found a violation of the Convention.[508] The case of *Genovese v Malta* is the first case in which the ECtHR found that nationality is part of a person's social identity and thus protected by the right to private life under Article 8 ECHR.[509] It is, moreover the first time the Court found a violation of the Convention in a question directly relating to citizenship. The case of *Genovese* remains a landmark case for the ECtHR's approach on the right to citizenship.

In the case of *Ramadan v Malta*,[510] the Court found that not only the refusal of the acquisition of citizenship could violate the right to private life but also its revocation:

> [t]he *loss of citizenship already acquired or born into* can have the same (and possibly a bigger) impact on a person's private and family life. [...] Thus, an arbitrary revocation of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of its impact on the private life of the individual.[511] (emphasis added)

Nevertheless, the ECtHR rejected a violation of the ECHR arguing that the withdrawal of nationality due to fraudulent acquisition was not arbitrary.[512] The fact that the applicant was possibly left stateless by the Maltese decision

505 *ibid 48.* The Court did not consider it necessary to examine whether there has also been a discrimination on the basis of the parent's sex, *ibid 50.*

506 *Genovese v Malta* (n 504) para 33.

507 *ibid.*

508 *ibid 49.*

509 See also Gerard-René de Groot and Olivier Vonk, 'Nationality, Statelessness and ECHR's Article 8: Comments on Genovese v Malta' (2012) 14 European Journal of Migration and Law 317, 317; Zimmermann and Landefeld (n 489) 99.

510 *Ramadan v Malta* (n 444).

511 *ibid 85.*

512 *ibid 86.* The outcome of the ruling has, however, been criticized. See Marie-Bénédicte Dembour, 'Ramadan v Malta: When Will the Strasbourg Court Understand That Nationality Is a Core Human Rights Issue?' (*Strasbourg Observers*, 22 July 2016) <http://blogs.brighton.ac.uk/humanrights/2016/07/22/ramadan-v-malta-when-will-the-strasbourg-court-understand-that-nationality-is-a-core-human-rights-issue/>.

did not change that outcome.[513] Similarly, in the case of *Fehér and Dolník v Slovakia* it found that:

> [s]ince the Convention guarantees no right to nationality, the question whether a person was denied a State's nationality arbitrarily in a way susceptible of raising an issue under the Convention is to be determined with reference to the terms of the domestic law.[514]

In the case of *Usmanov v Russia*, the Court consolidated its line of case on revocation of nationality.[515] The case concerned a man whose Russian citizenship was annulled ten years after his naturalization, as he had not informed the authorities about his siblings when applying for citizenship. The applicant argued that the annulment of his Russian citizenship and his removal from Russian territory violated Article 8 ECHR.[516] In its judgment, the ECtHR reiterated the criteria for revocation of nationality and clarified that it applies a two-step test to determine whether there has been a breach of the Convention: first it looks at the consequences for the individual concerned to establish whether there has been an interference with the right to private life, in a second step it assesses whether the revocation has been arbitrary.[517] In order to determine arbitrariness, the Court examines whether the measure in question was in accordance with the law, accompanied by procedural safeguards, subject to judicial review and whether the authorities had acted diligently and swiftly.[518] Applying this two-step test to the case at hand the Court found that the annulment of his Russian citizenship indeed amounted to an interference with Article 8 ECHR, given it deprived him of any legal status in Russia, left him without valid identity documents and ultimately led to his removal from Russia and that it was arbitrary as the legal framework was excessively formalistic and failed to give the individual adequate protection against arbitrary interference.[519] Hence, the annulment of citizenship in the case of *Usmanov v Russia* amounted to a violation of Article 8 ECHR.[520]

513 *Ramadan v Malta* (n 444) para 92.
514 *Fehér and Dolnik v Slovakia* (n 447) para 36.
515 *Usmanov v Russia* [2020] ECtHR Application No. 43936/18.
516 *ibid 43*.
517 *ibid 53*.
518 *ibid 54*.
519 *ibid 59 ff*.
520 *ibid 71*.

In principle, these criteria apply to all cases of deprivation of citizenship. However, in cases concerning deprivation of nationality in the context of national security, the ECtHR has so far granted the states a very wide margin of discretion.[521] In most of these cases the Court denied a violation of the Convention, arguing that the deprivation of nationality was not arbitrary given the severity of the (terrorist) acts committed, the respect for procedural guarantees, the fact that the deprivation order was not automatically followed by a removal order and that it did not result in statelessness.[522] Highly problematic in that respect seems in particular the reasoning of the Court in the case of *Ghoumid and others v France* where it argued that "terrorist violence is in itself a grave threat to human rights" and thereby seemed to imply that this results in a lower threshold of arbitrariness and diminishes the importance of citizenship as part of a person's social identity.[523]

Moreover, methodologically, the reasoning of the Court in cases concerning the right to citizenship under Article 8 ECHR and its focus on arbitrariness is somewhat inconsistent and does not follow the usual approach of the Court to cases concerning a violation of the right to private or family life.[524] The Court

521 See on the reception of this practice in the Member States eg Swiss Federal Administrative Court, *F-7013/2017*, (n 498); Swiss Federal Court, *1C_457/2021*, Urteil vom 25. März 2022 [2022]; Council of State of the Netherlands (Raad van State), Judgment of 30 December 2020, ECLI:NL:RVS:2020:3045 [2022]; *Supreme Court of the United Kingdom, R* (*on the application of Begum*) (*Appellant*) *v Special Immigration Appeals Commission* (*Respondent*), *R* (*on the application of Begum*) (*Respondent*) *v Secretary of State for the Home Department* (*Appellant*), *Begum* (*Respondent*) *v Secretary of State for the Home Departement* (*Appellant*), [2021] UK Supreme Court [2021] UKSC 7 para 64. See also Louise Reyntjens, 'Citizenship Deprivation under the European Convention-System: A Case Study of Belgium' (2019) 1 Statelessness and Citizenship Review 263.

522 In all cases that concerned individuals suspected or convicted of terrorism in Western European states the Court has so far found the complaints to be inadmissible or not violating the Convention, *K2 v UK* (n 493); *AS v France* [2020] Application No. 46240/15; *Said Abdul Salam Mubarak v Denmark* (n 493); *Ghoumid and others v France* [2020] ECtHR Application Nos. 52273/16, 52285/16, 52290/16, 52294/16 and 52303/16; *Adam Johansen v Denmark* [2022] ECtHR Application No. 27801/19. By contrast, violations have been found where the annulment of naturalization or identity documents or the refusal to issue identity documents was concerned, *Usmanov v Russia* (n 515); *Alpeyeva v Russia* (n 494); *Ahmadov v Azerbaijan* (n 492). Still pending *El Aroud v Belgium* [pending] ECtHR Application No. 25491/18; *Soughir v Belgium* [pending] ECtHR Application No. 27629/18.

523 *Ghoumid v France* (n 522) para 50. See also *Johansen v Denmark* (n 522) para 70.

524 See the criticism by Judge Paul Lemmens and Judge Georges Ravarani in a Joint Concurring Opinion to the judgment in *Usmanov v Russia,* European Court of Human Rights, 'Joint Concurring Opinion Judges Lemmens and Ravarani in Usmanov v Russia' (2020) Application No. 43936/18.

thereby creates a lower standard for cases concerning citizenship under Article 8 ECHR where the threshold for a violation is arbitrariness and not, as implied by Article 8, an interference which is not in accordance with the law and not necessary in a democratic society. The current approach of the ECtHR to cases concerning nationality — especially in a counter-terrorism context — therefore questions the Courts actual willingness to recognize nationality as a core human rights issue. Marie-Bénédicte Dembour, for example, is not convinced that the Court really changed its viewpoint that nationality matters generally fall outside its radar.[525] Equally critical of the Court's timid approach to nationality matters is Judge Pinto de Albuquerque. In a dissenting opinion to the judgment in *Ramadan v Malta*, he criticized that the Court failed to revisit its own insufficient case-law on the right to citizenship.[526] He argued that:

> In sum, the now well-established prohibition of arbitrary denial or revocation of citizenship in the Court's case-law presupposes, by logical implication, the existence of a right to citizenship under Article 8 of the Convention, read in conjunction with Article 3 of Protocol No. 4. Furthermore, a systemic interpretation of both provisions in line with the Council of Europe standards on statelessness warrants the conclusion that State citizenship belongs to the core of an individual identity. [...] taking into account the Convention's Article 8 right to an identity and to State citizenship [...] States parties to the Convention have a negative obligation not to decide on the loss of citizenship if the person would thereby become stateless and a positive obligation to provide its citizenship for stateless persons, at least when they were born — or found in the case of a foundling — in their respective territories, or when one of their parents is a citizen.[527]

Nevertheless, overall, the case law of the Court on citizenship, as part of a person's social identity and thus of a person's private life, in the meantime is quite well-established.[528] It also expanded the scope of the citizenship-dimension under the right to private life, from only covering arbitrary denial of citizenship

525 Dembour, *When Humans Become Migrants* (n 43) 145 f. See also Dembour, 'Ramadan v Malta' (n 512).

526 European Court of Human Rights, 'Dissenting Opinion Ramadan v Malta' (n 458) para 1.

527 *ibid.*

528 See eg also *Mennesson v France* [2014] ECtHR Application No. 65192/11 para 97. See further Barbara von Rütte, 'Social Identity and the Right to Belong — The ECtHR's Judgment in Hoti v Croatia' (2019) 24 Tilburg Law Review 147.

to including also the arbitrary refusal of a request to renounce citizenship — and thus to change citizenship — loss of citizenship, denial of citizenship that is not arbitrary and any discrimination in citizenship matters. Thus, while the ECHR thus does not guarantee a right to nationality as such, the ECtHR has over the years effectively recognized the human rights dimension of citizenship as part of the right to private life. It remains to be seen how this jurisprudence will evolve in the future.

2.2.1.3 Other Council of Europe Instruments

A *Convention on the Reduction of Cases of Multiple Nationality*

The Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality of 1963[529] was the first instrument on nationality adopted within the framework of the Council of Europe. It aimed at avoiding conflicts between nationality regimes and preventing multiple nationality.[530] It does not have a special focus on individual rights. In order to prevent multiple nationality it states that individuals shall lose their former nationality if they acquire the new one.[531] Implicitly the Convention, thereby, acknowledges that individuals must be able to change their nationality and states have an obligation to allow for the renunciation of nationality and recognition of the new nationality.[532]

The Second Protocol amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality further loosened the strict approach of the 1963 Convention.[533] It allows the retention of the nationality of origin and permits dual citizenship in cases of second-generation migrants, binational marriages if one spouse acquires the nationality of the other and children of binational couples.[534] This amendment indirectly amounts to the recognition of dual nationality.[535] However, the Second Protocol does not grant an enforceable individual right to

529 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, 6 May 1963, ETS No. 43 ('Convention on the Reduction of Multiple Nationality', '1963 Convention').

530 Council of Europe, 'Explanatory Report ECN' (n 443) para 6.

531 Article 1(1).

532 Article 2.

533 Council of Europe, 'Explanatory Report to the Second Protocol Amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality' (Council of Europe 1993) 1.

534 The provisions only apply to situations where the nationalities of two or more contracting states are at stake.

535 de Groot and Vonk (n 74) 220.

dual nationality, but merely allows state parties to permit dual nationality.[536] To sum up, the 1963 Convention and its Protocols have limited significance for the protection of the right to nationality.

B *Convention on the Avoidance of Statelessness in Relation to State Succession*

The youngest instrument adopted within the framework of the Council of Europe is the Convention on the Avoidance of Statelessness in Relation to State Succession of 2006.[537] Building on the ECN, the Convention aims at preventing, or at least reducing statelessness by setting up more detailed rules for the acquisition of nationality in the context of state succession.[538] Its substantive scope is limited to the context of state succession.[539] As Roland Schärer notes, this limitation upon the scope of the instrument had the advantage of facilitating a consensus between the state parties, despite the relatively clearly defined obligations for the member states set out in the Convention.[540]

The basic provision of the 2006 Convention is Article 2 stating that:

> Everyone who, at the time of the State succession, had the nationality of the predecessor State and who has or would become stateless as a result of the State succession has the right to the nationality of a State concerned, in accordance with the following articles.

According to Article 5, the right to nationality applies to everyone who, at the time of the succession, had both the nationality of a predecessor state and was a habitual resident or had another appropriate connecting factor to the territory of the successor state.[541] The main connecting factor for acquiring

536 Moreover, the Protocol was only ratified by three states, one of which denounced its membership later on, see the list of signatures and ratifications, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/149/signatures?p_auth=Wvb26RGY>.

537 The Convention has so far only been ratified by seven states, see the list of signatures and ratifications, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/200/signatures?p_auth=Xr4U7QYH>.

538 Preamble to the Convention on the Avoidance of Statelessness, Recital 3. See also Council of Europe, 'Explanatory Report to the Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession' (Council of Europe 2006) para 4; Roland Schärer, 'The Council of Europe and the Reduction of Statelessness' (2006) 25 Refugee Survey Quarterly 33.

539 See also de Groot and Vonk (n 74) 333.

540 Schärer (n 538) 34.

541 Article 5. Other appropriate connections include nationality of a predecessor state, birth on the territory or last habitual residence.

nationality under the Convention is habitual residence. In principle, according to the general presumption of international law, the population of a territory shall thus follow the change of sovereignty over the territory.[542] The predecessor state shall not withdraw nationality from its nationals during the succession if they would otherwise become stateless.[543] Together, the right to acquire the nationality of the successor state for habitual residence for those who would otherwise be stateless and the prohibition of withdrawal of nationality in cases of statelessness, contribute to the prevention of statelessness.[544]

Overall, the Council of Europe Convention on the Avoidance of Statelessness is of limited relevance to the protection and enforcement of the right to nationality. While it does stipulate the right to nationality, its scope remains limited to the prevention of statelessness occurring in the context of state succession. Thus, the 2006 Convention also falls below the standards proposed in the ILC Draft Articles on Nationality of 1999, which stipulate a right to nationality in the context of state succession irrespective of the risk of statelessness.[545]

C *Resolutions and Recommendations of Council of Europe Bodies*

The bodies of the Council of Europe — namely the Committee of Ministers and the Parliamentary Assembly (PACE) — have repeatedly dealt with nationality matters. The PACE adopted several recommendations dealing with statelessness. In particular, the prevention of childhood statelessness, the equality of women in nationality matters and the avoidance of multiple nationality.[546] In Recommendation 696 (1973) the PACE recalled the right to nationality as protected by the UDHR and emphasized the importance of an effective nationality for the individual's protection and for the exercise of her personal rights and freedoms.[547] In Recommendation 1081 (1988) it noted "that the nationality of a

542 Council of Europe, 'Explanatory Report Convention on the Avoidance of Statelessness' (n 538) para 20.

543 Article 6.

544 See for a more thorough discussion Schärer (n 538) 35 f.

545 See on the ILC Draft Articles on Nationality (n 362) Chapter 4, II.1.3.2.

546 Parliamentary Assembly of the Council of Europe, 'Recommendation 87 (1955) on Statelessness', 25 October 1955; Parliamentary Assembly of the Council of Europe, 'Recommendation 194 (1959) on the Nationality of Children of Stateless Persons', 23 April 1959; Parliamentary Assembly of the Council of Europe, 'Recommendation 519 (1968) on the Nationality of Married Women', 2 February 1968; Parliamentary Assembly of the Council of Europe, 'Recommendation 696 (1973) on Certain Aspects of the Acquisition of Nationality' (PACE 1973); Parliamentary Assembly of the Council of Europe, 'Recommendation 1654 (2004) on Nationality Rights and Equal Opportunities', 2 March 2004.

547 PACE, 'Recommendation 696 (1973)' (n 546).

person is not only an administrative matter, but also an important element of the dignity and of the cultural identity of human beings".[548] Recommendation 564 (1969) links the issues of forced migration and refugee integration with nationality matters and invites member states to facilitate naturalization of refugees and stateless persons.[549] In particular, states should take a liberal approach to the integration of refugees in the host country and make:

> every effort to remove, or at least reduce, legal obstacles to naturalisation, such as the minimum period of residence when it exceeds five years, the cost of naturalisation fees when it exceeds the financial possibilities of the majority of refugees, the length of time elapsing between the receipt of applications for naturalisation and their consideration and the requirement that refugees should prove loss of their former nationality.[550]

Moreover, states should enable refugee children to acquire nationality at birth and refugee youth to obtain the nationality of their country of residence at their request by age of majority, at the latest.[551] Thus, from an early stage, the PACE thus from an early stage linked access to citizenship to questions of refugee and migrant integration. This was, clearly, a different approach to other organizations, which first and foremost saw nationality matters in the context of statelessness.[552]

In 2014, the PACE adopted Resolution 1989 (2014), which was concerned with access to nationality and the effective implementation of the European

548 Parliamentary Assembly of the Council of Europe, 'Recommendation 1081 (1988) on Problems of Nationality of Mixed Marriages', 30 June 1988, para 3.

549 Parliamentary Assembly of the Council of Europe, 'Recommendation 564 (1969) on the Acquisition by Refugees of the Nationality of their Country of Residence', 30 September 1969. The Recommendation was adopted by the Committee of Ministers and transmitted to governments, Committee of Ministers, Resolution (70) 2, Acquisition by Refugees of the Nationality of their Country of Residence, 26 January 1970. See subsequently also Parliamentary Assembly of the Council of Europe, 'Recommendation 984 (1984) on the Acquisition by Refugees of the Nationality of the Receiving Country', 11 May 1984, and Committee of Ministers, Recommendation No. R (84) 21 on the Acquisition by Refugees of the Nationality of the Host Country, 14 November 1984.

550 PACE, 'Recommendation 564 (1969)' (n 549) para 9(i).

551 *Ibid*., para 9(iii).

552 See also PACE Recommendation 841 (1978), which calls upon states to facilitate the acquisition of nationality of second-generation migrants born or schooled in the country Parliamentary Assembly of the Council of Europe, 'Recommendation 841 (1978) on Second Generation Migrants', 30 September 1978. Adopted by the Committee of Ministers in Recommendation No. R (84) 9 on Second-Generation Migrants, 20 March 1984.

Convention on Nationality.[553] The Parliamentary Assembly notes the close link between nationality and human rights and the rule of law and recalls nationality as the right to have rights.[554] It calls upon states to take measures to prevent and eliminate statelessness, including ensuring the automatic acquisition of nationality for children born on the territory who would otherwise be stateless.[555] Moreover, it recommends facilitating access to nationality (naturalization) for long-term residents and ensuring that naturalization requirements are not excessive or discriminatory.[556] PACE Resolutions 1839 (2008),[557] 2006 (2014)[558] and 2043 (2015)[559] link nationality and democratic processes and call upon states to facilitate access to nationality for non-citizens and to allow for the right to dual nationality in order to facilitate democratic participation of persons with a migrant background.

Most recently, the Parliamentary Assembly adopted Resolution 2263 (2019) on the withdrawal of nationality as a measure to combat terrorism.[560] The

553 Parliamentary Assembly of the Council of Europe, 'Resolution 1989 (2014) on Access to Nationality and the Effective Implementation of the European Convention on Nationality', 9 April 2014. See also Parliamentary Assembly of the Council of Europe, 'Recommendation 2042 (2014) on Access to Nationality and the Effective Implementation of the European Convention on Nationality', 9 April 2014, calling upon the Committee of Ministers to promote accession to the ECN.

554 PACE, 'Resolution 1989 (2014)' (n 553) para 1.

555 *Ibid.*, para 5.2. The eradication of childhood statelessness is also the subject of Resolution 2099 (2016) which calls upon states to ensure that children born on the territory who would otherwise be stateless are granted nationality and that stateless persons have the possibility of facilitated naturalization, see Parliamentary Assembly of the Council of Europe, 'Resolution 2099 (2016) on the Need to Eradicate Statelessness of Children' (PACE 2016) para 12.2.2. and 12.2.3.

556 *Ibid.*, para 8.2. See on access to nationality for long-term residents also Parliamentary Assembly of the Council of Europe, 'Resolution 2083 (2015) on Chinese Migration to Europe: Challenges and Opportunities', 27 November 2015, para 6.4.

557 Parliamentary Assembly of the Council of Europe, 'Resolution 1617 (2008) and Recommendation 1839 (2008) on The State of Democracy in Europe, Specific Challenges Facing European Democracies: The Case of Diversity and Migration', 25 June 2008.

558 Parliamentary Assembly of the Council of Europe, 'Resolution 2006 (2014) on Integration of Migrants in Europe: The Need for a Proactive, Long-Term and Global Policy', 25 June 2014.

559 Parliamentary Assembly of the Council of Europe, 'Resolution 2043 (2015) on Democratic Participation for Migrant Diasporas', 6 March 2015.

560 Parliamentary Assembly of the Council of Europe, 'Resolution 2263 (2019) on Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach?' (PACE 2019). The Resolution is complemented by Recommendation 2145 (2019) which recommends the Committee of Ministers to prepare a study on national legislation allowing for the deprivation of nationality and to set up draft guidelines on the criteria for the deprivation of nationality and other counter-terrorism measures, see Parliamentary Assembly of the Council of Europe, 'Recommendation 2145 (2019) Withdrawing Nationality as a

Assembly expressed its concern that some states consider nationality as a privilege and not a right.[561] The Resolution calls upon states to refrain from any deprivation of nationality that could be arbitrary or discriminatory.[562] It stresses that:

> [t]he use of nationality deprivation must in any case be applied in compliance with the standards stemming from the European Convention on Human Rights and other relevant international legal instruments. Any deprivation of nationality for terrorist activities shall be decided or reviewed by a criminal court, with full respect for all procedural guarantees, shall not be discriminatory and shall not lead to statelessness; it shall have suspensive effect and shall be proportionate to the pursued objective and applied only if other measures foreseen in domestic law are not efficient.[563]

The Committee of Ministers, for its part, dealt with similar issues. The main topics were the nationality of spouses of binational marriages and their children,[564] the acquisition of nationality for refugees and migrants,[565] and the avoidance of statelessness.[566] Recommendation No. R (83) 1 of 1983 addresses the situation of stateless nomads and nomads of undetermined nationality in Europe.[567] The Recommendation notes that many nomads in Europe experience difficulties regarding their legal status because they lack a sufficient link

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Measure to Combat Terrorism: A Human Rights-Compatible Approach?', 25 January 2019. Furthermore, the Resolution is accompanied by a report on the same subject drafted by Tineke Strik, see Parliamentary Assembly of the Council of Europe, 'Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach?' (PACE 2019) Report Doc. 14790 (2019). See moreover already PACE, Resolution 2091 (2016) on Foreign Fighters in Syria and Iraq, 27 January 2016, para 19.

561 PACE, 'Resolution 2263 (2019)' (n 560), para 5.

562 *Ibid.*, para 9.

563 *Ibid.*, para 7.

564 Council of Europe, Committee of Ministers, 'Resolution (77) 12 on the Nationality of Spouses of Different Nationalities' (Committee of Ministers 1977); Committee of Ministers, 'Resolution (77) 13 on the Nationality of Children Born in Wedlock' (Committee of Ministers 1977).

565 Council of Europe, Committee of Ministers, 'Resolution (70) 2' (n 549); Committee of Ministers, 'Recommendation No. R (84) 9' (n 552); Committee of Ministers, 'Recommendation No. R (84) 21' (n 549).

566 Council of Europe, Committee of Ministers, 'Recommendation No. R (99) 18 on the Avoidance and the Reduction of Statelessness' (Committee of Ministers 1999).

567 Council of Europe, Committee of Ministers, 'Recommendation No. R (83) 1 on Stateless Nomads and Nomads of Undetermined Nationality', 22 February 1983.

of nationality or residence to a state.[568] It calls upon states to facilitate the establishment of a link with a state for stateless nomads or nomads of undetermined nationality based on the place of birth, the origin of the immediate family, habitual residence, frequent periods of residence or the lawful presence of immediate family or nationality of family members.[569]

The Committee of Ministers also adopted a recommendation to promote the new European Convention on Nationality.[570] The Recommendation, *inter alia*, calls upon states to apply the principles of the ECN, including the principle that access to the nationality of a state should be possible whenever a person has a genuine and effective link with that state, that nationality should not be arbitrarily deprived and that deprivation should not result in statelessness.[571] Moreover, it recommends that states take the genuine and effective link of a person to a state and the gravity of the facts into account when considering the deprivation of nationality due to fraudulent conduct, false information or concealment of relevant facts.[572]

The Committee of Ministers reaffirmed these principles ten years later in its Recommendation (2009)13 on the nationality of children.[573] The appendix to the Recommendation lists principles concerning the nationality of children that should be implemented in order to reduce childhood statelessness and improve children's access to the nationality of their parents, their country of birth and residence.[574] It calls upon states to provide for the acquisition of nationality either *jure sanguinis* or *jure soli* if a child would otherwise be stateless.[575] States should provide that children who are nevertheless stateless have the right to apply for their nationality after lawful and habitual residence after a maximum of five years.[576] Moreover, states should ensure that children who are born on member state' territory to a foreign parent with lawful and habitual residence have facilitated access to nationality.[577] In cases of second and

568 *Ibid.*, preamble.

569 *Ibid.*, para 2. See also Article 8 of the AU Draft Protocol on Nationality, below Chapter 4, II.2.3.2.

570 Council of Europe, Committee of Ministers, 'Recommendation No. R (99) 18' (n 566).

571 *Ibid.*, para 1.4, I., b., c. and d.

572 *Ibid.*, para 1.4, II., c.

573 Council of Europe, Committee of Ministers, 'Recommendation CM/Rec(2009)13 of the Committee of Ministers of the Council of Europe on the Nationality of Children' (Committee of Ministers 2009) CM/Rec(2009)13. See on the Recommendation also de Groot, 'Children's Right to Nationality' (n 108) 156 ff.

574 Council of Europe, Committee of Ministers, 'Recommendation (2009)13' (n 573) para 3.

575 *Ibid.*, Appendix, para 1 and 2.

576 *Ibid.*, Appendix, para 5.

577 *Ibid.*, Appendix, para 17.

third generation migrants, the acquisition of nationality should be more facilitated, as second and third generation migrants are, as the Recommendation points out, *per se* integrated in the host society, which itself justifies facilitation of access to nationality.[578]

Thus, both the PACE and the Committee of Ministers recognize the right to nationality as a human right. In their resolutions and recommendations, they developed the specific obligations under the right to nationality. They rely on the ECN, but also on the case law of the ECtHR and universal standards. The rights and duties proposed by PACE and by the Committee of Ministers, however, are often aspirational and go beyond the current practice of Council of Europe member states. The CoE organs, thereby, make an important contribution to the codification of the right to nationality at European level. All in all, the legal framework on the right to nationality under the auspices of the Council of Europe is well developed. The right to nationality is protected directly or indirectly in binding treaties and reaffirmed in soft law instruments, as well as the case law of the ECtHR. While the CoE might be the most important actor for the protection of the right to nationality in Europe, it is not the only one. The following two subsections shall look at two additional actors: the OSCE and the European Union.

2.2.2 *Organization for Security and Co-operation in Europe*

The Organization for Security and Co-Operation in Europe (OSCE), for its part, has also repeatedly reaffirmed the right to nationality in its instruments.[579] Both the declaration of the 1992 Helsinki Summit[580] and the Charter for European Security[581] declare that everyone has the right to a nationality and that no one should be deprived of his or her nationality arbitrarily. In the Ljubljana Guidelines on Integration of Diverse Societies of 2012, the OSCE confirms the commitment for the protection of the right to nationality.[582] The

578 *Ibid.*

579 See for an overview on the work of OSCE on statelessness and nationality UNHCR and OSCE, 'Handbook on Statelessness in the OSCE Area: International Standards and Good Practices' (UNHCR 2017) <https://www.osce.org/handbook/statelessness-in-the-OSCE-area>.

580 Organization for Security and Co-operation in Europe, 'Helsinki Summit' (OSCE 1992) <https://www.osce.org/event/summit_1992>. See also Knocke (n 443) 190.

581 Organization for Security and Co-operation in Europe, 'Charter for European Security' (OSCE 1999) <https://www.osce.org/mc/17502>.

582 Organization for Security and Co-operation in Europe, 'The Ljubljana Guidelines on Integration of Diverse Societies' (OSCE 2012) <https://www.osce.org/hcnm/ljubljana-guidelines>. The Guidelines are not binding but they illustrate the commitment within the framework of the OSCE to protect the rights of minorities. See on the

Guidelines reaffirm that the right to citizenship from the moment of birth is part of international human rights law and that "everyone has the right to a citizenship".[583] States should avoid statelessness and "consider granting citizenship to persons who have been *de jure* or *de facto* stateless for a considerable amount of time, even when other objective grounds may not be present" (original emphasis).[584] Additionally, the Guidelines link the right to citizenship to integration of non-citizens and social cohesion in migration societies:

> The long-term presence of a significant number of persons without citizenship in a State runs counter to the integration of society and potentially poses risks to cohesion and social stability. It is therefore in the interest of the Stat to provide persons habitually residing on its territory over a prolonged period of time with the opportunity to naturalize without undue obstacles and to actively promote their naturalization.[585]

Interestingly, the Guidelines also call upon states to respect the principles of friendly, good neighborly relations and territorial sovereignty when granting access to citizenship based on cultural, historical or familial ties.[586] Against that background, it is also not surprising that the Guidelines take a positive stance on multiple citizenship, particularly when acquired at birth.[587]

While not being as prominent as instruments adopted under the auspices of the CoE, the instruments adopted within the framework of the OSCE add a dimension of security to the discussion about the right to nationality. The recognition of the right to nationality in OSCE instruments highlights how important a rights-based regulation of citizenship is to secure stable and democratic societies and achieve social cohesion.

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importance of the OSCE as an extra-conventional human rights organ also Kälin and Künzli, *Menschenrechtsschutz* (n 88) 309.

583 Organization for Security and Co-operation in Europe, 'Ljubljana Guidelines' (n 582) para 34.

584 *ibid 35.*

585 *ibid.*

586 *ibid 36.* This point was already raised in the Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations of 2008, which call upon states to ensure that the conferral of citizenship respects the principles of friendly, including good neighbourly, relations and territorial sovereignty, and to refrain from conferring citizenship *en masse*. See Organization for Security and Co-operation in Europe, 'The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations' (OSCE 2008) 7 <https://www.osce.org/hcnm/bolzano-bozen-recommendations>.

587 Organization for Security and Co-operation in Europe, 'Ljubljana Guidelines' (n 582) para 37.

2.2.3 *European Union*

Any discussion about nationality in a European context must also have a look at European Union (EU) and the regulation of citizenship in EU law. In EU law, nationality matters are primarily assessed in relation to EU citizenship.[588] The legal status of EU citizenship and its relationship with national citizenship is complex and multifaceted, as is often discussed in the literature.[589] EU citizenship, introduced by the Treaty of Maastricht in 1992, is a unique form of membership to a supranational, *sui generis* legal order. According to the CJEU, EU citizenship is "the fundamental status of nationals of the Member States".[590] As enshrined in Article 20(1) of the Treaty on the Functioning of the European Union:[591]

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588 It is telling that the EU Charter of Fundamental Rights does not address citizenship, see Charter of Fundamental Rights of the European Union, 26 October 2012, OJ C 326/391 ('EUCFR').

589 See on EU Citizenship and its relationship to national citizenship eg Rainer Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8 Theoretical Inquiries in Law 453; Rainer Bauböck, 'The Three Levels of Citizenship within the European Union' (2014) Vol. 15 German Law Journal 751; Samantha Besson and André Utzinger, 'Toward European Citizenship' (2008) 39 Journal of Social Philosophy 185; Martijn van den Brink, 'A Qualified Defence of the Primacy of Nationality over EU Citizenship' (2020) 69 International and Comparative Law Quarterly 177; Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004); Elspeth Guild (ed), *The Reconceptualization of European Union Citizenship* (Martinus Nijhoff 2014); Dimitry Kochenov, *EU Citizenship and Federalism: The Role of Rights* (2017); Dora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge University Press 2008); Kristine Kruma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge* (Martinus Nijhoff 2014); Willem Maas, 'European Governance of Citizenship and Nationality' (2016) 12 Journal of Contemporary European Research 532; Daniel Thym, 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and Its Limits' in Maurice Adams and others (eds), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice Examined* (Hart Publishing 2013). See for an interesting discussion on the state of EU citizenship also, Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' (European University Institute 2020) Working Paper <http://cadmus.eui.eu//handle/1814/67019>.

590 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] CJEU C-184/99 para 31. Further landmark cases on EU citizenship are *Micheletti and Others v Delegación del Gobierno en Cantabria* [1992] CJEU C-369/90; *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur* [2001] CJEU C-192/99; *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] CJEU C-200/02; *Janko Rottman v Freistaat Bayern* [2010] CJEU C-135/08; *Toufik Lounes v Secretary of State for the Home Department* [2017] CJEU C-165/16; *Tjebbes and Others v Minister van Buitenlandse Zaken* [2019] CJEU C-221/17; *JY v Wiener Landesregierung* [2021] CJEU C-118/20.

591 Treaty on the Functioning of the European Union, 26 October 2012, OJ C 326/47, 'TFEU'.

> Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Even though EU citizenship, according to Article 20(2) TFEU, creates independent rights and duties, it is dependent on the possession of and thus additional to national citizenship. As the Advocate General Maduro held in its Opinion to the *Rottman* case, "there is no autonomous way of acquiring and losing Union citizenship".[592] This being said, there is also no autonomous right to EU citizenship independent of national citizenship.[593] The question whether an individual possesses national citizenship, however, is determined by domestic law of member states.[594] Even though the CJEU has developed certain criteria and principles that have to be observed in the regulation of acquisition and loss of citizenship, member states still have the exclusive competence to determine the conditions.[595] The obligation to observe

592 *Opinion of Advocate General Maduro in Case C-135/08* (*Rottman*) [2009] CJEU C-135/08 para 15.

593 A decoupling of EU citizenship from national citizenship is currently being discussed in the context of Brexit and the loss of EU citizenship by UK nationals, see Oliver Garner, 'The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status' (2018) 20 Cambridge Yearbook of European Legal Studies 116; Liav Orgad and Jules Lepoutre, 'Should EU Citizenship Be Disentangled from Member State Nationality?' (European University Institute 2019) Working Paper EUI RSCAS 2019/24 <http://cadmus.eui.eu//handle/1814/6222>.

594 Declaration No. 2 on the Nationality of Member States attached to the Maastricht Treaty, 29 July 1992, OJ C 191/98.

595 *AG Opinion Rottman* (n 592) para 17; *JY v Wiener Landesregierung* (n 590) para 54. See also Kruma (n 589) 133. EU member states' competence in citizenship matters is well illustrated by the controversy around the investment citizenship regimes in Bulgaria, Cyprus and Malta under which foreign investors can acquire national citizenship upon a certain investment while regular naturalization requirements are waived or softened. With national citizenship the investor automatically acquires EU citizenship. This practice ultimately results in EU citizenship being for sale for foreign investors. The EU Commission has reacted critically, arguing that these schemes undermine the very concept of EU citizenship and raising specific concerns relating to security, money laundering, tax evasion and transparency, see European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Investor Citizenship and Residence Schemes in the European Union' (European Commission 2019) COM(2019) 12 final <https://ec.europa.eu/info/sites/info/files/com_2019_12_final_report.pdf>. In 2020 the EU Commission moreover opened infringement procedures based on Article 258 TFEU against Malta and Cyprus for its investor citizenship schemes.

EU law includes an obligation to adhere to international (human rights) law.[596]

In the case of *Tjebbes and others v The Netherlands* the CJEU was called to examine the lawfulness of a provision that foresaw that dual nationals would automatically lose their Dutch nationality, and with it Union citizenship, if they reside outside the Netherlands and the EU for an uninterrupted period of more than ten years.[597] The Court confirmed that it is legitimate for member states "to take the view that nationality is the expression of a genuine link between it and its nationals, and therefore to prescribe that the absence, or the loss, of any such genuine link entails the loss of nationality".[598] Considering that the Dutch rule does not apply if the person concerned would become stateless and that there is the possibility to retain nationality by declaration, the CJEU concluded that EU law does not preclude such automatic loss of national citizenship even if it entails the loss of EU citizenship.[599] However, national authorities must have due regard to the principle of proportionality concerning the consequences of the loss for the person concerned and her family.[600] "The loss of nationality of a Member State by operation of law", so the Court stated, "would be inconsistent with the principle of proportionality if the relevant national rules did not permit at any time an individual examination of the consequences of that loss for the persons concerned from the point of view of EU law".[601] The CJEU's ruling in *Tjebbes* is largely in line with the previous case law of the court on the relationship between EU and national citizenship.[602] What is interesting about the case, however, is the proportionality assessment, which adds a rights perspective.[603] Even though it is legitimate for the state to foresee the loss of nationality, such a rule is an interference with individual rights and must be carefully weighed and justified. The proportionality requirement in citizenship cases was further strengthened by the CJEU in the case of *JY v Wiener Landesregierung*.[604] The case raised questions regarding the relationship between naturalisation procedures and EU citizenship. The

596 See *Rottman* (n 590) para 53. See on the limitations on EU member states' sovereignty in nationality matters derived from the ECN also Hall (n 398) 598.

597 *Tjebbes* (n 590). See also Caia Vlieks, 'Tjebbes and Others v Minister van Buitenlandse Zaken: A Next Step in European Union Case Law on Nationality Matters?' (2019) 24 Tilburg Law Review 142.

598 *Tjebbes* (n 590) para 35.

599 *ibid 39.*

600 *ibid 40.*

601 *ibid 41.*

602 Vlieks (n 597) 146.

603 See also Chapter 5, III.7.

604 *JY v Wiener Landesregierung* (n 590).

woman concerned, an Estonian national living in Austria, had her Estonian citizenship revoked in view of acquiring Austrian nationality by naturalization. Even though the Austrian authorities had already assured that she would be naturalized, she was ultimately rejected Austrian nationality for committing traffic offences — a decision which deprived her of her Union citizenship and left her stateless.[605] The CJEU ruled that the Austrian authorities failed to have due regard to the principle of proportionality. The consequences of the refusal to grant JY Austrian nationality were so significant for her, the normal development of her family and professional life and had the effect of making her lose the status of Union citizen that they did not appear to be proportionate to the gravity of the offences commited.[606]

De Groot and Vonk identify four additional limitations of member states' autonomy in nationality matters based on the case law of the CJEU:

1. The nationality of a Member State cannot be lost for the sole reason of using the free movement rights that follow from one's European citizenship;
2. In order to comply with Article 4(2) TEU [Treaty on European Union[607]], nationality cannot be accorded to large numbers of non-Member State citizens without consultation of the EU;
3. EU law is violated if a Member State's provisions on the acquisition and loss of its nationality are contrary to international law. The different Member States cannot, for example, accept the loss of Member State nationality on grounds which violate international law if this loss entails that someone ceases to be a European citizen;
4. Lack of coordination of the nationality laws of the Member States may lead to a violation of EU law. This ground for violation of EU law may be illustrated by way of the CJEU's *Rottmann* [sic] ruling.[608]

It would go beyond the scope of this study to discuss EU citizenship and its relationship to national citizenship in more detail. Regarding the question at hand, the right to nationality in international law, this short side note nevertheless allows for the conclusion that EU law does not, as such, guarantee a right to citizenship — neither to EU citizenship nor to national citizenship of an EU member state. The obligation to respect EU law and international law does, however,

605 *ibid 14 f.*
606 *ibid 73.*
607 Treaty on European Union, consolidated version, 26 October 2012, OJ C 326/13.
608 de Groot and Vonk (n 74) 353 f.

indirectly reinforce the general obligation to respect international human rights law, including the right to nationality and the principle of proportionality. Thus, while EU law does not directly protect the right to nationality, it recognizes the human rights dimension of citizenship, and with EU citizenship — as a unique form of supranational citizenship — it has significantly contributed to a novel, more individual rights oriented understanding of citizenship.

To sum up, there are a number of instruments at the European level that codify the right to nationality — some of them directly, such as those within the framework of the Council of Europe, and some indirectly, by recognizing the rights-dimension of nationality matters. In particular, the ECN's comprehensive codification of relevant standards relating to acquisition and loss nationality and the innovative provisions on naturalization and nationality procedures serve as an important model for the regulation of nationality internationally. Nevertheless, the European system falls below the benchmark set by Article 20 ACHR. What is absent in the framework of the Council of Europe is an enforceable, general right to nationality. This *lacunae* is not closed by the ECHR, which does not include a right to nationality. However, the Convention system, at least, offers indirect protection of the right to nationality through the case law established by the ECtHR under the right to private life, as according to Article 8 ECHR. EU citizenship, finally, has a special position as a status *sui generis* within the EU system of free movement and is only indirectly relevant for the discussion on the right to nationality.

2.3 Africa

At first glance, the system of protection of the right to nationality within the African human rights framework seems relatively weak.[609] The main regional human rights instruments do not enshrine a right to nationality. However, several initiatives deserve further attention. The developments within the African Union are indicative of a progressive and innovative interpretation of nationality and nationality rights. The developments must be seen in the particular historical context of the African continent, where "the initial establishment of borders by colonial powers, has given questions of nationality and statelessness particular characteristics" and where matters of citizenship and belonging have contributed to many conflicts.[610]

609 Bronwen Manby, 'Citizenship Law in Africa: A Comparative Study' (Open Society Foundations 2010) 10. See generally on citizenship on the African continent also Manby, *Citizenship in Africa* (n 363).

610 African Union, Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in

The following section will first discuss the right to nationality within the framework of the African Charter on Human and Peoples' Rights (ACHPR) (II.2.3.1), then examine the draft for a Protocol on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness, which is currently being negotiated (II.2.3.2) and finally turn to the framework of the African Charter on the Rights and Welfare of the Child, which entails a specific right to nationality for children (II.2.3.3).[611] The analysis reveals an innovative approach to the protection of the right to nationality, which has been strongly influenced by the case law of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights (ACtHPR).[612]

2.3.1 *African Charter on Human and Peoples' Rights*

The main human rights instrument on the African continent is the African Charter on Human and Peoples' Rights.[613] [614] Among its broad catalogue of civil, political, economic, social, cultural and collective rights the ACHPR does

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Africa, Draft May 2017 ('Draft Protocol on Nationality' or 'AU Draft Protocol'), Preamble Recital 12. See also African Union, 'Explanatory Memorandum to the Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa' (AU 2017) para 7 <https://au.int/sites/default/files/newsevents/workingdocuments/34197-wd-draft_protocol_explanatory_memo_en_may2017-jobourg.pdf>. See further Human Rights Council, 'Report of the Independent Expert on Minority Issues on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' (HRC 2008) UN Doc. A/HRC/7/23 para 50. See on the history of citizenship in Africa Mahmood Mamdani, *Citizen and Subject: Contemprary Africa and the Legacy of Late Colonialism* (Princeton University Press 2018).

611 The section will not discuss the sub-regional level, namely the initiatives within the Economic Community of West African States (ECOWAS) and the Abidjan Declaration and the Banjul Plan of Action, which both address statelessness. See also ECOWAS, 'Nationality and Statelessness in West Africa — Background Note' (ECOWAS 2017) 5 <https://www.unhcr.org/protection/statelessness/591c20ac7/statelessness-conference-2017-background-note-english.html>.

612 The ACmHPR and the ACtHPR form the institutional framework for individual complaints under the ACtHPR. While the ACmHPR can only make recommendations, the Court has the competence to adopt binding judgments. Before the Court not only the rights enshrined in the African Charter on Human and Peoples' Rights can be invoked, but all human rights treaties ratified by a state party. See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2n ed, Oxford University Press 2019) 207.

613 African Charter on Human and Peoples' Rights, 26 June 1981, 1520 UNTS 217 ('African Charter', 'ACHPR').

614 Fatsah Ouguergouz, 'African Charter on Human and Peoples' Rights (1981)' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010) para 2 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e741>.

itself not enshrine a right to nationality.[615] Other instruments adopted within the framework of the Charter that address nationality matters directly equally fall short of actually protecting a right to nationality.[616] An exception, however, is Resolution No. 234, adopted by the ACmHPR in 2013, dealing with the right to nationality.[617] Referring to the relevant international and regional legal framework the Resolution reaffirms:

> the right to nationality of every human person is a fundamental human right implied within the provisions of Article 5 of the African Charter on Human and Peoples' Rights and essential to the enjoyment of other fundamental rights and freedoms under the Charter.[618]

The Resolution calls upon states to refrain from taking discriminatory decisions in nationality matters, to observe minimum procedural standards to avoid arbitrary decisions, to ensure judicial review, to ratify all relevant international and regional instruments, to ensure civil registration and to prevent and reduce statelessness.[619] It recalls that all children have a right to the nationality of the state in which they were born if they would otherwise be stateless and urges states to prohibit arbitrary denial or deprivation of nationality.[620] The Resolution is not legally binding.[621] However, it mandated

615 Article 12 ACHPR enshrines different rights relating to migration, namely the right to leave any country and to return, the right to seek asylum and limitations upon expulsion measures as well as a prohibition of mass expulsions, but does not explicitly refer to nationality. See also Darren Ekema Ewumbue Monono, 'People's Right to a Nationality and the Eradication of Statelessness in Africa' (2021) 3 Statelessness and Citizenship Review 33; Manby, 'Citizenship Law in Africa' (n 609) 10.

616 Article 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 7 November 2003 calls upon states to guarantee women the right to retain their nationality or to acquire the nationality of their husbands (let. g). Let. h grants women equal rights to transmit their nationality to their children, "except where this is contrary to a provision in national legislation or is contrary to national security interests". Hence, the Protocol effectively fails to grant women equal rights in nationality matters, especially regading the transmission of nationality to their children, see Manby, *Citizenship in Africa* (n 363) 21.

617 African Commission on Human and Peoples' Rights, Resolution No. 234 on the right to nationality, Banjul, 23 April 2013, OAU Doc ACHPR/Res. 234 (LIII) 13 ('Resolution No. 234'). See also Horace S Adjolohoun, 'African Commission on Human and Peoples' Rights Resolution 234 on the Right to Nationality' (2014) 53 International Legal Materials 413.

618 Resolution No. 234 (n 617), Recital 10.

619 *Ibid.*, Recital 11 ff.

620 *Ibid.*, Recital 13.

621 Adjolohoun (n 617) 414.

the African Commission's Special Rapporteur on Refugees, Asylum Seekers, Displaces and Migrants in Africa to carry out a study on the right to nationality in Africa.[622] This study, published in 2015, makes a broad list of recommendations pertaining to the right to nationality.[623] Concluding that the African region lacks an effective instrument safeguarding the right to a nationality, the study suggested the adoption of a new Protocol to the ACHPR on that matter.

In the absence of a specific provision on the right to nationality in the ACHPR, the ACmHPR and the ACtHPR have stepped in and regularly address nationality matters indirectly based on other provisions in the Charter. By doing so, the Commission and the Court have made a significant contribution to the development of the right to nationality under the Charter. Many of the cases concerning nationality before the Commission and the Court were complaints against expulsions under Article 12 ACHPR.[624] But other provisions of the Charter — namely the principles of non-discrimination and equality before the law (Articles 2 and 3), the right to human dignity and recognition of legal status (Article 5) and to a fair trial (Article 7) — have also been interpreted by the African Commission in a way that implicitly recognizes the right to nationality.[625]

The central case on nationality before the ACmHPR is the case of *John K. Modise v Botswana*.[626] [627] The complainant, John Modise, was born in South Africa to a Botswanan father and a South African mother and grew up in Botswana.[628] After he had started a political career in Botswana, Botswanan authorities refused to recognize him as a citizen, declared him an undesirable immigrant and deported him to South Africa, where he spent several years in homelands and in border zones between the two countries.[629] Mr. Modise, *inter alia*, complained that he should have acquired Botswana nationality by

622 Resolution No. 234 (n 617), Recital 17.

623 African Commission on Human and Peoples' Rights, 'Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons, Study on the Right to Nationality in Africa' (2015) 50 ff <http://www.achpr.org/files/special-mechanisms/refugees-and-internally-displaced-persons/the_right_to_nationality_in_africa.pdf>.

624 Bialosky (n 4) 163.

625 African Commission on Human and Peoples' Rights, 'Study on the Right to Nationality in Africa' (n 623) 6.

626 *John K Modise v Botswana* [2000] ACmHPR Communication No. 97/93.

627 Bialosky (n 4) 185.

628 *Modise v Botswana* (n 626) para 1.

629 *ibid 5.* In fact, he was only refused recognition as a citizen after he founded an opposition political party in 1978, see for more details Manby, *Citizenship in Africa* (n 363) 121.

descent and was unjustly deprived of his real nationality.[630] The Commission concluded that the denial to grant the complainant Botswanan citizenship amounted to a violation of the right to equal protection before the law and the right to respect for human dignity and recognition of legal status under the Charter.[631] Finding that Mr. Modise actually has Botswanan citizenship the ACmHPR then held that the repeated deportation of the complainant from Botswana to South Africa amounted to a violation of his rights.[632] In *Modise v Botswana* the ACmHPR implicitly acknowledged a right to nationality. If the conditions for acquiring of nationality in domestic law were fulfilled, nationality had to be granted.[633] A denial of nationality in such situations amounts to a violation of the ACHPR. Moreover, the judgment highlights the close link between nationality and the full and effective enjoyment of other human rights, namely also political rights.

The protection against unlawful expulsion was also at stake in the cases of *Malawi African Association and Others v Mauritania*[634] and *Amnesty International v Zambia*.[635] The case of *Malawi African Association* had arisen out of political tensions, during the course of which almost 50'000 persons were deprived of their identity documents, no longer recognized as Mauritanian citizens and expelled to Senegal and Mali.[636] The ACmHPR found that the complainants were deprived of their Mauritanian citizenship in violation of Article 12(1) ACHPR.[637] In addition to finding a violation of the Charter, the Commission recommended that Mauritania, as a positive measure, issued the persons concerned new identity cards to allow them to return to their country.[638] The case of *Amnesty International v Zambia* concerned two politicians who were deported from Zambia after losing an election in 1991. The Zambian government refused to recognize them as citizens. The ACmHPR found a a number of violations of the Charter, including a violation of the right to be heard, as the complainants were not granted access to the procedure

630 *Modise v Botswana* (n 626) para 9.
631 Articles 3(2) and 5 ACHPR, see *ibid 89*.
632 *ibid 91 ff.*
633 Bialosky (n 4) 186. See also *Good v Botswana* where the Commission found a violation inter alia of Article 12.4 of the ACHPR and recalled the obligations derived from international law limiting state sovereignty in nationality matters, *Kenneth Good v Republic of Botswana* [2010] ACmHPR Communication No. 313/05, 26 May 2010.
634 *Malawi Africa Association and others v Mauritania* [2000] ACmHPR Communications No. 54/91, 61/91, 96/93, 98/93, 164/97, 196/97, 210/98, 11 May 2000.
635 *Amnesty International v Zambia*, Communication No. 212/98, 5 May 1999.
636 *Malawi Africa Association v Mauritania* (n 634) para 13.
637 *ibid 126.*
638 *ibid 145.*

relating to their citizenship, as well as a violation of Article 12(4) regarding their deportation to Malawi.[639] The Commission noted that by expelling the victims from Zambia it had arbitrarily removed their citizenship which "cannot be justified".[640] Finally, it found that Zambia had forced the two victims to live as stateless persons under degrading conditions and without their families which amounted to a violation of their dignity as human being.[641] The cases of *Amnesty International v Zambia* and *Modise v Botswana,* moreover, show how closely citizenship is tied to political rights and to the functioning of democratic structures. This is also illustrated by the case of *Legal Resources Foundation v Zambia*,[642] which deals with the question whether political rights may be tied to the mode of acquisition of citizenship. The complainant argued that an amendment to the Zambian constitution, according to which the office of president of the country can only be held by a person whose parents both are Zambian by birth or descent, violates the ACHPR. The ACmHPR argued that the retroactive limitation of political rights to "indigenous Zambians" — ie persons who were born and whose parents were born in Zambia — is arbitrary and violates Article 13 ACHPR.[643] Even though the decision does not directly relate to a right to nationality, it illustrates that states may not make the exercise of passive political rights dependent on certain criteria of citizenship — *in casu* a double *jus soli*.[644]

Another central case for the discussion of the right to nationality under the African Charter is the case of *The Nubian Community in Kenya v The Republic of Kenya.*[645] The case concerns the citizenship status of the Nubian ethnic minority in Kenya. The complainants argued that the Nubian people have been denied identity documents, which effectively deprived them of the possibility of proving their citizenship and of the benefits tied to that status and rendered them *de facto* stateless.[646] Examining whether the denial of identity documents amounted to a violation of human dignity, the Commission referred

639 *AI v Zambia* (n 635) para 44.
640 *ibid 52.*
641 *ibid 58.*
642 *Legal Resources Foundation v Zambia* [2001] ACmHPR Communication No. 211/98, 7 May 2001 para 3.
643 *ibid 71.*
644 The Commission confirmed this approach in the case of *Mouvement ivoirien des droits humains (MIDH) v Côte d'Ivoire* [2008] ACmHPR Communication No. 246/02, 29 July 2008.
645 *The Nubian Community in Kenya v The Republic of Kenya* [2015] ACmHPR Communication No. 317/06, 28 February 2015.
646 *ibid 5 f.*

to the judgment of the IACtHR in the case of *Yean and Bosico v Dominican Republic*[647] and noted that:

> nationality is intricately linked to an individual's juridical personality and that denial of access to identity documents which entitles an individual to enjoy rights associated with citizenship violates an individual's right to the recognition of his juridical personality. The Commission considers that *a claim to citizenship or nationality as a legal status is protected under Article 5 of the Charter*.[648] (emphasis added)

The ACmHPR then recalled that while states do "enjoy a wide discretion when it comes to determining who qualifies to acquire its nationality", this discretion is limited by the obligation to prevent statelessness and discrimination.[649] Even though Kenya is not a state party to the 1954 Convention or the 1961 Convention, the Commission nevertheless referred to the two Conventions, noting that they "outline the position of international customary law on State obligations to prevent statelessness".[650] It concluded that Kenya failed to take measures preventing members of the Nubian community from becoming stateless and to put in place fair, non-discriminatory and non-arbitrary processes for acquiring identity documents, both of which violated Article 5 ACHPR.[651] The discriminatory treatment faced by members of the Nubian minority resulted in a tenuous citizenship status that left the Nubians in a precarious situation, in violation of other rights in the Charter.[652]

The same day, the African Commission also issued a decision for the case of *Open Society Justice Initiative v Côte d'Ivoire*.[653] The case concerned the concept of '*ivoirité*', an official policy that stipulated that Ivorian nationality could only be obtained by persons born in Côte d'Ivoire from two Ivorian parents.[654] The complainants argued that this policy arbitrarily deprived the ethnic minority of Dioulas of their Ivorian nationality.[655] The ACmHPR assessed the Ivorian

647 *Yean and Bosico* (n 395).
648 *The Nubian Community v Kenya* (n 645) para 140.
649 *ibid 145.*
650 *ibid 146.*
651 *ibid 151.*
652 *ibid 167 f.*
653 *Open Society Justice Initiative v Côte d'Ivoire* [2015] ACmHPR Communication No. 318/06, 28 February 2015.
654 See *ibid 4.*
655 *ibid 91.*

nationality regime under the prohibition of torture and cruel, inhuman and degrading treatment according to Article 5 ACHPR.[656] The decision of the Commission entails an elaborate discussion of the concept of nationality in the African context and illustrates the complexity of nationality matters in the post-colonial context.[657] The Commission elaborated that "the right to a nationality of any human person is a fundamental right derived from the terms of Article 5 of the Charter and essential for the enjoyment of other fundamental rights and freedoms guaranteed by the Charter".[658] Nationality, according to the Commission, is "the primordial mode of realization of the right to the recognition of legal status".[659] Unreasonable laws on the acquisition of nationality, such as those in Côte d'Ivoire, were arbitrary and therefore not consistent with the right to nationality.[660] The ACmHPR then examined the Ivorian nationality code in detail and concluded:

> In short, on the right to nationality as a recognition of legal status, the Commission observes that the Ivorian nationality Code establishes original nationality for Ivorians and acquired nationality for foreigners, but fails to clearly define who an outright Ivorian is, who an Ivorian by origin is and who a foreigner is. This way, the Code and laws [...] have prevented access to nationality both theoretically and practically. [...] Consequently, the laws and practices of the Respondent State violate the provisions of Article 5 of the Charter with regard to all victims.[661]

The Commission's decision in *Open Society Justice Initiative v Côte d'Ivoire* illustrates for how it interprets the concept of nationality, links it to other international legal instruments and the relevant case law of international tribunals and derives a right to nationality directly from Article 5 ACHPR.

656 *ibid 95 ff.*

657 See for a discussion of the concept of nationality and citizenship in Africa in detail among many Mamdani (n 610); Said Adejumobi, 'Citizenship, Rights, and the Problem of Conflicts and Civil Wars in Africa' (2001) 23 Human Rights Quarterly 148; Samantha Balaton-Chrimes, *Ethnicity, Democracy and Citizenship in Africa: Political Marginalisation of Kenya's Nubians* (Routledge 2016); Bronwen Manby, *Citizenship and Statelessness in Africa: The Law and Politics of Belonging* (Wolf Legal Publishers 2015); Manby, *Citizenship in Africa* (n 363).

658 *OSI v Côte d'Ivoire* (n 653) para 97.

659 *ibid.*

660 *ibid 109.*

661 *ibid 138.*

The ACtHPR, so far, has only decided one case that touches upon nationality issues.[662] The case of *Anudo v Tanzania* of 2018 concerned the denationalization and expulsion of a Tanzanian citizen.[663] Tanzanian authorities had confiscated Mr. Anudo's passport, withdrawn his nationality and expelled him to Kenya, arguing that there were irregularities with his citizenship and that he obtained his passport fraudulently. In Kenya, Mr. Anudo found himself stuck in a no man's land between the Kenyan and Tanzanian border.[664] The Court reaffirmed states' sovereignty in granting nationality,[665] and that "the granting of nationality falls within the ambit of the sovereignty of states".[666] It acknowledged that neither the African Charter nor the ICCPR enshrine a right to nationality, but found that the UDHR guarantees a right to nationality and has been recognized as forming part of customary international law.[667] Thus, "the power to deprive a person of his or her nationality has to be exercised in accordance with international standards, to avoid the risk of statelessness".[668] According to these standards, so the Court stated, loss of nationality is only permissible if it has a clear legal basis, serves a legitimate purpose under international law, is proportionate to the interest protected and respects procedural guarantees including the right to independent review.[669] *In casu,* the Court was not convinced by the evidence provided by the Tanzanian government to justify the withdrawal of nationality and found the deprivation to be in violation of Article 15(2) UDHR.[670] The Court, further, found a violation of the right not to be arbitrarily expelled as the expulsion resulted from the arbitrary deprivation of nationality, which violated the principle that a nationality may not be withdrawn for the sole purpose of expelling a person.[671] Finally, the ACtHPR argued that international law requires that citizens, by birth, must have a

662 The case of *Youssef Ababou v Morocco* in which the applicant also raised complaints relating to nationality issues, including the failure to be issues identity documents, was struck out for lack of jurisdiction as Morocco is not a member state to African Union and has not signed or ratified the ACtHPR Protocol, *Youssef Ababou v Kingdom of Morocco* [2011] ACtHPR Application No. 007/2011 para 11 ff.

663 *Anudo v Tanzania* (n 71). See in more detail Bronwen Manby, 'Anudo Ochieng Anudo v Tanzania (African Court on Human and Peoples' Rights, App No 012/2015, 22 March 2018)' (2019) 1 The Statelessness and Citizenship Review 170.

664 *Anudo v Tanzania* (n 71) para 4.

665 *ibid 74.*

666 *ibid 77.*

667 *ibid 76.*

668 *ibid 78.*

669 *ibid 79.*

670 *ibid 88.*

671 *ibid 99 ff.*

judicial remedy to challenge decisions concerning their nationality and found Tanzania fell below this standard.[672] Ultimately, the ACtHPR not only found a violation of the rights not to be expelled arbitrarily and to be heard under the ACHPR, but also a violation of the prohibition of arbitrary deprivation of nationality under Article 15(2) UDHR and of the right to be heard under Article 14 ICCPR.[673] An interesting point in the case of *Anudo v Tanzania* is the way the African Court accepts the right to nationality under Article 15 UDHR to be binding customary international law, and how it links the right to be heard to the withdrawal of nationality. In doing so, it defines certain minimum procedural standards that need to be fulfilled for the deprivation not to be arbitrary. In the absence of a formalized deprivation procedure, moreover, the burden of proof that the individual concerned is not a citizen lies with the state.[674]

Thus, the Commission and the Court in their jurisprudence, effectively developed a right to nationality under the ACHPR without an explicit basis in the Charter. As shown by the case of *Anudo v Tanzania*, the right to nationality can even be directly invoked before the institutions of the African Charter on Human and Peoples' Rights. This clearly strengthens the right to nationality in the African human rights system.

2.3.2 *Draft Protocol on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa*

A new development promises to significantly strengthen the right to nationality in the African human rights system. Based on a proposal by the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa, the member states of the African Union are currently negotiating a protocol to the ACHPR on the right to nationality with the aim of identifying, preventing and reducing statelessness and protecting the right to nationality.[675] A first draft of this Protocol on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa was published in 2017 and a revised draft and explanatory memorandum released in June 2018.[676]

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672 *Anudo v Tanzania* (n 71).

673 *ibid* 132.

674 Bronwen Manby, '"Restore the Factory Settings": Efforts to Control Executive Discretion in Nationality Administration in Africa' (*Citizenship Rights in Africa Initiative Blog*, 16 April 2018) <http://citizenshiprightsafrica.org/restore-the-factory-settings-efforts-to-control-executive-discretion-in-nationality-administration-in-africa/>.

675 The process was initiated based on the 2013 Resolution No. 234 (n 617) and the 2015 study on the right to nationality by the Special Rapporteur and, at the time of writing was still ongoing. See also Chapter 4, II.3.2.1.

676 See Manby, *Citizenship in Africa* (n 363) 22; Ewumbue (n 615) 50.

The current draft foresees 21 substantive provisions that should govern nationality matters in African states. Its purpose is to:

a. Ensure respect for the right to a nationality in Africa;
b. Establish the obligations and responsibilities of States relative to the specific aspects of the right to a nationality in Africa; and
c. Ensure that statelessness in Africa is eradicated.[677]

The instrument aims to facilitate the inclusion of individuals in African States, to provide a legal solution for the recognition and exercise of the right to a nationality, to eradicate statelessness and to identify the principles that govern the relationship between individuals and states in nationality matters.[678] It draws, *inter alia*, on the models of the ECN and the ILC Draft Articles on Nationality.[679]

Article 3(2) of the Protocol declares the right to nationality to be a general principle. Not only does this right include both a general right to nationality (lit. a) and a prohibition of arbitrary deprivation or denial of recognition of nationality and the right to change one's nationality (lit. b), it also specifies, that everyone should have the right to the nationality of at least one state to which she has an appropriate connection (lit. c).[680] Moreover, it recognizes the principle of the best interests of the child as a primary consideration in nationality matters (lit. d). If adopted, the Draft Protocol would be the first instrument that generally ties the right to nationality to an individual's actual connections in identifying the state that owes the obligation to grant its nationality. This is a significant change compared to existing instruments.[681]

The right to nationality based on an appropriate connection is further developed in the substantive provisions on the acquisition of nationality. In cases, where a child would otherwise be stateless, and in those of second generation migrants, states shall always attribute nationality *jure soli* (Articles 5(1)(b) and (c)).[682] Habitual residents must have the possibility to acquire nationality.[683] Such acquisition may be made subject to certain conditions, including

677 Article 2 Draft Protocol on the Right to Nationality. See also African Union, 'Explanatory memorandum' (n 610) para 1.
678 *ibid.*
679 African Union, 'Explanatory memorandum' (n 610) para 9 ff.
680 *ibid para 19 f.*
681 The Explanatory Memorandum points out that the concept is derived from the ILC Draft Articles on Nationality which applies it in the context of state succession, see *ibid 25.*
682 *ibid 36.*
683 Article 6(1) Draft Protocol.

a residence requirement of a maximum of ten years.[684] Certain groups shall, moreover, have the possibility of facilitated naturalization. Among these groups are people who already were habitually resident in the state as children, stateless persons and refugees.[685] Article 8 addresses the specific situation of nomadic and cross-border populations.[686] For these groups, the Draft Protocol suggests that an appropriate connection can be evidenced by factors such as repeated residence, presence of family members, cultivation of crops, use of water points or grazing sites, burial sites of ancestors and the testimony of members of the community, as well as the expressed will of the person herself (lit. c). This provision is unique and, as the Explanatory Memorandum points out, "recognizes the specific aspects of nationality and statelessness in an African context, where many millions of people follow a nomadic lifestyle, or live in communities divided by a colonial border".[687]

As the wording of Article 3(2)(c) ("every person has the right to the nationality of at least one state […]") indicates, the Draft Protocol allows for multiple nationality.[688] In fact, it obliges states not to prohibit multiple nationality in cases where a child has been attributed multiple nationalities at birth, and in cases where someone acquires another nationality automatically through marriage (Article 11(2)). Moreover, states shall not make the renunciation of another nationality a condition for acquiring nationality if such renunciation is not possible, cannot be reasonably required or exposes the person to the risk of statelessness (Article 6(3)). The Draft Protocol, however, intends to leave states a relatively wide margin of discretion to make distinctions between the modes of acquiring of nationality and between single and dual nationals in the exercise of political rights and the deprivation of nationality (Article 4(3)). Here, the Draft Protocol seems to fall below the standards enshrined in other international instruments that establish absolute prohibitions of discrimination in nationality matters.[689]

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684 According to the Explanatory Memorandum most African states require five years of residence, see African Union, 'Explanatory memorandum' (n 610) para 49.

685 Article 6(2) Draft Protocol. Article 19 specifies that states should facilitate the recognition or acquisition of nationality for stateless persons and persons whose nationality is in doubt to offer them effective protection.

686 Ie persons who follow a pastoralist or nomadic lifestyle and whose migratory routes cross borders or who life in border regions and whose place of habitual residence cannot be defined clearly, see African Union, 'Explanatory memorandum' (n 610) para 77.

687 *ibid 63.*

688 *ibid 77.*

689 For example, Article 5 ECN.

Regarding loss or deprivation of nationality, Article 16(1) of the Draft Protocol states that "a State Party shall not provide for the loss of its nationality". Exceptions to this principle are possible where the recognition or acquisition of nationality has been obtained fraudulently within a maximum ten year period and provided the deprivation would not be disproportionate (Article 16(3)). Deprivation of nationality shall only be possible if nationality was acquired after birth, if it is provided for in a law of general application, and in cases where the person concerned served voluntarily in foreign military forces or was convicted of a crime that is seriously prejudicial to the vital interests of the state concerned (Article 16(4)). Moreover, deprivation of nationality shall not affect family members (Article 16(6)). Arbitrary deprivation, including deprivation on racial, ethnic, religious or political grounds, and on grounds related to the exercise of rights established in the ACHPR, is absolutely prohibited (Article 16(5)), as is deprivation of nationality resulting in statelessness (Article 16(7)). The latter would also be a novelty compared to current international legal standards.

A number of provisions in the Draft Protocol deal with procedural questions. States shall provide for documents evidencing the entitlement to nationality, such as birth certificates, and for certificates of nationality and documents that are conclusive proof of a person's nationality, including identity cards and passports (Articles 12 and 13). Article 21 provides that all rules governing recognition, acquisition, loss, deprivation, renunciation, certification or recovery of nationality must be set out in law, be clear and accessible. It also notes that procedures may not be arbitrary, must be processed within a reasonable time and that fees and other procedural requirements must be reasonable. This is an important protection for the principles of due process in nationality matters.[690] Article 22, finally, foresees that the African Commission and the African Court will have jurisdiction to hear individual complaints once the Protocol is in force. Thus, compared to the ECN, the African Union Protocol would have an effective enforcement mechanism.

The Protocol has not yet been adopted. It is still being negotiated among the member states of the AU and since 2018 there have been no significant developments.[691] It remains to be seen if, and if so, in which form the African Union Protocol on Nationality will be adopted.[692] If it is adopted without significant

690 African Union, 'Explanatory memorandum' (n 610) para 113.

691 The plan to adopt it in 2019 was not realized, see https://www.unhcr.org/ibelong/event/meeting-on-the-african-union-protocol-on-the-right-to-a-nationality-and-the-eradication-of-statelessness/.

692 Manby indicated that the state representatives tried to water down the legal effect of the Protocol, see Manby, *Citizenship in Africa* (n 363) 22 n 69. See also Manby, 'Restore the Factory Settings' (n 674).

changes to the draft, it would be the most comprehensive and specific instrument on nationality besides the European Convention on Nationality.[693] The Protocol would establish a novel approach to nationality matters, strengthening the right to nationality based on an individual's connection to a state — irrespective of whether a person is stateless or not.[694] As Manby writes, it would "radically strengthen rights to belong".[695]

2.3.3 *African Charter on the Rights and Welfare of the Child*

As long as the Protocol on Nationality and Statelessness is not yet in force, the African Charter on the Rights and Welfare of the Child (ACC)[696] is the only instrument that explicitly enshrines the right to nationality in the African context.[697] Article 6 ACC guarantees the child's right to a nationality. Article 6(3) provides that "every child has the right to acquire a nationality". Article 6(4) specifies how states are supposed to implement this right and prevent statelessness:

> State Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth he is not granted nationality by any other State in accordance with its laws.

Article 6 ACC follows the model of Article 7 CRC.[698] It introduces a *jus soli*-mechanism for children who would otherwise be stateless, similar to Article 1 1961 Convention.[699] Even though the wording of Paragraph 4 is relatively vague, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) — the monitoring body to the ACC — has interpreted Article 6(4) as an obligation of result: "States Parties need to make sure that all necessary measures are taken to prevent the child from having no nationality."[700]

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693 de Groot and Vonk (n 74) 262.

694 See also Manby, 'Restore the Factory Settings' (n 674).

695 Manby, *Citizenship in Africa* (n 363) 317.

696 African Charter on the Rights and Welfare of the Child, 11 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990) ('African Children's Charter', 'ACC').

697 Manby, *Citizenship in Africa* (n 363) 21.

698 Manby, 'Citizenship Law in Africa' (n 609) 10. See also Adjami and Harrington (n 37) 99.

699 See de Groot and Vonk (n 74) 253; Manby, *Citizenship in Africa* (n 363) 21.

700 *Institute for Human Rights and Development in Africa* (*IHRDA*) *and Open Society Justice Initiative* (*on behalf of Children of Nubian Descent in Kenya*) *v the Government of Kenya* [2011] ACERWC Decision No 002/Com/002/2009 para 52.

In 2014, the ACERWC adopted a General Comment on Article 6 ACC.[701] The Committee notes that the right to a name, the right to birth registration and the right to a nationality guaranteed in Article 6 are interlinked.[702] It stresses that the rights in Article 6 constitute the pillars of a person's identity.[703] The possession of a recognized and effective nationality, according to the Committee, is essential for the respect for and fulfillment of other human rights.[704] Nationality is a necessary foundation for the exercise of political rights, the freedom of movement, participation in the formal economy and the enjoyment of diplomatic protection.[705] Thus, "a State's compliance with the obligation to prevent and reduce statelessness starts from taking all necessary measures to ensure that all children born on its territory are registered", irrespective of whether they are eligible for citizenship or not.[706] In doing so, states do not have unlimited discretion, but have to respect their international legal obligations.[707] As the Committee notes, Articles 6(3) and (4) ACC oblige states to grant their nationality to children born on their territory if they would otherwise be stateless.[708] It also stresses the importance of nationality as a form of "recognition as a full participant in the political and social life of the country where a person has been born and lived all his or her life"[709] and encourages states to facilitate the acquisition of nationality for children who were not born in on the territory but have arrived as children and grew up there.[710]

The Committee's General Comment on Article 6 drew substantively on the Committee's own jurisprudence on the right to nationality. In its decision on *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian Decent in Kenya v Kenya*[711] the

701 African Committee of Experts on the Rights and Welfare of the Child, 'General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child: "Birth Registration, Name and Nationality"' (ACERWC 2014) ACERWC/GC/02 <http://citizenshiprightsafrica.org/wp-content/uploads/2016/01/ACERWC-General-Comment-Article-6-Eng.pdf>.

702 *ibid 3 and 9.*

703 *ibid 23.*

704 *ibid 83 f.*

705 *ibid 84.*

706 *ibid 23.*

707 *ibid 87.*

708 *ibid 88.*

709 *ibid 89.*

710 *ibid 92.*

711 *Children of Nubian Descent v Kenya* (n 700).

ACERWC interpreted the child's right to nationality under the ACC.[712] The case of the *Children of Nubian Descent in Kenya* was the very first decision on the merits of an individual communication before the Committee. It concerns the nationality of children of Nubian ethnicity in Kenya who were regarded as 'aliens' by Kenyan authorities due to their ethnic origins and continue to have an uncertain citizenship status.[713] Children of Nubian descent often lack birth registration and have major difficulties to obtain identity documents to prove their nationality upon reaching adulthood.[714] In its decision, the Committee found multiple violations of Articles 6(2), (3) and (4), Article 3, Article 14(2) and Article 11(3).[715] It noted that children that are not registered are not issued birth certificates and because of that rendered stateless, as they cannot prove their nationality. State parties to the ACC are under the obligation to ensure that all children are effectively registered immediately after birth.[716] Moreover, the Committee stressed the strong and direct link between birth registration and nationality. Even though Article 6(3) does not explicitly state that every child has the right from his birth to acquire a nationality, a purposive reading and interpretation of the provision suggests that children should have a nationality from birth.[717] Therefore, the Kenyan practice of leaving Nubian children without a nationality until the age of 18 violates Article 6 ACC and the best interests of the child.[718] It has an enormously negative impact on children leaving them in a legal limbo and hindering them to freely exercise their socio-economic rights. "Being stateless as a child", so the Committee, "is generally *antithesis to the best interests of children*" (emphasis added).[719] Therefore, the Committee found that

> although states maintain the sovereign right to regulate nationality, in the African Committee's view, state discretion must be and is indeed

712 See also Bialosky (n 4) 163.

713 See also the case on *The Nubian Community in Kenya* of the ACmHPR (n 644), Chapter 4, 11.2.3.1. See on the citizenship status of Nubian Kenyans generally Balaton-Chrimes (n 657).

714 The situation is comparable to that of persons of Haitian descent in the Dominican Republic as Bialosky and de Groot and Vonk point out. The Committee itself refers to the judgment of the IACtHR in the case of *Yean and Bosico v Dominican Republic* in its decision, see *Children of Nubian Descent v Kenya* (n 700) para 56. See also Bialosky (n 4) 187; de Groot and Vonk (n 74) 727.

715 *Children of Nubian Descent v Kenya* (n 700) para 69.

716 *ibid 40.*

717 *ibid 42.*

718 *ibid.*

719 *ibid 46.*

> limited by international human rights standards, in this particular case the African Children's Charter, as well as customary international law and general principles of law that protect individuals against arbitrary state actions. In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid and reduce statelessness.[720]

The Committee is careful to not to suggest that the Charter would require states to introduce a *jus soli* approach. Nevertheless, in line with the principle of the best interests of the child, it notes that the intent of Article 6(4) is that a state should allow a child to acquire its nationality if it is born on its territory and is not granted nationality by another state.[721] The merely theoretical possibility that a child might be entitled to acquire the nationality of another state is not enough to abrogate this obligation.[722]

The conclusion that can be drawn from the foregoing analysis of the right to nationality on the African continent is not straightforward. Nevertheless, the ACmHPR, the ACtHPR and the ACERWC have developed a nuanced case law deriving a right to nationality from other human rights. The drafting of a Protocol to the Charter on Human and Peoples' Rights on the right to nationality represents a significant step towards the recognition of nationality as a human right and offers an innovative attempt at concretizing states' obligations under the right to nationality based on one's appropriate connection, provided it will be adopted. Looking at these developments Africa, as Bialosky writes:

> is perhaps the region most representative of the global shift toward recognition of nationality as a fundamental human right. The attention it has given to the issue of nationality is cause for optimism that any future right to a nationality protected in Africa will be at least as strong as that which is recognized by other regional human rights bodies.[723]

2.4 Middle East and North Africa

In the Middle East and North Africa, the protection of the right to nationality is relatively weak. As Zahra Albarazi notes, the Middle East and North African region "has always had a complicated relationship with the notion of

720 *ibid 48.*
721 *ibid 50.*
722 *ibid 51.*
723 Bialosky (n 4) 189.

nationality and which individuals and groups to determine as nationals".[724] Nevertheless, both the Arab Charter on Human Rights[725] (II.2.4.1) and the Covenant on the Rights of the Child in Islam (II.2.4.2) entail a provision dealing with the right to nationality.

2.4.1 Arab Charter on Human Rights

Article 29 of the revised version of the Arab Charter on Human Rights[726] enshrines the right to nationality. It establishes that:

1 Every person has the right to a nationality, and no citizen shall be deprived of his nationality without a legally valid reason.
2 The State Parties shall undertake, in accordance with their legislation, all appropriate measures to allow a child to acquire the nationality of his mother with regard to the interest of the child.
3 No one shall be denied the right to acquire another nationality in accordance with the applicable legal procedures of his country.

Thus, Paragraph 1 of Article 29 ArCHR enshrines both the right to a nationality and a prohibition of deprivation of nationality without a *legally valid reason*.[727] Bialosky argues that it should be interpreted synonymously with the notion of arbitrariness.[728] Article 29(2) addresses the right of the child to a nationality. It grants the right of children to acquire the nationality from their mothers "with regard to the interest of the child". Even though the provision seems to stipulate that women should have (equal) rights in passing on their nationality to their children, this right is limited, in practice, to cases where the father is a foreign national or is stateless.[729] Moreover, the already vague obligation ("shall undertake all appropriate measures") is further narrowed down

724 Zahra Albarazi, 'Regional Report on Citizenship: The Middle East and North Africa (MENA)' (Global Citizenship Observatory (GLOBALCIT) 2017) GLOBALCIT Comparative Report 2017/3 <http://cadmus.eui.eu/bitstream/handle/1814/50046/RSCAS_GLOBALCIT_Comp_2017_03.pdf?sequence=1&isAllowed=y>.

725 Arab Charter on Human Rights, 23 May 2004, reprinted in 12 *International Human Rights Reports* 893 (2005) ('Arab Charter', 'ArCHR').

726 The Arab Charter on Human Rights of 23 May 2004 replaced the Arab Charter on Human Rights of 1994 which never entered intro force.

727 The notion of 'legally valid reason' has never been defined, due to the lack of a monitoring body or enforcement mechanism to the Charter.

728 Bialosky (n 4) 165.

729 Wael Allam, 'The Arab Charter on Human Rights: Main Features' (2014) 28 Arab Law Quarterly 40, 54 n. 67.

by reference to domestic legislation, leaving states with wide discretion.[730] The third paragraph of Article 29 ArCHR grants the right to "acquire another nationality". This right to acquire another nationality implies a right to change one's nationality, and also to possess two or more nationalities.[731] Again, however, the right is limited by reference to the "applicable legal procedures of his country". Thus, considering that many Arab states do not allow for dual nationality and some even prohibit the renunciation of nationality, this right seems to be of little practical relevance.[732] Bialosky moreover criticizes that the wording of Article 29(3) "seems to allow for domestic legislation allowing states to deprive citizenship to nationals who acquire a new nationality".[733] Overall Article 29 ArCHR leaves ample room for state discretion in nationality matters and does not grant individuals any protection beyond the rights already granted at the domestic level.

2.4.2 *Covenant on the Rights of the Child in Islam*

Article 7 of the legally binding Covenant on the Rights of the Child in Islam (CRCI)[734] enshrines the right of a child to an identity. The provision is inspired by Article 7 and 8 CRC.[735] Regarding nationality, Article 7 states the right to have his or her nationality determined (Paragraph 1) and to have safeguarded the elements of one's identity, including nationality (Paragraph 2). Article 7(2) stipulates that "states shall make every effort to resolve the issue of statelessness for any child born on their territories or to any of their citizens outside their territory". The provision reflects both *jus soli* and *jus sanguinis* by declaring both the state of birth, as well as the country of nationality of one of the parents responsible for granting the child a nationality.[736] Article 7(3) concerns children of unknown decent or children who are legally assimilated to this status, and explicitly mentions the right of such children to nationality. The provision not only includes foundlings but also children whose parents may be known and are not legally recognized and cannot transmit their nationality to the child.[737] Hence, Article 7 of the Covenant does not grant

730 Bialosky (n 4) 165.
731 See also de Groot and Vonk (n 74) 331.
732 Albarazi (n 724) 16 f.
733 Bialosky (n 4) 165.
734 Covenant on the Rights of the Child in Islam, June 2005, OIC Doc OIC/9-IGGE/HRI/2004/Rep.Final ('CRCI').
735 de Groot and Vonk (n 74) 332.
736 van Waas, *Nationality Matters* (n 115) 62 n 58.
737 de Groot and Vonk (n 74) 332.

a right to nationality as such, but obliges states to determine the nationality of children born on their territory or to their nationals and to protect them against statelessness.

Even though the scope of both Article 29 ArCHR and Article 7 of the CRCI are limited and fall below the standards at universal level, the provisions reflect a certain acceptance of the right to nationality in a region where many people are affected by statelessness, and where discrimination in nationality matters on the basis of gender remains widespread.[738] Moreover, in February 2018 the Arab League endorsed the Arab Declaration on Belonging and Identity,[739] an instrument calling upon member states of the Arab League to ensure gender equality in conferring nationality to children and spouses in order to respect the right of the child to a nationality, and for women to acquire, change or retain nationality in conformity with international standards.[740] It remains to be seen whether this Declaration will contribute to improving the protection of the right to nationality in the Middle Eastern and North African region in the long run.

2.5 Asia and Pacific

In the Asian and Pacific region, finally, there is no binding regional human rights treaty.[741] Instead, within the framework of the Association of Southeast Asian Nations (ASEAN), the non-binding ASEAN Human Rights Declaration[742] includes a provision on the right to nationality. Article 18 states:

> Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.

738 Bialosky (n 4) 165.

739 Arab Declaration on Belonging and Identity, 28 February 2018, <http://equalnationalityrights.org/images/zdocs/Final-Ministerial-Conference-Declaration-on-Belonging-and-Identity---English.pdf>.

740 See also Catherine Harrington, 'Groundbreaking Arab League Declaration Heightens Global Momentum to End Gender Discrimination in Nationality Laws' (*European Network on Statelessness Blog*, 8 March 2018) <https://www.statelessness.eu/blog/groundbreaking-arab-league-declaration-heightens-global-momentum-end-gender-discrimination>.

741 Kälin and Künzli, *Menschenrechtsschutz* (n 88) 61. Moreover, Asian states have generally been reluctant to ratify international instruments dealing with nationality or citizenship, see Olivier Vonk, 'Comparative Report: Citizenship in Asia' (Global Citizenship Observatory (GLOBALCIT) 2017) <http://cadmus.eui.eu//handle/1814/50047> .

742 ASEAN Declaration of Human Rights, 18 November 2012 ('ASEAN Declaration').

Article 18 of the ASEAN Declaration mirrors Article 15 UDHR.[743] However, Article 18 only provides that a "right to a nationality *as prescribed by law"* (emphasis added). This limits the scope of the right to nationality to the protection foreseen in domestic legislation and leaves a wide margin for states' discretion. Overall, the protection provided by Article 18 falls below other international standards.[744]

2.6 Interim Conclusion

Overall, this analysis of the codification of the right to nationality in international law at the universal and the regional levels, largely shows three different types of regulations. First, a growing number of instruments explicitly recognizing the right to nationality, though most of these instruments only do so as a general principle and not as an effective and enforceable individual right. This includes the ACHR, but also the ICCPR, the CRC or the ECN. A second group of instruments addressing nationality matters without explicitly guaranteeing a right to nationality. This is, for example, the case with the CSS and the CSR, but also the non-discrimination instruments CEDAW, CERD and CRPD. And a third groupd of instruments, that do not address nationality matters or the right to nationality explicitly, but have, nevertheless, been interpreted as indirectly protecting aspects of the right to nationality. Here, the examples would be the ECHR or the ACHPR. Apart from the ArCHR, the CRCI and the ASEAN Declaration, the instruments that do codify the right to nationality do not fall below the minimum standard established by Article 15 UDHR. The foregoing analysis evidences that the right to nationality — despite continuing affirmations of nationality as a *domaine réservé* — finds a broad and growing basis in international law. As the Special Rapporteur of the African Union on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa noted:

> The international community has made considerable efforts to fill the normative void in the area of nationality, although progress still remains

743 Article 10 of the Declaration explicitly refers to the UDHR and the rights set out therein. See also Bialosky (n 4) 164.

744 Generally, the ASEAN Human Rights Declaration has been criticized as falling below international standards, see Kälin and Künzli, *Menschenrechtsschutz* (n 88) 61. See also the statement of the UN High Commissioner for Human Rights, Navi Pillay, 19 November 2012, <https://news.un.org/en/story/2012/11/426012>.

> to be achieved to effectively deal with statelessness around the world, and the right to a nationality is now virtually a universal legal given.[745]

Thereby, the instruments developed at the regional level — particularly Article 20 ACHR, the ECN and, if it is to be adopted, the African Union Protocol on Nationality — set the most progressive standards.[746] This is reinforced by the innovative and rights-oriented jurisprudence of, particularly, the IACtHR, but also the ACmHPR and the ACtHPR, as well as to some extent the ECtHR. Soft law, moreover, plays an important role in further developing the content of and specifying the obligations under the right to nationality.

In a schematized form, the most important instruments discussed above protecting the right to nationality — at least in a limited form or based on jurisprudence (x) — can be summarized as follows in table 1 on page 204.

The vast number of international and regional treaties, declarations, resolutions or recommendations confirming the right to nationality as a human right must be interpreted as reflecting consistent state practice — a paper practice — recognizing the human rights character of nationality.[747] As the different reservations and declarations to the instruments discussed show, not all states have unconditionally accepted all these provisions codifying the right to nationality and are reluctant to accept international obligations in the field of nationality.[748] Notwithstanding, the analysis also shows that, over the last few years, several states have withdrawn their reservations. But not only that, the reservation of Malasyia to Article 18 CRPD has provoked the opposition of many European states that have stressed the importance of the right to nationality as a fundamental principle. This signals a new conviction that the right to nationality belongs to the core catalogue of human rights from which no derogations should be allowed. The question remains, however, whether this practice can also be qualified as state practice in the more narrow sense of

745 African Commission on Human and Peoples' Rights, 'Study on the Right to Nationality in Africa' (n 623) 20.

746 See also Hall (n 398) 600.

747 See Anuscheh Farahat, *Progressive Inklusion: Zugehörigkeit und Teilhabe im Migrationsrecht* (Springer 2014) 267.

748 The starting point for any discussion about reservations is Article 19 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 ('VCLT'), according to which reservations are permissible unless the treaty itself prohibits reservations *per se* or only allows for specific reservations or if the reservation is incompatible with the object and purpose of the treaty.

TABLE 1 Legal sources codifying the right to nationality

	Acknowledgement of right to nationality	*Jus soli* for otherwise stateless children	Facilitated acquisition for stateless persons or refugees	Prohibition of arbitrary deprivation	Right to change one's nationality	Prohibition of discrimination in nationality matters
15 UDHR	x	-	-	x	x	x
24(3) CCPR	(x)	(x)	-	-	-	x
7 CRC	(x)	(x)	-	-	-	x
29 CMW	(x)	(x)	-	-	-	x
9 CEDAW	-	-	-	-	-	x
5 CERD	(x)	-	-	(x)	-	x
18 CRPD	x	-	-	x	x	x
1954 CSS	-	-	x	-	-	-
1961 CRS	-	x	-	x	-	x
1951 CSR	-	-	x	-	-	-
ACHR	x	x	-	x	x	x
ECN & 2006 Conv.	(x)	x	x	x	x	x
ACHPR & ACC	(x)	(x)	-	(x)	-	x
ARCHR & CRCI	(x)	(x)	-	-	-	x
ASEAN	(x)	-	-	(x)	(x)	x

Article 38(1)(b) of the ICJ-Statute giving rise to customary international law. This is the question that shall be analyzed in the following section.

III The Right to Nationality as Customary International Law?

Customary international law includes those legal standards considered to be binding, even if they are not enshrined in a treaty to which the state parties explicitly consented.[749] An international rule or instrument is recognized as customary international law if there is 1) an international general practice of states consisting of repeated similar practices by several states over a certain period of time, and 2) a corresponding *opinio juris*, a "sense among states of the existence or non-existence of an obligatory rule".[750]

In general, it is difficult to find customary international law on nationality.[751] States usually insist on having exclusive jurisdiction in nationality matters. The reservations discussed in the previous section bear witness to this reluctance. The resistance of the Dominican Republic — or, more precisely, its constitutional court — against the ruling of the IACtHR in the case of *Yean and Bosico* is another example in that regard.[752] This complicates finding the necessary *opinio juris*.[753] In other words, the reluctance of states to accept treaties limiting their sovereignty in nationality matters translates to the field of customary law. Weis concluded in 1979:

> There is no basis in present customary international law for a right to a nationality; neither has the individual a right to acquire a nationality at birth, nor does international law prohibit loss of nationality after birth by

749 International Law Commission, 'Memorandum Prepared by the Secretariat on the Formation and Evidence of Customary International Law' (ILC 2013) UN Doc. A/CN.4/659 28, Observation 19.

750 *ibid 17, Observation 8.* See also the leading cases of the International Court of Justice, *Lotus Case* (n 59) 18; *North Sea Continental Shelf* (n 59) para 60 ff; *Colombian-Peruvian Asylum Case* (n 59) 276 f.

751 See also Conklin (n 56) 163; Mantu (n 38) 7.

752 Alexandra Huneeus and René Urueña, 'Treaty Exit and Latin America's Constitutional Courts' (2017) 111 American Journal of International Law Unbound 456, 458. Interestingly, however, the Dominican Constitutional Court has not primarily challenged the recognition of the right to nationality as a human right but argued that the accession of the Dominican Republic to the IACtHR's jurisdiction was constitutionally invalid and hence the state was not bound by its judgments.

753 Conklin (n 56) 163.

> deprivation or otherwise, with the possible exception of the prohibition of discriminatory denationalization.[754]

Despite the difficulty in finding a coherent state practice, the baseline is more nuanced today. Most international legal scholars seems to agree on the existence of certain customary standards relating to nationality. First, there is a relatively broad consensus that the general principles enshrined in Chapter 1 of the 1930 Convention[755] have acquired the rank of customary international law.[756] This includes the right to renounce one's nationality for dual or multiple nationals, which could be interpreted as implicitly entailing a right to change one's nationality under certain conditions.[757] Second, as discussed above, it is increasingly argued that Article 15 UHDR has become part of customary international law.[758] This strengthens the position of those who argue that the right to nationality, as such, has become a customary international legal norm.[759] Nevertheless, this position remains controversial, given the lack of a consistent state practice and opinion relating to the right to nationality.[760] As Chan writes:

> It is probably true that there is no rule of international Law imposing a duty on States to confer their nationality. Given the wide difference in approaching the right to nationality in various human rights instruments, they can *hardly reflect customary international law*. Nor could the

754 Weis, *Nationality in International Law* (n 352) 248.

755 Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April 1930, LNTS Vol. 179, p. 89 ('1930 Convention').

756 Fripp (n 45) 17; de Groot and Vonk (n 74) 87; Schram (n 10) 231. See on the 1930 Convention chapter 3, III.3.

757 This position is supported by Knop and Chinkin who argue that there is "some sort of customary consensus regarding the right to change one's nationality", Knop and Chinkin (n 167) 562. See also Chan (n 52) 11. More critical Anne Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction' (2010) 53 German Yearbook of International Law 662.

758 See above Chapter 4, 1.3. See Hailbronner and others (n 69) 37; Kraus (n 30) 205; Schram (n 10) 241; see also *Anudo v Tanzania* (n 71) para 76.

759 Batchelor, 'Transforming International Legal Principles' (n 292) 10; Hailbronner and others (n 69) 37; *Advisory Opinion OC-4/84* (n 1) para 34.

760 See eg Serena Forlati, 'Nationality as a Human Right' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 27; Hannum (n 9) 346; Kraus (n 30) 260.

> widely divergent State practice in the conferment of nationality support such a claim.[761] (emphasis added)

The domestic nationality regulations states recorded in the GLOBALCIT Database on Modes of Acquisition of Citizenship shows that in 2016, 174 out of 175 states knew a provision on the acquisition of nationality through naturalization.[762] In the very large majority of states, naturalization occurs through a discretionary procedure in which the decision whether to grant citizenship ultimately remains with the state. Few jurisdictions foresee a right to nationality or a general entitlement to acquire nationality by means of naturalization or registration in domestic law.[763] In most cases, the entitlement to acquire nationality through naturalization is only available for particular groups of non-citizens; namely, for persons with long periods of residence.[764] Hence, Chan's objection that state practice is too divergent to support a customary right to nationality is still valid. The large acceptance of the possibility of acquiring nationality through naturalization (on a discretionary basis or based on entitlement), however, supports the conclusion that states are under a customary obligation to provide for possibility of naturalization — even if they are free to determine the mode, the procedure and the conditions for such naturalization.[765] Stephan Hobe, moreover, argues that there is a customary prohibition of mass naturalization and forced or arbitrary (extraterritorial) naturalization.[766] Furthermore, it is increasingly maintained that the right of the child to be granted nationality at birth if it would otherwise

761 Chan (n 52) 10. See also Oliver Dörr, 'Nationality' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006) para 7.

762 Global Citizenship Observatory (GLOBALCIT), 'Database Acquisition of Citizenship' (n 464).

763 The GLOBALCIT database lists 18 states that grant an entitlement to naturalization for certain non-citizen residents. Many of them at the same time have a discretionary ordinary naturalization procedure that applies to those non-citizens that do not qualify for the acquisition based on entitlement, *ibid*.

764 Under the German Nationality Act persons with more than eight years of residence and a permanent residence permit are entitled to be naturalized if they respect constitutional values, have sufficient financial resources, language skills, civil knowledge, no criminal record and renounce their former nationality, see §10 Deutsches Staatsangehörigkeitsgesetz vom 22. Juli 1913. See also Farahat (n 747) 154 ff.

765 Similarly already International Law Commission, 'Hudson Report' (n 6) 8. See also Chapter 5, III.3.6.

766 Hobe (n 62) 91. See also Donner (n 14) 148 f; Peters, 'Extraterritorial Naturalizations' (n 757) 678.

be stateless is a customary right. In an extensive empirical study, William Worster has analyzed the international legal framework and state practice relating childhood statelessness and has come to the conclusion that "it is more likely than not that there is a norm of customary international law that governs child statelessness".[767] This opinion is shared, *inter alia*, by Chan and Ziemele.[768]

A trend towards the recognition of the duty to prevent and reduce statelessness, or rather a customary obligation for states to prevent and reduce statelessness generally, is identified by other authors.[769] However, an obligation to avoid or reduce statelessness does not amount to a prohibition of statelessness. Most authors, furthermore, agree that the prohibition of racial discrimination in nationality matters is a principle of customary international law.[770]

Finally, a broader consensus also exists regarding the customary nature of the prohibition of arbitrary deprivation of nationality.[771] The CJEU has recognized the prohibition of arbitrary deprivation of nationality as a general principle of international law.[772] Moreover, while there has been a surge in

767 Worster, 'The Obligation to Grant Nationality under Treaty Law' (n 102). See also Worster, 'Customary International Law' (n 318).

768 Chan (n 52) 11; Ziemele, 'State Succession' (n 356) 243. See also Forlati (n 760) 27.

769 Chan (n 52) 11; Clerici (n 200) 845; Council of Europe, 'Explanatory Report ECN' (n 443) para 33; Alice Edwards, 'The Meaning of Nationality in International Law in an Era of Human Rights, Procedural and Substantive Aspects' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 29; Kay Hailbronner, 'Nationality in Public International Law and European Law' in Rainer Bauböck and others (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries, Volume 1: Comparative Analyses* (Amsterdam University Press 2006) 65; Knop and Chinkin (n 167) 562; Molnár (n 148) 80; Pilgram (n 446) 2. See also the judgment by the *Yean and Bosico* (n 395) para 140. Weis in 1979 was more reluctant to accept such obligation, see Weis, *Nationality in International Law* (n 352) 198; similarly Ziemele, 'State Succession' (n 356) 243. See further Chapter 5, III.2.3.

770 See for an in-depth discussion Foster and Baker (n 201) 83 ff; Clerici (n 200) 845; Forlati (n 760) 27; Pilgram (n 446); CtteeEDAW, 'General Recommendation No. 32' (n 168) para 59. See also Chapter 5, III.2.1.

771 See eg de Groot and Vonk (n 74) 46; Molnár (n 148) 74; Pilgram (n 446) 2. See also Human Rights Council, 'Report 13/34 of the Secretary General on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2009) UN Doc. A/HRC/13/34 para 21; UNHCR, 'Expert Meeting — Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")' (UNHCR 2013) para 2 <https://www.refworld.org/docid/533a754b4.html>. More reluctant Hobe (n 62) 96; Rainer Hofmann, 'Denaturalization and Forced Exile' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) para 17.

772 *Rottman* (n 590) para 53.

denationalizations in recent years, states are careful to stress that deprivation measures are based in law, follow a procedure and aim to achieve a particular public interest, namely the protection of national security in the context of anti-terrorism measures. Thus, the current state practice on deprivation of nationality thus seems to respect the prohibition of arbitrariness. Together with the different legal instruments prohibiting arbitrary deprivation of nationality, this would support the conclusion that the prohibition of arbitrary deprivation of nationality has indeed acquired the rank of customary international law.[773] The prohibition is, however, limited to the *arbitrary* deprivation of nationality. Deprivation of nationality *per se* is still possible in most jurisdictions and has re-emerged in recent years as a political instrument against unwanted citizens in the context of counter-terrorism measures.[774]

To sum up, whether the right to nationality has become customary international law is disputed. State practice and the lack of consistent *opinio juris* do not support such a conclusion, even though the literature and international courts, namely the IACtHR and the ACtHPR, progressively argue so. Regardless, certain elements of the right to nationality are increasingly recognized as customary international law, namely the right of the child to the nationality of the state of birth if it would otherwise be stateless, the duty to prevent and reduce statelessness, the prohibition of discrimination in nationality matters and the prohibition of arbitrary deprivation of nationality.

IV Conclusion: The Body of International Human Rights Law

In this Chapter I have attempted to substantiate my claim that the traditional perception of nationality as a *domaine réservé* no longer holds and that the right to nationality attracts growing international support. The in-depth analysis of the international legal framework at the universal and regional levels shows that the right to nationality is, in fact, widely regulated in contemporary international human rights law.[775] The relevant legal framework is built, on the one hand, directly by provisions in treaty law that protect the right to nationality as an enforceable right or as a general principle underpinning nationality matters. On the other hand, the right to nationality is indirectly recognized as

773 See James Crawford, *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press 2019) 508.

774 See namely UNHCR, 'Tunis Conclusions' (n 771) para 2.

775 See also Blackman (n 359) 1191; Spiro, 'New Citizenship Law' (n 169) 745.

a human right in soft law instruments and the case law of international human rights tribunals on the basis of other, well established human rights norms.

Given that the right to nationality was already included in the first modern universal human rights instrument — the Universal Declaration of Human Rights — these developments are consistent. While no UN human rights treaty codifies a general right to nationality, most grant children a right to nationality or recognize the right to nationality through the principle of non-discrimination. Together, these standards protect different aspects of the right to nationality and jointly indicate the existence of a general right to nationality. The importance of right to nationality is confirmed in the practice of the UN human rights treaty bodies. Furthermore, the protection of the right to nationality is the underlying aim of the 1961 Convention and, to a more limited extent, the 1954 Convention. Moreover, the right to nationality is repeatedly recognized in resolutions of UN bodies; namely, by the Human Rights Council. The right to nationality as a general human right is reinforced by instruments at the regional level. In particular, the ACHR, the ECN and, possibly in the near future, the AU Draft Protocol on Nationality, recognize the right to nationality as a human right. Article 20 ACHR provides for the only current hard law recognition of a general right to nationality for all. The IACtHR, the ACmHPR, the ACtHPR and, to some extent, the ECtHR have contributed to the development of a coherent jurisprudence on the right to nationality. Regarding customary international legal standards, it remains doubtful whether the right to nationality, as such, has acquired the rank of customary law, particularly due to the lack of a consistent state practice and corresponding *opinio juris*. Nevertheless, different aspects of the right to nationality are found to be binding on a customary basis; namely, the right of the child to the nationality of the state of birth if it would otherwise be stateless, the principle of prevention and reduction of statelessness and the prohibition of arbitrary deprivation of nationality.

Overall, the international legal framework on nationality matters has fundamentally changed over the last decades.[776] It can no longer be argued that there is no such right as a right ot nationality just because there is an absence of an express recognition of a general right to nationality in a binding universal treaty. While it remains for the state to decide on acquisition and loss of nationality, this decision is subject to a broad framework of international legal sources that, overall, guarantee that everyone has a right to a nationality.[777] To

776 Batchelor, 'Developments in International Law' (n 464) 59.

777 European Court of Human Rights, 'Dissenting Opinion Ramadan v Malta' (n 458) para 6; Human Rights Council, 'Report 25/28 of the Secretary General on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2013) UN Doc. A/HRC/25/28.

turn back to the elements for new human rights standards, as set out in UN GA Resolution 41/120, the analysis of the international legal framework in this chapter has not only provided additional support for the argument that the right to nationality attracts broad and growing international support and that it is consistent with the existing body of international human rights law.[778] It has also shown that there is a functioning implementation machinery with the treaty bodies at universal level and the regional human rights courts that interpret and develop the right to nationality. This is so regardless of the remaining gaps in the direct invocation of the right to nationality before international courts. The next step is to now identify which concrete rights individuals have under the right to nationality and what corresponding obligations it bears for states. This will be the subject of Chapter 5.

778 See Chapter 2, III.3.

CHAPTER 5

Defining the Right to Nationality

Rights and Obligations

> […] two aspects of the right to nationality: the right to a nationality from the perspective of endowing the individual with the basic legal protection for a series of relationships by establishing his connection to a specific State, and the protection of the individual against the arbitrary deprivation of his nationality […][1]
>
> IACtHR, Case of Expelled Dominicans and Haitians, 2014

The previous chapter concluded that the right to nationality is codified in most international and regional human rights instruments and enjoys broad and growing international support. The central question to determine the status of the right to nationality as a legal human right, according to UN GA Resolution 41/120, is now whether the right is sufficiently precise to give rise to identifiable and predictable rights and obligations. So what does the right to nationality actually entail? What is its scope and content? To whom does it apply? When and where? Which specific rights and obligations can be derived from the right to nationality? And what are the conditions under which the right may be lawfully interfered with? The aim of this chapter is to define the scope and content of the right to nationality under current international law to specify the rights of individuals and the obligations of states under the right to nationality. Article 15 UDHR — "the general rule on the right to a nationality that applies in all circumstances"[2] — can again be taken as a starting point. This will set the stage to discuss the gaps of the current framework and propose an alternative interpretation of the right to nationality in Chapter 6.

1 *Case of Expelled Dominicans and Haitians v Dominican Republic* [2014] IACtHR Series C No. 282 para 254.

2 Human Rights Council, 'Report 13/34 of the Secretary General on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2009) UN Doc. A/HRC/13/34 para 50.

Chapter 5 starts with a general qualification of the right to nationality as a civil right (I.). It then looks at its personal, substantive, territorial and temporal scope of application (II.). The third section analyzes the rights it attributes to rights holders and the obligations it imposes on the duty bearers (III.). Section four then discusses under what conditions the right to nationality can be restricted (IV.), before the last section raises the question of how the right is implemented and enforced at the national level (V.). The analysis shows that while, in fact, a surprising number of identifiable and predictable rights and obligations are found, the determination of a general right to nationality of a specific state remains the main flaw of the right to nationality which significantly hampers its effective implementation in practice.

I Qualifying the Right to Nationality

Human rights are often categorized along the lines of civil, political, economic, social, cultural, solidarity and group rights.[3] This categorization should not be understood as suggesting or allowing for any hierarchy in the order of rights.[4] All human rights are universal, interdependent, interrelated and of equal importance.[5] Nevertheless, the categorization can help to identify the rights and obligations that can be derived from a right and determine whether it primarily aims at negatively prohibiting state interferences or at securing certain basic rights and services, thus requiring active state intervention.

How does the right to nationality fit into these categories? The different international legal sources codifying the right to nationality mostly qualify it as a civil and political right. Among the rights of the UDHR, Articles 3–21 are considered to be civil and political rights.[6] This includes the right to nationality enshrined in Article 15. Equally, the ACHR lists the right to nationality in the chapter on civil and political rights. The same conclusion can be drawn from the inclusion of the child's right to a nationality in Article 24 of the Covenant

3 See eg Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd ed, Oxford University Press 2019) 29.

4 *ibid 30.* Moreover, the characterization of the three categories as three generations of rights is increasingly rejected in legal scholarship.

5 See also the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>, para 5.

6 See Michèle Morel, *The Right Not to Be Displaced in International Law* (Intersentia 2014) 31.

on Civil and Political Rights[7] — the Covenant on *civil and political rights*.[8] The Committee on the Rights of the Child also considered the right to nationality under Article 7 of the Convention on the Rights of the Child[9] to fall within the category of civil rights and freedoms.[10] Only the Committee on the Elimination of Racial Discrimination listed access to citizenship as a separate category, distinct from both civil and political rights, and from economic, social and cultural rights.[11]

In legal scholarship the right to nationality is mostly qualified as a civil and political right.[12] Nevena Vuckovic, Jaap Doek and Jean Zermatten qualify the right to nationality in the context of the CRC as a right to identity, arguing that nationality is an essential element of an individuals' identity.[13] This bears resemblance to the ECtHR's qualification of citizenship as part of a person's social identity as protected by the right to private life.[14] Some authors, however, place the right to nationality outside the categories of civil and political, economic, social, cultural, solidarity or group rights. Kraus, for example, argues that the right to nationality is a membership right and thus a category *sui generis*.[15] She maintains that civil and political rights presuppose the

7 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 ('ICCPR').

8 See also Human Rights Committee, 'General Comment No. 17: Article 24 (Rights of the Child)' (HRCttee 1989) UN Doc. CCPR/C/21/Rev.1/Add.9 para 2.

9 Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 ('CRC').

10 Similarly also Committee on the Rights of the Child, 'General Comment No. 9 (2006) on the Rights of Children with Disabilities' (CtteeRC 2007) UN Doc. CRC/C/GC/9 para 34. See also Committee on the Rights of the Child, 'General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para 6)' (CtteeRC 2003) UN Doc. CRC/GC/2003/5 para 6; Committee on the Rights of the Child, 'General Comment No. 11 (2009) on Indigenous Children and Their Rights Under the Convention' (CtteeRC 2009) UN Doc. CRC/C/GC/11 para 41.

11 See Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 34 on Racial Discrimination Against People of African Descent' (CtteeERD 2011) UN Doc. CERD/C/GC/34 para 47 ff.

12 See eg Stephen Hall, 'The European Convention on Nationality and the Right to Have Rights' (1999) 24 European Law Review 586, 588.

13 Nevena Vučković Šahović, Jaap E Doek and Jean Zermatten, *The Rights of the Child in International Law: Rights of the Child in a Nutshell and in Context: All About Children's Rights* (Stämpfli 2012) 120 ff. See also Schmahl who also qualifies the right to nationality under Article 7 CRC as an 'identity right', see Stefanie Schmahl, *Kinderrechtskonvention: mit Zusatzprotokollen* (2. Aufl., Nomos 2017) 131.

14 As part of the right to private life under Article 8 ECHR the right to nationality falls within the category of civil and political rights.

15 See Manuela Sissy Kraus, *Menschenrechtliche Aspekte der Staatenlosigkeit* (Pro-Universitate-Verlag 2013) 192 ff.

membership in a (state) community whereas the right to nationality grants access to the community in the first place.[16]

Notwithstanding this argument, the qualification of the right to nationality as a civil and political right is, overall, more convincing. Not only is it consistent with the relevant legal sources, it also reflects the quality of citizenship as a status that is inherently linked to statehood and the position of the individual. While citizenship can give rise to economic, social or cultural rights, it itself is not such a right. And while the right to nationality implies a pathway to acquire nationality, it is not a right that necessarily requires specific services or state action. Rather it requires states not to interfere with the right to nationality, ie not to deprive a person of her nationality, not to restrict her right to acquire another and change her nationality and, importantly, not to deny acquisition of nationality arbitrarily.

II The Scope of the Right to Nationality

The scope of a human right determines *who* is protected by such a right, *where* protection is granted, *when* and to *what* extent.[17] The following section shall discuss the personal (II.1), the substantive (II.2), territorial (II.3) and temporal scope of application (II.4) of the right to nationality, before it turns to the consequences of the applicability of the right to nationality, its content (III.).

1 *Personal Scope of Application*

1.1 Everyone

The personal scope of application of a human right determines who can claim protection under that right. In principle, human rights apply to all human beings alike — irrespective of their nationality or legal status.[18] Article 15 UDHR[19] provides that "*everyone* has the right to a nationality" and that "*no one* shall be arbitrarily deprived of his nationality and denied the right to change

16 *ibid 195.*

17 Walter Kälin and Jörg Künzli, *Universeller Menschenrechtsschutz: der Schutz des Individuums auf globaler und regionaler Ebene* (4. Aufl., Helbing Lichtenhahn Verlag 2019) 136.

18 *ibid.* See also David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press 2008) 34 f.

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

his nationality" (emphasis added).[20] Similarly, Article 20 ACHR[21] refers to '*every* person' and '*no one*'. Thus, in principle, the right to nationality applies to all human beings alike. As Human Rights Council Resolution 20/4 states:

> [...] the right to a nationality is a universal human right enshrined in the Universal Declaration of Human Rights, and that *every man, woman and child* has the right to a nationality;[22] (emphasis added)

It applies regardless of one's nationality and legal status. This means that the right to nationality applies irrespective of whether a person has a nationality — and if so, whether it is the nationality of the state against which the right is invoked or the nationality of another state — or if the person concerned is stateless. Arguments that the right to *a* nationality only grants a right to have *one* nationality and not be stateless and, hence, only applies to stateless persons are not convincing.[23] Such interpretation is neither supported by the wording of Article 15(1), which grants 'everyone' a right to nationality, nor by the drafting history, which shows that the drafters were very much aware that the provision would grant rights beyond the context of statelessness also in a migratory context.[24] Thus, in principle, the right to nationality has a universal personal scope of application.

1.2 Instruments with a Limited Personal Scope

Some instruments or norms expressly limit their personal scope of application to certain people or groups. In the context of the right to nationality, two limitations of the personal scope of application can be observed. Some instruments limit the personal scope of application of the right to nationality to *children*. This includes the CRC or the African Charter on the Rights and Welfare of the

20 See also Gonçalo Matias, *Citizenship as a Human Right, The Fundamental Right to a Specific Citizenship* (Palgrave Macmillan 2016) 13.

21 American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, OAS Treaty Series No. 36 ('American Convention', 'ACHR').

22 Human Rights Council, 'Resolution 20/4 on the Right to a Nationality: Women and Children' (HRC 2012) UN Doc. A/HRC/RES/20/4 para 1.

23 See with regard to Article 15 UDHR eg Haro Frederik van Panhuys, *The Role of Nationality in International Law* (A W Sijthoff 1959) 222; William L Griffin, 'The Right to a Single Nationality' (1966) 40 Temple Law Quarterly 57. This is not to be confused with instruments that explicitly apply only to stateless persons, see immediately below Chapter 5, II.1.2.

24 See also Matias (n 20) 49.

Child,[25] where the treaty itself only applies to children.[26] Article 24(3) ICCPR and Article 29 CMW,[27] by contrast, only apply to children while the remaining provisions of the treaties pertain to everyone.[28] With respect to Article 24(3) ICCPR, the Human Rights Committee declared an individual communication of a 72-year old author to be inadmissible, recalling that:

> This provision protects the right of every *child* to acquire a nationality. Its purpose is to prevent a child from being afforded less protection by society and the State because he or she is stateless, rather than to afford an entitlement to a nationality of one's own choice.[29] (original emphasis)

A different limitation of the personal scope of application exists in instruments that explicitly only apply to *stateless persons*.[30] Article 1 CRS[31] grants an indirect right to nationality for stateless persons by obliging state parties to the Convention to grant individuals its nationality if they are born on its territory and would otherwise be stateless.[32] The same goes for the prohibition of deprivation of nationality according to Article 8(1) CRS, which only applies if the deprivation of nationality would render the person concerned stateless. Equally, the 1954 Convention[33] only applies to stateless persons.[34]

While some these instruments expressly limit the personal scope of application of the right to nationality to children or to stateless persons, such limitation is not inherent in the right to nationality. The right to nationality, in

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25 African Charter on the Rights and Welfare of the Child, 11 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990) ('African Children's Charter', 'ACC').

26 See also Chapter 4, II.1.1.2. and II.2.3.3.

27 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, 2220 UNTS 3 ('CMW').

28 See Chapter 4, II.1.1.1 and II.1.1.3. See also Human Rights Committee, 'General Comment No. 15: The Position of Aliens Under the Covenant' (HRCttee 1986) para 1; Human Rights Committee, 'General Comment No. 17' (n 8) para 2.

29 *Gorji-Dinka v Cameroon, Communication No 1134/2002* [2005] HRCttee UN Doc. CCPR/C/83/D/1134/2002 para 4.10.

30 See also Chapter 5, III.3.2.

31 Convention on the Reduction of Statelessness, 30 August 1961, 989 UNTS 175 ('1961 Convention', 'CRS').

32 Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 International Journal of Refugee Law 161. See Chapter 4, II.1.2.2.

33 Convention Relating to the Status of Stateless Persons, 28 September 1954, 360 UNTS 117 ('1954 Convention', 'CSS').

34 Tamás Molnár, 'Stateless Persons under International Law and EU Law: A Comparative Analysis Concerning Their Legal Status, With Particular Attention to the Added Value of the EU Legal Order' (2010) 51 Acta Juridica Hungarica 293, 294.

principle, is universal and applies to everyone, irrespective of age and citizenship or the lack thereof.

1.3 Legal Persons?

Some human rights can also apply to legal persons.[35] This depends both on the nature of the right in question and the legal basis which may or may not allow legal persons to invoke it. What about the right to nationality? Legal persons, as well as ships and aircrafts, according to legal theory, do have a nationality — ie a state to which they are functionally linked.[36] The nationality of legal persons, however, must be distinguished from nationality of natural persons.[37] Nationality of legal persons amounts to a functional attribution of a legal entity to a state and, on the international plane, mainly has the purpose of allowing for legal standing in dispute settlement procedures, for diplomatic protection and for the attribution of responsibility.[38]

For the purposes of the right to nationality, this means that the nationality of legal persons, ships and aircrafts must be distinguished from the nationality of natural persons. Nationality for legal persons has a different purpose and does not require the same degree of protection. Legal persons, for example, cannot become stateless. Most legal bases that grant a right to nationality therefore exclude legal persons from its scope of application. The ACHR, for example, explicitly limits its personal scope of application to natural persons (Article 1(2) ACHR). The same is true for the ICCPR, the CRC and the other universal human rights instruments.[39] The ILC Draft Articles on

35 See Kälin and Künzli, *Menschenrechtsschutz* (n 17) 137.

36 See generally James Crawford, *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press 2019) 512 ff; Myres S McDougal, Harold D Lasswell and Lung-chu Chen, 'Nationality and Human Rights: The Protection of the Individual and External Arenas' (1980) 83 Yale Law Journal 900, 916. The 'nationality' of a legal person is usually determined on the basis of its seat or its place of incorporation, see Oliver Dörr, 'Nationality' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006) para 26.

37 See also *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) [1970] ICJ Reports 1970, p. 3 42.

38 Dörr (n 36) para 24. See also Andreas Kind, *Der diplomatische Schutz: Zwischenstaatlicher Rechtsdurchsetzungsmechanismus im Spannungsfeld von Individualrechten, Ausseninteressen, Staatsangehörigkeit und Schutzpflichten: Eine schweizerische Perspektive* (Dike Verlag Zürich 2014) 59 f.

39 Kälin and Künzli, *Menschenrechtsschutz* (n 17) 137. See for the ICCPR also Human Rights Committee, 'General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (HRCttee 2004) UN Doc. CCPR/C/21/Rev.1/Add. 13 para 9.

Nationality[40] also apply solely to natural persons.[41] In the case of the ECHR,[42] some of the provisions, in principle, apply to legal persons — but not the right to private life, which is interpreted as protecting the right to nationality as part of a person's social identity.[43] The application of the right to nationality to legal persons would also not make sense given the rationale of the right, which aims at preventing statelessness and protecting the social ties of an individual in a state through the link of nationality. Therefore, it seems valid to argue that legal persons are excluded from the personal scope of the right to nationality.

2 *Substantive Scope of Application*

2.1 Nationality

The right to nationality protects the acquisition, change and retention of *nationality*. In the context of the right to nationality as a human right, the notion of nationality denotes nationality in the legal sense, as a legal bond between a person and a *state*.[44] Thus, the right to nationality protects the legal relationship between an individual and a state giving rise, *inter alia*, to the right to full membership in that state through the status of nationality and access to the rights tied to citizenship.[45]

Hence, the substantive scope of the right to nationality does not cover attribution or deprivation of *statuses similar to nationality or other forms of membership*. In particular, membership in private entities or clubs.[46] An exception

40 International Law Commission, Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, 3 April 1999, Supplement No. 10, UN Doc. A/54/10 ('ILC Draft Articles on Nationality').

41 See the title of the Draft Articles referring explicitly to 'natural persons', as well as the explanatory memorandum according to which "the scope of application of the present draft articles is limited, *ratione personae*, to the nationality of individuals. It does not extend to the nationality of legal persons" (original emphasis), International Law Commission, 'Commentary on the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States' (ILC 1999) Yearbook of the International Law Commission, 1999, Vol. II, Part Two 23 <http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/3_4_1999.pdf&lang=EF>.

42 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5 ('European Convention on Human Rights', 'ECHR').

43 Kälin and Künzli, *Menschenrechtsschutz* (n 17) 137.

44 See eg the definition in Article 2 let. a European Convention on Nationality, 6 November 1997, ETS No. 166 ('ECN') or Committee on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women' (CtteeEDAW 2014) UN Doc. CEDAW/C/GC/32 para 51. See on the concept of nationality Chapter 2, II.

45 See Chapter 2, II.3.3.

46 An example here would be the case of the so-called "Reichsbürger" in Germany who deny the lawfulness and existence of the Federal Republic of Germany and claim to be

can be made where non-state actors — for example, rebel groups — effectively exercise jurisdiction over a territory and, in that context, grant a membership status for that territory and the territory subsequently gains independence as a new state.[47] Formally, however, such attribution of nationality only becomes effective externally once the state is internationally recognized. In these situations the rules on nationality in case of state succession come into play.[48]

Membership in sub- or supra-state political entities falls within the material scope of application of the right to nationality in so far as it is part of nation state citizenship. In case of the Swiss multilevel citizenship, for example, where the three levels of citizenship are inextricably linked, the acquisition, change and loss of cantonal or municipal citizenship falls within the substantive scope of the right to nationality as it is relevant for the acquisition, the change and loss of Swiss nationality.[49] In case of *supra-state citizenship*, namely EU citizenship, the provisions protecting the right to nationality do not, in principle, extend to EU citizenship as such.[50] As the CJEU held in the *Rottman* case, with reference to Article 15(2) UDHR, Article 4(c) ECN and the 1961 Convention, it is for the member states to decide on acquisition and loss of national citizenship — and, thereby, indirectly EU citizenship — while having due regard to EU law.[51] In principle, the right to nationality, therefore, does

citizens of the "Reich" and issue their own "passports", see eg Stefan Goertz and Martina Goertz-Neumann, *Politisch motivierte Kriminalität und Radikalisierung* (Kriminalistik 2018); Anna-Maria Haase, '„Reichsbürger und Selbstverwalter" im Kontext politisch motivierter Gewalt in Sachsen' (2018) 15 Totalitarianism and Democracy 47; Jan Rathje, '"Reichsbürger" — Verschwörungsideologie mit deutscher Spezifik' (2017) 1 Wissen schafft Demokratie 238.

47 See eg on the importance of citizenship in the context of the independence of Kosovo Gezim Krasniqi, 'Contested Territories, Liminal Polities, Performative Citizenship: A Comparative Analysis' (Global Citizenship Observatory, Robert Schuman Centre for Advanced Studies, European University Institute 2018) RSCAS 2018/13. See also Article 10 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/49(Vol. 1)/Corr.4, 2001.

48 See on the question of nationality and the transition from illegal regimes Ineta Ziemele, 'State Succession and Issues of Nationality and Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 236 ff. See also below Chapter 5, III.3.3.

49 According to Article 8 of the Swiss Citizenship Act of 2014 a person automatically loses all citizenships if she loses one.

50 See Chapter 4, II.2.2.3. Similarly also eg the supranational community citizenship within the Economic Community of West African States, see ECOWAS, 'Nationality and Statelessness in West Africa — Background Note' (ECOWAS 2017) <https://www.unhcr.org/protection/statelessness/591c20ac7/statelessness-conference-2017-background-note-english.html>.

51 *Janko Rottman v Freistaat Bayern* [2010] CJEU C-135/08 para 52 f.

not protect acquisition and loss of EU citizenship.[52] However, the principle of non-discrimination in nationality matters would prohibit discrimination in acquisition and loss of EU citizenship.[53]

2.2 Acquisition, Change and Loss of Nationality

As becomes clear from Article 15 UDHR, the right to nationality, in a general sense, relates to the acquisition, change and loss of nationality. Acquisition covers the automatic acquisition of nationality at birth by descent (*jus sanguinis*) or based on the place of birth (*jus soli*), as well as the subsequent acquisition of nationality *ex lege*, eg on the basis of marriage or after a certain residence period, by declaration, by registration, upon application through naturalization, through declaration or option.[54] Change of nationality relates to the possibility of dual or multiple nationality or the right to renounce one's nationality. Loss of nationality, finally, covers all forms of lapse of nationality be it on the basis of renunciation, withdrawal, lapse or nullification.[55] The rights and obligations protected by the right to nationality apply to individuals in all procedures relating to the acquisition, change and loss of citizenship.

3 *Territorial Scope of Application*

Human rights, in principle, apply within the territory and jurisdiction of the state that is bound by them.[56] Article 2(1) ICCPR expresses this principle by obliging member states to respect and ensure the rights set forth in the Covenant to all individuals within its territory and subject to its jurisdiction.[57] The Human Rights Committee clarified that this "means that a State party must respect and ensure the rights laid down in the Covenant to anyone within

52 See on the complex categories of nationality in EU member states and the impact on EU citizenship Kristine Kruma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge* (Martinus Nijhoff 2014) 129 ff.

53 One should note that the EU itself is a state party to the CRPD and thus directly bound by the right to nationality under Article 18 CRPD, see EU Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 26 November 2009, OJ L 23/35. In the Concluding Observations to the first report submitted by the EU to the CtteeRPD the right to nationality was not addressed, see Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of the European Union' (CtteeRPD 2015) UN Doc. CRPD/C/EU/CO/1.

54 Gerard-René de Groot and Olivier Vonk, *International Standards on Nationality Law: Texts, Cases and Materials* (Wolf Legal Publishers 2016) 50. See also Chapter 2, II.3.2.

55 *ibid 51.*

56 Kälin and Künzli, *Menschenrechtsschutz* (n 17) 146.

57 See also Human Rights Committee, 'General Comment No. 31' (n 39) para 3.

the power or effective control of that State Party, even if not situated within the territory of the State Party".[58] Other treaties, such as the ECN, leave it up to the state parties to determine the territories to which the instrument shall apply.[59] Following these principles, the right to nationality would apply to all persons residing within the territory of a *state*.[60] In federal systems, all levels of the state are bound by the right to nationality.[61] Moreover, the right to nationality also applies to persons outside the territory, if a person is effectively under a state's jurisdiction, for example, a person is deprived of her nationality while being outside the state in question.

Moreover, it is conceivable that the right to nationality also applies in territories that a state has *de facto* lost control over or, in cases where states exercise power outside their own territory.[62] An example here is the practice of extraterritorial naturalizations as it occurred in the Russian occupied territories in Ukraine.[63] In April 2019, Russia announced it would grant Russian passports to the residents of Crimea and later to the inhabitants of the Donbas region.[64] In such a situation both Russia, which exercised jurisdiction on Ukrainian territory by issuing passports, and the Ukraine, to which the territory in question belongs from international legal perspective, are under an obligation to respect, protect and fulfill the right to nationality regarding the inhabitants of the occupied territories in question. Accordingly, a selective conferral of Russian nationality only on Russian speaking inhabitants, for example, would

58 *ibid 10.*

59 Article 30 ECN.

60 See also above Chapter 5, II.2.1.

61 See eg explicitly Article 50 ICCPR.

62 See on the question of extraterritorial jurisdiction Kälin and Künzli, *Menschenrechtsschutz* (n 17) 150 ff.

63 See with regard to South Ossetia, Abkhazia and Transnistria as well as Romanian, Hungarian and German extraterritorial naturalization policies Anne Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction' (2010) 53 German Yearbook of International Law. See also Chapter 5, III.3.4.

64 UN Office of the High Commissioner on Human Rights, 'Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine)' (OHCHR 2017) <https://www.ohchr.org/Documents/Countries/UA/Crimea2014_2017_EN.pdf>. See also Krishnadev Calamur, 'How Countries Use Passports as a Geopolitical Tool' *The Atlantic* (26 April 2019) <https://www.theatlantic.com/international/archive/2019/04/russia-passports-separatists-ukraine-common/588160/>; Elia Bescotti et al, 'Passportization. Russia's "Humanitarian" Tool for Foreign Policy, Extra-Territorial Governance, and Military Intervention' *Verfassungsblog* (23 March 2022) <https://verfassungsblog.de/passportization/>.

hardly be compatible with the right not to be discriminated against in the context of naturalization.[65]

4 *Temporal Scope of Application*

The temporal scope of application refers to the temporal dimension of a right. In principle, a right applies from the moment a treaty is ratified until its denunciation, as far as a treaty allows for it.[66] Some of the instruments that provide for a right to nationality do not foresee the possibility of denunciation, such as the ICCPR, while most others allow it.[67]

The temporal scope of application, moreover, gives rise to the question of whether derogation is possible in cases of public emergency.[68] Amid the 2020 corona virus pandemic, Denmark, for example, decided to temporarily halt all naturalization procedures as long as the mandatory handshake during the naturalization ceremony was not possible for health reasons.[69] Is this compatible with the right to nationality? In principle, human rights are derogable in cases of state emergency, either on the basis of an explicit derogation clause or based on certain principles, as long as a right is not considered to be non-derogable.[70] Does the right to nationality fall within the category of non-derogable rights? The ACHR expressly addresses this question and prohibits, in Article 27(2), any suspension of the right to nationality even in times of war, public danger or other emergency. The IACtHR has confirmed the non-derogable nature of the right to nationality without specifying the implications.[71] Article 4 ICCPR,

65 See also Peters, 'Extraterritorial Naturalizations' (n 63) 665.

66 Kälin and Künzli, *Menschenrechtsschutz* (n 17) 167.

67 Eg Article 52 CRC, Article 19 1961 Convention, Article 78 ACHR or Article 31 ECN. The current version of the AU Draft Protocol on Nationality does not foresee the possibility of denunciation either.

68 See Rhona Smith, *International Human Rights Law* (8th ed, Oxford University Press 2017) 185 ff. Derogations must be distinguished from permissible limitations of rights, see below Chapter 5, IV.

69 Elian Peltier, 'No Handshakes, No New Citizens: Coronavirus Halts Danish Naturalizations' *The New York Times* (7 March 2020) <https://www.nytimes.com/2020/03/07/world/europe/denmark-coronavirus-citizenship.html>. Later the government announced to temporarily suspend the handshake requirement during the naturalization ceremonies, see Nathan Walmer, 'Government Suspends Handshake Rule' *The Copenhagen Post* (Copenhagen, 16 April 2020) <www.cphpost.dk>.

70 Kälin and Künzli, *Menschenrechtsschutz* (n 17) 168 ff. See also *Constance Ragan Salgado v The United Kingdom, Communication No 11/2006* [2007] CtteeEDAW UN Doc. CEDAW/C/37/D/11/2006 [8.4].

71 *Case of the Girls Yean and Bosico v Dominican Republic* [2005] IACtHR Series C No. 130 (2005) para 136.

which prohibits derogation from certain rights protected by the Covenant, by contrast, does not include Article 24(3) ICCPR.

Hence, it remains doubtful whether the right to nationality as such should generally be considered non-derogable in cases of state emergency or whether only certain aspects cannot be derogated. At least the prohibition of arbitrary deprivation of nationality seems to leave very little room for limitations. The same goes for the prohibition of deprivation of nationality based on discriminatory grounds. The Independent Expert on Minority Issues pointed out in a report to the UN Human Rights Council that the principle of non-discrimination is a non-derogable norm of international law.[72] This is particularly relevant for the context of terrorism, where an increasing securitization of citizenship can be observed and deprivation of nationality is used as a counter-terrorism strategy.[73] Restricting other aspects of the right to nationality — such as access to dual or multiple nationality, for example, or the right to change one's nationality during war time — seems less problematic as there exists a strong, situational interest for the state to do so in such an emergency or armed conflict. Except where an instrument explicitly declares the provision on the right to nationality to be non-derogable, as in the case of Article 27(2) in conjunction with Article 20 ACHR, the right to nationality as such can, in principle, be derogated in times of national emergency. Thus, one could argue that the Danish decision to temporarily suspend naturalizations for public health reasons was acceptable, even though doubts as to the proportionality of such measure remain. The prohibition of arbitrary deprivation of nationality and discriminatory deprivation of nationality, in contrast, should be considered to be absolute.

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72 Human Rights Council, 'Report of the Independent Expert on Minority Issues on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' (HRC 2008) UN Doc. A/HRC/7/23 para 35. See also Human Rights Council, 'Report 13/34' (n 2) para 35. See also below Chapter 5, .

73 See eg Dana Burchardt and Rishi Gulati, 'International Counter-Terrorism Regulation and Citizenship-Stripping Laws — Reinforcing Legal Exceptionalism' (2018) 23 Journal of Conflict and Security Law 203; Leslie Esbrook, 'Citizenship Unmoored: Expatriation as a Counter-Terrorism Tool' (2016) 37 University of Pennsylvania Journal of International Law 1273; Audrey Macklin, 'The Securitization of Dual Citizenship' (2007) SSRN Scholarly Paper ID 1077489; Sandra Mantu, '"Terrorist" Citizens and the Human Right to Nationality' (2018) 26 Journal of Contemporary European Studies 28; Arnfinn H Midtbøen, 'Dual Citizenship in an Era of Securitisation: The Case of Denmark' (2019) 9 Nordic Journal of Migration Research 293; Parliamentary Assembly of the Council of Europe, 'Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach?' (PACE 2019) Report Doc. 14790 (2019). See also below Chapter 5, III.6.

III Rights and Obligations Derived from the Right to Nationality

The previous section has discussed the conditions under which the right to nationality is applicable. Moving on from the scope of the right to nationality, the discussion shall now turn to its content. Which rights can individuals derive from the right to nationality? And which obligations are imposed on states? While the precise content of the right to nationality depends on the particular legal source granting a right to nationality, the following section will try to generalize the obligations derived from the right to nationality based on the different legal sources. As the UN Secretary General pointed out in his 2009 report to the UN Human Rights Council on human rights and arbitrary deprivation of nationality:

> The right to a nationality implies the right of each individual to *acquire*, *change* and *retain* a nationality. The right to retain a nationality corresponds to the prohibition of arbitrary deprivation of nationality.[74] (emphasis added)

Based on these three main aspects, plus the additional element of enjoyment of nationality, the following section tries to identify the obligations that can be derived from the right to nationality. First, however, a general discussion of the types of obligations derived from human rights and a broad classification of the obligations derived from the right to nationality shall be provided in order to set the stage for the subsequent analysis (III.1). A second section outlines transversal obligations,[75] which apply to all elements of the right to nationality and have an impact on all other obligations arising from it: the prohibition of discrimination, the prohibition of arbitrariness and the duty to prevent and reduce statelessness (III.2). Then I examine which obligations exist regarding the acquisition (III.3), enjoyment (III.4), change (III.5) and loss of nationality (III.6). A final section looks at the procedural guarantees derived from the right to nationality (III.7).

1 *Negative and Positive Obligations*

Rights for one side usually imply duties for the other party. Human rights — traditionally understood as rights of individuals — imply certain duties or obligations on the side of the addressee of the right, that is in most cases the

74 Human Rights Council, 'Report 13/34' (n 2) para 21. See also Johannes M Chan, 'The Right to a Nationality as a Human Right' (1991) 12 Human Rights Law Journal 1, 13.

75 See also Kälin and Künzli, *Menschenrechtsschutz* (n 17) 110.

state.[76] Without corresponding obligations, rights would remain empty. International human rights law identifies different categories of duties or obligations that can be derived from human rights. Broadly speaking, a distinction is made between negative and positive obligations. *Negative obligations* impose a duty upon states to refrain from a certain action in order not to interfere with a right. *Positive obligations*, in contrast, require states to act to ensure that an individual is effectively capable of exercising a right.[77] Nevertheless, the boundary between positive and negative obligations cannot always be defined precisely.[78]

Generally, three more specific forms of obligations that are both negative and positive in nature can be identified:[79] the duty to respect, the duty to protect and the duty to fulfill or ensure.[80] The *duty to respect* obliges states to refrain from interfering with a right. In that sense, the duty to respect corresponds with negative obligations. The duty to respect arises directly from a human right and does not require any further implementation or active measures from the state. The *duty to protect* refers to the obligation to actively protect individuals against any threat or interference with their rights from third parties or external threats like natural hazards. The *duty to fulfil*, thirdly, refers to the obligation to take active measures to achieve the effective realization of rights in practice to the widest degree possible. Kälin and Künzli identify two kinds of services that might prove to be necessary to ensure the fulfilment of a right. On the one hand, there are legislative and administrative measures necessary to establish the legal, institutional and procedural framework to ensure the full realization of the right in question.[81] On the other hand, the duty to fulfill can imply the provision of actual benefits in the form of money, goods or services, such as food, medical care or translation services, or the provision of infrastructure, such as schools, without which the realization of a right would seem illusionary.[82]

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76 See Samantha Besson, 'The European Union and Human Rights: Towards A Post-National Human Rights Institution?' (2006) 6 Human Rights Law Review 333.

77 Kälin and Künzli, *Menschenrechtsschutz* (n 17) 108. See also Aaron Fellmeth, *Paradigms of International Human Rights Law* (Oxford University Press 2016) 25 ff.

78 *Hoti v Croatia* [2018] ECtHR Application No. 63311/14 para 122.

79 Human Rights Committee, 'General Comment No. 31' (n 39) para 6.

80 See generally Kälin and Künzli, *Human Rights Protection* (n 3) 87 f. See also Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, NP Engel 2005) XX.

81 See also Human Rights Committee, 'General Comment No. 31' (n 39) para 7.

82 Kälin and Künzli, *Human Rights Protection* (n 3) 88.

This general structure of human rights is set out in Article 2 ICCPR. Article 2(1) obliges states to respect and ensure the rights recognized in the Covenant. Article 2(2) adds the obligation to adopt measures necessary to give effect to those rights. As the UN Human Rights Committee clarified in General Comment No. 31:

> The article 2, paragraph 1, obligation *to respect* and *ensure* the rights recognized by [...] the Covenant has immediate effect for all States parties. Article 2, paragraph 2, provides the overarching framework within which the rights specified in the Covenant are to be promoted and *protected*.[83] (emphasis added)

Kälin and Künzli propose the following schema to structure the obligations arising from human rights (see table 2).[84]

How can this general structure of human rights obligations be transposed to the right to nationality? How do the three elements of the right to nationality fit in? Which obligations under the right to nationality are positive, which negative? Which obligations entail a duty to respect and refrain from interferences, which oblige states to take active measures to protect individuals against interferences with their right to nationality? And which obligations impose a duty to fulfill the right to nationality by providing the necessary legislative, institutional and procedural means to ensure its full realization?

TABLE 2 Structure of obligations

negative	to respect		
		preventive	operational and immediate
	to protect		through legislation
		remedial	operational and immediate
positive			through legislation
		legislative, institutional and procedural facilities to	
	to fulfil	ensure full realization of the right	
		benefits in the narrow sense	

83 Human Rights Committee, 'General Comment No. 31' (n 39) para 5.

84 Kälin and Künzli, *Human Rights Protection* (n 3) 88.

As the UN Secretary General noted in a recent report to the Human Rights Council, "states must enact laws governing the acquisition, renunciation and loss of nationality in a manner that is consistent with their international obligations, including in the field of human rights".[85] As already argued, the obligations derived from this international legal framework guaranteeing the right to nationality are primarily negative.[86] States have a *duty to respect* the right to nationality: they shall recognize everyone's right to nationality without discrimination.[87] They shall not deprive an individual arbitrarily of her nationality.[88] They shall not interfere with individuals' right to change their nationality. They shall refrain from collective mass naturalization and mass deprivation of nationality. And states shall not impose their nationality on individuals without their consent.

The positive obligations under the right to nationality find less support in the existing legal framework and are clearly more controversial.[89] Nevertheless, the right to nationality *does* establish positive obligations for states.[90] The Inter-American Court of Human Rights, for example, held in the *Yean and Bosico Case* that:

> [T]he Dominican Republic failed to comply with its obligation to guarantee the rights embodied in the American Convention, which implies not only that the State shall respect them (*negative obligation*), but also

85 Human Rights Council, 'Report 31/29 of the Secretary General on the Impact of the Arbitrary Deprivation of Nationality on the Enjoyment of the Rights of Children Concerned, and Existing Laws and Practices on Accessibility for Children to Acquire Nationality, Inter Alia, Of the Country in Which They Are Born, If They Otherwise Would Be Stateless' (HRC 2015) UN Doc. A/HRC/31/29 para 3.

86 Chapter 5, I. See similarly Emmanuel Decaux, 'Le droit à une nationalité, en tant que droit de l'homme' (2011) 22 Revue trimestrielle des droits de l'homme 237, 244; Jo Shaw and Igor Stiks, 'Citizenship Rights: Statues, Challenges and Struggles' [2014] Belgrade Journal of Media and Communications 74.

87 Martina Caroni and Nicole Scheiber, 'Art. 9 CEDAW' in Erika Schläppi, Silvia Ulrich and Judith Wyttenbach (eds), *CEDAW: Kommentar zum UNO-Übereinkommen über die Beseitigung jeder Form der Diskriminierung der Frau: Allgemeine Kommentierung, Umsetzung in der Schweiz, Umsetzung in Österreich* (Stämpfli, Manz 2015) para 23.

88 See also Kraus (n 15) 196.

89 See also International Law Commission, 'Commentary Draft Articles on Nationality' (n 41) 25.

90 See with regard to Article 9 CEDAW Savitri WE Goonesekere, 'Article 9' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press 2012) 247.

> that it must adopt all appropriate measures to guarantee them (*positive obligation*) [...].[91] (emphasis added)

The right to nationality imposes a *duty to protect* against interferences with the right to nationality by third parties, eg by protecting women in the exercise of their right to a nationality freely and independently from their husband's consent.[92] The positive obligations under the right to nationality also entail a *duty to fulfill* the right by taking active and, if necessary, preventive, measures to ensure its full realization. This can include legislative or institutional measures, such as foreseeing the necessary regulatory framework that allows for otherwise stateless children to acquire nationality based on their place of birth or descent to prevent them from becoming stateless.[93] Or, it can cover the possibility of the facilitated acquisition of nationality for stateless persons and refugees. Moreover, procedural safeguards should be in place to ensure its full realization.[94] Naturalization procedures should be accessible and fees not excessive. Furthermore, the duty to fulfill the right to nationality can imply an obligation to ensure that the population is aware of the right to nationality, eg by conducting information campaigns.[95] As a remedial protective measure, states should, for example, allow for the restoration of nationality if a person lost her nationality resulting in statelessness.[96] It can, however, also consist of the conferment of nationality by administrative decision after discriminatory naturalization requirements prevented the acquisition of nationality by ordinary naturalization.[97] Finally, the duty to fulfill also entails benefits in the narrow sense, such as issuance of passports or other forms of proof of nationality, as well as the financial or personal means to ensure the right to nationality, eg to establish a statelessness determination procedure.[98] The following section

91 *Yean and Bosico* (n 71) para 173.

92 Caroni and Scheiber (n 87) para 24.

93 See eg Human Rights Council, 'Resolution 20/4' (n 22) para 3. See also Human Rights Council, 'Report 25/28 of the Secretary General on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2013) UN Doc. A/HRC/25/28 para 43.

94 See eg Human Rights Council, 'Resolution 20/4' (n 22) paras 9–10.

95 Human Rights Council, 'Report of the Independent Expert on Minority Issues' (n 72) para 91.

96 See eg Human Rights Council, 'Resolution 20/5 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2012) UN Doc. A/HRC/RES/20/5 para 12.

97 See the judgment in *HP v Denmark* (*Decision*) [2016] ECtHR Application No. 55607/09.

98 See eg Human Rights Council, 'Report 25/28' (n 93) para 37. See also Caroni and Scheiber (n 87) para 26.

now analyzes the specific obligations that can be derived from the right to nationality in more detail in order to illustrate its content.

2 *Transversal Obligations*

2.1 Prohibition of Discrimination

The prohibition of discrimination is an essential element of the international system of human rights protection that is enshrined in virtually all human rights treaties.[99] Discrimination can even amount to degrading treatment because of its severe impact on a person's human dignity.[100] Accordingly, the principle of non-discrimination is also of central importance for the right to nationality.[101] Here, two situations can be distinguished: on the one hand, discriminatory treatment in the application of nationality laws is prohibited (III.2.1.1). On the other hand, differential treatment based on nationality might be problematic under certain circumstances (III.2.1.2).

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99 Fellmeth (n 77) 109; Kälin and Künzli, *Menschenrechtsschutz* (n 17) 405; Smith (n 68) 195. The prohibition of discrimination on the basis of race is sometimes referred to as *jus cogens,* see eg Crawford, *Brownlie's Public International Law* (n 36) 620; Alice Edwards, 'The Meaning of Nationality in International Law in an Era of Human Rights, Procedural and Substantive Aspects' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 26; Tamás Molnár, 'The Prohibition of Arbitrary Deprivation of Nationality under International Law and EU Law: New Perspectives' [2014] Hungarian Yearbook of International Law and European Law 67, 80; Michelle Foster and Timnah Rachel Baker, 'Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?' (2021) 11 Columbia Journal of Race and Law 83. The IACtHR even declares the principle of equality and non-discrimination generally to be a principle of *jus cogens*, *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants* [2003] IACtHR OC-18/03 101; reaffirmed for the context of the right to nationality in *Expelled Dominicans and Haitians* (n 1) para 264. See also Serena Forlati, 'Nationality as a Human Right' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 23.

100 The European Commission on Human Rights recognized on that basis that discrimination on the basis of race may amount to degrading treatment, *East African Asians v The United Kingdom* [1973] ECmHR Application Nos. 4403/70 et al para 207. See also *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* [1984] IACtHR OC-4/84, Series A No. 4 (1984) para 55; *BGE 129 I 217* [2003] para 2.1.

101 Kristin Henrard, 'The Shifting Parameters of Nationality' (2018) 65 Netherlands International Law Review 290. See also European Court of Human Rights, 'Dissenting Opinion of Judge Pinto de Albuquerque in Ramadan v Malta' (European Court of Human Rights 2016) Application No. 76136/12 para 6.

2.1.1 *Discrimination in the Context of Acquisition, Change and Loss of Nationality*

The prohibition of discrimination forbids unjustified unequal treatment in the application of nationality laws. States may not discriminate based on race, color, gender, sex, language, religion, political or other opinion, national or social origin, property, economic situation, birth, age, disability or other status.[102] Jean-Yves Carlier argues that it matters little whether the right to nationality is actually recognized as an individual human right, as the principle of non-discrimination clearly prohibits any discriminatory treatment with regard to acquisition of nationality.[103] This is confirmed by case law. The Swiss Federal Court, for instance, has introduced minimal protection for fundamental rights of non-citizens in naturalization procedures through the prohibition of discrimination.[104]

In practice, the prohibition of discrimination constitutes an important safeguard for individual rights in nationality matters. As the UN Independent Expert on Minority Issues noted in a report in 2008:

> Disputes regarding citizenship often arise against the background of pre-existing ethnic or regional conflict, linked in many cases to broader factors of poverty, competition for scarce resources and political instability.[105]

This link between citizenship, ethnicity, religion and discrimination is well-illustrated by the conflicts around the 2019 Indian citizenship act which discriminates against the Muslim minority in India. In a contentious move, the Indian state of Assam updated its national register of citizens, which had remained unchanged since 1951.[106] Officially aimed at identifying irregular migrants, the update leaves up to two million people in a legal limbo, as they are not able to put forward evidence for their ties to India accepted by the

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102 The prohibition of racial discrimination is even recognized as *jus cogens*, Foster and Baker (n 99), 85.

103 Jean-Yves Carlier, 'Droits de l'homme et nationalité' (2003) 63 Annales de Droit de Louvain 247.

104 *BGE 129 I 217* (n 100). See further *BGE 136 I 309*; *BGE 139 I 169*.

105 Human Rights Council, 'Report of the Independent Expert on Minority Issues' (n 72) para 26. See on the nexus between race and citizenship also David Scott Fitzgerald, 'The History of Racialized Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 133.

106 See Niraja Gopal Jayal, 'Reconfiguring Citizenship in Contemporary India' (2019) 42 South Asia: Journal of South Asian Studies 33.

authorities and are no longer recognized as citizens.[107] This disproportionately affects Muslims who migrated to India in the 1970[ies] from Bangladesh.[108] In a second step, the Hindu-nationalist government under Narendra Modi amended the Indian Citizenship Act of 1955 in December 2019. The amendment makes non-Muslim immigrants from Afghanistan, Bangladesh and Pakistan eligible for citizenship, but not Muslims from these countries.[109] From a non-discrimination perspective the targeted denaturalization of Muslims and the preferential naturalization of non-Muslims is clearly problematic.[110]

On a more specific level, the prohibition of discrimination requires that nationality laws as well as their application are not discriminatory. In other words, states have to observe the principle of non-discrimination in the application of laws relating to the acquisition, enjoyment, change and loss of nationality. They have an obligation to refrain from enacting or maintaining discriminatory nationality legislation and from applying it in a discriminatory manner.[111] Differential treatment based on a protected characteristic must be based on an objective and reasonable ground.[112] In the context of the acquisition of nationality, this means that rules on acquiring nationality automatically at birth may not differentiate on the basis of a protected ground without a legitimate reason. Nationality laws like those of Liberia or Sierra Leone, where citizenship from birth can only be acquired on the basis of 'negro descent', seem incompatible with the prohibition of racial discrimination.[113] It also means that states may not discriminate between children born to married parents and children born out-of-wedlock, as the ECtHR famously ruled in

107 See on the importance of registers and documentation also below Chapter 5, III.4.

108 See also Regina Menachery Paulose, 'A New Dawn? Statelessness and Assam' (2019) 7 Groningen Journal of International Law 99; Talha Abdul Rahman, 'Identifying the 'Outsider'. An Assessment of Foreigner Tribunals in the Indian State of Assam' (2020) 2 Statelessness and Citizenship Review 112.

109 See Human Rights Watch, 'India: Citizenship Bill Discriminates Against Muslims' (2019) <https://www.hrw.org/news/2019/12/11/india-citizenship-bill-discriminates-against-muslims>.

110 See also Foster and Baker (n 99), 97.

111 See eg Human Rights Council, 'Resolution 20/4' (n 22) para 5; Human Rights Council, 'Resolution 32/5 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2016) UN Doc. A/HRC/RES/32/5 para 4; *Expelled Dominicans and Haitians* (n 1) para 264.

112 *Keshva Rajan and Sashi Kantra Rajan v New Zealand, Communication No 820/1998* [2003] HRCttee UN Doc. CCPR/C/78/D/820/1998 para 7.4. See on the justification of discrimination also James A Goldston, 'Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens' (2006) 20 Ethics & International Affairs 334 f.

113 In Liberia persons not of 'negro descent' are also excluded from acquiring nationality through naturalization, see Bronwen Manby, *Citizenship and Statelessness in Africa: The Law and Politics of Belonging* (Wolf Legal Publishers 2015) 114.

Genovese v Malta.[114] Women, moreover, may not be discriminated against on the basis of gender in the transmission of nationality to their children (Article 9(2) CEDAW[115]).[116] Thus, the still wide-spread discrimination of women in the transmission of nationality to their children is a violation of the prohibition of discrimination under the right to nationality.[117]

Naturalization may not be rejected solely on discriminatory grounds.[118] As James Goldston writes, "it is no longer permissible for states to single out particular racial or ethnic groups for exclusionary or invidious treatment in access to citizenship".[119] Nationality legislation stipulating that persons with chronic illnesses or with intellectual or psychosocial disabilities may not be granted nationality is equally discriminatory.[120] At the same time, naturalization requirements that disproportionately disadvantage or make access to citizenship virtually impossible for persons of a particular group, such as women, elderly persons or persons with disabilities equally amount to (indirect)

114 *Genovese v Malta* [2011] ECtHR Application No. 53124/09. See also Human Rights Committee, 'General Comment No. 17' (n 8) para 8.

115 Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979, 1249 UNTS 13, 'CEDAW').

116 See eg the case of *Attorney General v Unity Dow* [1993] Court of Appeal of Botswana No. 4/91. See also Human Rights Council, 'Report 23/23 of the Secretary General on Discrimination Against Women on Nationality-Related Matters, Including the Impact on Children' (HRC 2013) UN Doc. A/HRC/23/23 para 34 ff.

117 See on the most recent law reforms to achieve gender equality in nationality laws UNHCR, 'Background Note on Gender Equality, Nationality Laws and Statelessness 2022' (UNHCR 2022) <https://www.refworld.org/docid/6221ec1a4.html>.

118 See also *BGE 129 I 217* (n 100) para 2.4. The case was decided based on the prohibition of discrimination in Article 8(2) of the Swiss Constitution (Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101, 'Swiss Constitution'). The Federal Court left open whether there was also a violation of Article 2 CERD (para 2.4). The arguments of the Federal Court could, however, also be based on the relevant international standards. See with regard to discrimination on the basis of national origin also Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 27 on Discrimination against Roma' (CtteeERD 2000) para 4; *DR v Australia, Communication No 42/2008* [2009] CtteeERD UN Doc. CERD/C/75/D/42/2008 para 7.3; *Open Society Justice Initiative v Côte d'Ivoire* [2015] ACmHPR Communication No. 318/06, 28 February 2015.

119 Goldston (n 112) 333.

120 Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Ecuador' (CtteeRPD 2014) UN Doc. CRPD/C/ECU/CO/1 para 32. Similarly also Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Peru' (CtteeRPD 2012) UN Doc. CRPD/C/PER/CO/1 para 6; Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the combined seventh and eighth periodic reports of Yemen' (CEDAW 2021) UN Doc. CEDAW/C/YEM/CO/7-8 para 32.

discrimination.[121] However, where the refusal to grant nationality is not based solely on discriminatory grounds but can be motivated by other — seemingly neutral — requirements such as local integration, the principle of non-discrimination will normally not be violated.[122]

Where loss of nationality is concerned, nationality may not be withdrawn on discriminatory grounds.[123] Such a deprivation of nationality based on discriminatory grounds is arbitrary and thus unlawful.[124] As Article 9 of the 1961 Convention illustrates that it is, thereby, irrelevant whether the person concerned is rendered stateless by the deprivation measure or not. Against this background, the current trend to allow for deprivation of nationality as a counter-terrorism measure is problematic where it has a disproportionate effect on individuals of a certain religious or ethnic background, even if does not result in statelessness.[125] Equally, deprivation of nationality seems questionable if it entails a differentiation between mono, dual or plural nationals.[126]

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121 Human Rights Council, 'Report 23/23' (n 116) para 23; CtteeEDAW, 'General Recommendation No. 32' (n 44) para 54; Radha Govil and Alice Edwards, 'Women, Nationality and Statelessness' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 180 f. See eg also *BGE 135 I 49* para 6.1 ff.

122 See for example *Benon Pjetri v Switzerland, Communication No 53/2013* [2016] CtteeERD UN Doc. CERD/C/91/D/53/2013.

123 Committee on the Elimination of Racial Discrimination, 'General Recommendation No. XXX on Discrimination Against Non-Citizens' (CtteeERD 2002) para 14; Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 34' (n 11) para 48. See eg with regard to the possibly discriminatory effect of deprivation of nationality in the context of national security measures Tom L Boekestein and Gerard-René de Groot, 'Discussing the Human Rights Limits on Loss of Citizenship: A Normative-Legal Perspective on Egalitarian Arguments Regarding Dutch Nationality Laws Targeting Dutch-Moroccans' (2019) 23 Citizenship Studies 320.

124 Human Rights Council, 'Report 10/34 of the Secretary General on Arbitrary Deprivation of Nationality' (HRC 2009) UN Doc. A/HRC/10/34 para 55; Human Rights Council, 'Report 13/34' (n 2) para 26. See also Chapter 5, III.6.1.1.

125 See also UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, 'Report on Racial Discrimination in the Context of in the Context of Laws, Policies and Practices Concerning Citizenship, Nationality and Immigration' (Special Rapporteur on Racism 2018) UN Doc. A/HRC/38/52 para 57; Mantu, 'Terrorist Citizens' (n 73).

126 See immediately below Chapter 5, III.2.1.3 as well as III.6.1. See also Hans Ulrich Jesserun d'Oliveira, 'Once Again: Plural Nationality' (2018) 25 Maastricht Journal of European and Comparative Law METRO 22, 32 ff; Matthew J Gibney, 'Denationalisation and Discrimination' (2020) 46 Journal of Ethnic and Migration Studies 2551, 2562 f; Laura van Waas and Sangita Jaghai, 'All Citizens Are Created Equal, but Some Are More Equal Than Others' (2018) 65 Netherlands International Law Review 417 ff. Left open in *K2 v The United Kingdom* (*Decision*) [2017] ECtHR Application No. 42387/13.

The prohibition of discrimination in nationality matters, finally, not only entails a negative obligation for states to refrain from discriminatory treatment, it can also imply a positive obligation to take proactive measures to guarantee substantive equality and ensure equal access to nationality rights.[127] This can require, for example, that persons with disabilities are exempted from certain naturalization requirements in order to have equal access to citizenship.

The international instruments prohibiting discrimination in nationality matters list different prohibited grounds. Some provisions have an open catalogue of protected grounds, whereas others only address specific grounds of discrimination. The grounds of ethnic or national origin, race, religion, disability or birth are often the main grounds for discrimination in nationality matters in practice. Of particular importance for the discussion at hand is, moreover, the prohibition of discrimination on the basis of gender, as protected inter alia by Article 9 CEDAW.[128] Where women and men do not have equal rights to acquire, change and retain their nationality, or to transmit it to their children, a significant risk of statelessness is created both for the women and their children.[129] The principle of dependent nationality is not, therefore, compatible with the obligation not to discriminate on the basis of gender in nationality matters, despite many nationality laws still using it as a basis.[130]

Discrimination cannot only occur based on one single ground alone. Often, individuals face multiple and intersecting forms of discrimination, such as, for example, women belonging to racial or ethnic minorities, migrants with a disability or elderly persons of color.[131] An example of this can be found in naturalization requirements, such as economic self-sufficiency, that are significantly more likely to affect single mothers or women with care-responsibilities. Here the combined or intersecting effect results in indirect discrimination.[132] These

127 Human Rights Council, 'Report 23/23' (n 116) para 27.

128 See in more detail Govil and Edwards (n 121).

129 Human Rights Council, 'Report 23/23' (n 116) para 20 ff; CtteeEDAW, 'General Recommendation No. 32' (n 44) para 51.

130 Govil and Edwards (n 121) 178 ff; Human Rights Council, 'Report 23/23' (n 116) para 19.

131 Human Rights Council, 'Report 23/23' (n 116) para 25; UN Special Rapporteur on Racism (n 125) para 12; UN Special Rapporteur on Minority Issues, 'Report of the Special Rapporteur on Minority Issues to the Human Rights Council' (2008) UN Doc. A/HRC/7/23 para 37. For the concept of intersectionality see Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 University of Chicago Legal Forum 139.

132 CtteeEDAW, 'General Recommendation No. 32' (n 44) para 55.

cumulative or intersectional forms of discrimination also constitute a violation of the principle of non-discrimination under the right to nationality.[133]

2.1.2 *Discrimination on the Basis of Nationality*

Generally, international law allows states to treat their citizens differently from non-citizens.[134] Moreover, states can give certain privileges to some groups of non-citizens or make certain differentations on the basis of citizenship, provided there is an objective and legitimate ground for such difference.[135] Nevertheless, distinctions on the basis of nationality or nationality status can be problematic. The ECtHR, for example, requires very weighty reasons to justify a difference in treatment on the basis of nationality.[136] Article 5(2) ECN calls upon states not to discriminate between nationals by birth and nationals who have acquired nationality later in life.[137] Article 3 1954 Convention obliges states not to discriminate between stateless persons on the basis of race, religion or country of origin. Moreover, certain international legal instruments specifically prohibit discrimination on the basis of nationality — namely, EU law, where the prohibition of discrimination on the basis of nationality between EU citizens is a fundamental principle.[138] EU law also states that any

133 Committee on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women' (CtteeEDAW 2010) UN Doc. CEDAW/C/GC/28 para 18. In practice, domestic courts and international treaty bodies have so far been reluctant to acknowledge intersectional forms of discrimination, see eg *Benon Pjetri v Switzerland* (n 122) para 7.6; see the judgment of the Swiss Federal Court at the national level *1D_6/2018, Urteil vom 3 Mai 2019* [2019].

134 Article 1(2) CERD. See also Chapter 4, II.1.2.5. See further *Diop v France, Communication No 2/1989* [1991] CtteeERD UN Doc. CERD/C/39/D/2/1989 para 6.6; *Gaygusuz v Austria* [1996] ECtHR Application No. 17371/90 para 42.

135 CtteeERD, 'General Recommendation No. XXX' (n 123) para 4. See Edwards (n 99) 38 ff. See also *C v Belgium* [1996] ECtHR Application No. 21794/93 para 38; *Ponomaryovi v Bulgaria* [2011] ECtHR Application No. 5335/05 para 54 ff.

136 Eg *Andrejeva v Latvia* [2009] ECtHR Application No. 55707/00 para 87; *Biao v Denmark* (*Grand Chamber*) [2016] ECtHR Application No. 38590/10 para 93. The CtteeERD also repeatedly expressed its concern about the situation of the category of non-citizens in Latvia, see Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Sixth to Twelfth Periodic Reports of Latvia' (CtteeERD 2018) UN Doc. CERD/C/LVA/CO/6-12 paras 20 and 21.

137 See similarly Ineta Ziemele, 'General Aspects of Nationality and Human Rights in Relation to State Succession' in Council of Europe (ed), *Challenges to National and International Law on Nationality at the Beginning of the New Millenium, Proceedings of the 2nd European Conference on Nationality* (Council of Europe 2001) 167.

138 Article 18 Treaty on the Functioning of the European Union, 26 October 2012, OJ C 326/47, 'TFEU'. Differentiations between EU citizens and third country nationals, however,

differential treatment on the basis of nationality between EU nationals must be justified by objective reasons independent of a person's nationality.[139]

Differential treatment based on the possession or lack of a particular nationality or statelessness, the possession of more than one nationality or the mode of acquiring nationality might consequently violate the principle of non-discrimination.[140] In particular, such differentiations are problematic when they entail a differentiation on the basis of race, ethnicity or religion. As the UN Special Rapporteur on Racism notes:

> [C]itizenship, nationality, and immigration laws and policies constitute a violation of international human rights law when they discriminate, in purpose or effect, between citizens and non-citizens, or among non-citizens, on the basis of race, colour, descent, or national or ethnic origin.[141]

Differentiations between mono and plural nationals — as they occur, for example, in the context of deprivation of nationality — are, in practice, likely to accord different rights depending on a person's national or ethnic origin and descent, as persons with more than one nationality often have a migration background and thus also a foreign ethnic origin.[142]

In the case of *Biao v Denmark* the Grand Chamber of the European Court of Human Rights found discrimination on the basis of ethnic origin due to a

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are inherent to the concept of EU citizenship. See eg Dora Kostakopoulou, 'When EU Citizens Become Foreigners' (2014) 20 European Law Journal 447; Francesca Strumia, *Supranational Citizenship and the Challenge of Diversity: Immigrants, Citizens and Member States in the EU* (Brill Nijhoff 2013).

139 *Heinz Huber v Germany* [2008] CJEU C-524/06 para 75. See, however, the proposal by the EU Commission to include EU citizens with an additional third country citizenship into the European Criminal Records Information System database for criminal records, whereby it would have introduced a distinction between mono EU nationals and dual EU nationals, on the one hand, and dual nationals with EU and third country citizenship, on the other hand; European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Centralised System for the Identification of Member States Holding Conviction Information on Third Country Nationals and Stateless Persons (TCN) to Supplement and Support the European Criminal Records Information System (ECRIS-TCN System) and Amending Regulation (EU) No 1077/2011' (EU Commission 2017) COM(2017) 344 <https://ec.europa.eu/info/sites/info/files/commission_proposal_for_a_regulation_on_ecris-tcn_system_0.pdf>.

140 See also CtteeERD, 'General Recommendation No. XXX' (n 123) para 4; Human Rights Council, 'Report 25/28' (n 93) para 6.

141 UN Special Rapporteur on Racism (n 125) para 27.

142 See also below Chapter 5, III.6.1.1.

differentiation based on the mode of acquiring nationality.[143] The case concerned a Danish law on family reunification. The ECtHR found that the legislation in question had the indirect effect of favoring nationals of Danish ethnic origin and disproportionately disadvantaging persons who acquired Danish nationality later in life and, likely, were of a foreign ethnic origin.[144] As Denmark was not able to put forward compelling or very weighty reasons unrelated to ethnic origin to justify the difference in treatment, the Court saw a violation of Article 14 in conjunction with Article 8 ECHR on the basis of ethnic origin.[145] This shows that a differential treatment between persons who acquire nationality at birth and persons who acquire it later in life is not only hard to justify, it also usually entails discrimination on the basis of one's ethnic origin.[146] Moreover, as van Waas and Jaghai note, "by making citizenship for naturalized and dual citizens conditional upon good behavior, citizenship becomes a less secure status for specific groups of citizens and a less equal status".[147]

In the context of naturalizations, facilitated requirements for nationals of certain countries, for example, are permissible where they are based on factual differences that are indicative of a closer affinity to the state of naturalization and are consistent with the nature and purpose of the grant of nationality.[148] However, such provisions may not discriminate against a particular nationality (Article 1(3) CERD) and may not have the effect of discriminating against persons of a certain religion, race or ethnic background.[149] Thus, the scope for such preferential rules is relatively narrow.

To sum up, the prohibition of discrimination is of central importance for the full and effective enjoyment of the right to nationality. States have to ensure that everyone can ensure the right to nationality without discrimination — not only regarding the treatment of non-citizens or stateless persons, but also for the regulation of acquisition, change and loss of nationality.

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143 *Biao v Denmark* (GC) (n 136).

144 *ibid 113.*

145 *ibid 138 and 139.* The Grand Chamber overturned the Chamber judgment which had previously found that the 28-year rule was not disproportionate, *Biao v Denmark* [2014] ECtHR Application No. 38590/10 para 102. Similarly also *Abdulaziz, Cabales and Balkandali v The United Kingdom* [1985] ECtHR Application Nos. 9214/80, 9473/81, 9474/81 para 87 ff.

146 See also *Biao v Denmark* (GC) (n 136) para 134.

147 van Waas and Jaghai (n 126) 418.

148 *Advisory Opinion OC-4/84* (n 100) para 59 f. See also Human Rights Council, 'Report 10/34' (n 124) para 62.

149 *DR v Australia* (n 118) para 7.2. See also Chapter 4, II.1.1.5.

2.2 The Prohibition of Arbitrariness and the Question of Proportionality

The prohibition of arbitrariness forms a second category of transversal obligations that underpin all aspects of the right to nationality.[150] Limitations of the right to nationality may not be arbitrary. The prohibition of arbitrariness is explicitly mentioned regarding deprivation of nationality, for example, in Article 15(2) UDHR, Article 18(1)(a) CRPD, Article 20(3) ACHR and Article 4(c) ECN.[151] The prohibition of arbitrariness, however, applies beyond the deprivation of nationality to all aspects of the right, including the acquisition of nationality. In the case of *Yean and Bosico,* the IACtHR concluded that the Dominican Republic acted arbitrarily — without reasonable and objective criteria — when it applied requirements for the acquisition of nationality by birth to Haitian children that differed from those for other children. The requirements made it impossible for the girls to acquire Dominican nationality.[152] This amounted to an arbitrary denial of nationality. Similarly, the ECtHR has accepted that arbitrary revocation,[153] denial[154] and refusal to renounce citizenship[155] might raise an issue under Article 8 ECHR. Equally, the procedures relating to the acquisition, change or loss of nationality may not be arbitrary.[156] As the ECtHR has laid out in *K2 v the UK*, in order to avoid acting arbitrarily the authorities must act diligently and swiftly in a deprivation procedure and afford the individual concerned the necessary procedural safeguards, including the right to be heard, a right of appeal and the possibility of legal representation.[157] Based on these standards, Bialosky argues that "the prohibition against arbitrariness in state policy on an individual's ability to retain and change nationality [...] seems also to have become a norm of customary international law".[158]

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150 See also de Groot and Vonk (n 54) 45; van Waas and Jaghai (n 126) 422.

151 See also Chapter 4, II.

152 *Yean and Bosico* (n 71) para 166.

153 *Ramadan v Malta* [2016] ECtHR Application No. 76136/12 para 85.

154 Eg *Genovese v Malta* (n 114) para 30. The 'unjust' denial of nationality was also the issue in the case of *John K Modise v Botswana* [2000] ACmHPR Communication No. 97/93.

155 *Riener v Bulgaria* [2006] ECtHR Application No. 46343/99 para 154.

156 Human Rights Council, 'Resolution 26/14 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2014) UN Doc. A/HRC/RES/26/14 para 12; Human Rights Council, 'Resolution 32/5' (n 111) para 13. See for the deprivation of nationality also *Baruch Ivcher Bronstein v Peru* [2001] IACtHR Series C No. 74 para 95. See also Chapter 5, III.7.

157 *K2 v UK* (n 126) para 53 f.

158 Jonathan Bialosky, 'Regional Protection of the Right to a Nationality' (2015) 24 Cardozo Journal of International & Comparative Law 153, 189.

The notion of arbitrariness is defined by the Human Rights Committee as "an application of law to an individual's detriment" that is "not based on reasonable and objective grounds".[159] Arbitrariness "must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality".[160] As the 2009 Report of the UN Secretary General on Arbitrary Deprivation of Nationality notes:

> [...] in order not to be arbitrary, deprivation of nationality must be *in conformity with domestic law* and in addition comply with specific *procedural and substantive standards*, in particular the principle of proportionality. Measures leading to deprivation of nationality must serve a *legitimate purpose* that is consistent with international law and in particular the objectives of international human rights law. Such measures must be the *least intrusive instrument* amongst those which might achieve the desired result and they must be *proportional* to the interest to be protected.[161] (emphasis added)

The concept of arbitrariness is closely linked to the principle of *proportionality*.[162] It entails the same standards of reasonableness, effectiveness, necessity and balance that are also inherent to the principle of proportionality.[163] However, the two standards are not congruent. In principle, the standard of non-arbitrariness implies a higher threshold than proportionality.[164] If

159 *Borzov v Estonia, Communication No 1136/2002* [2004] HRCttee UN Doc. CCPR/C/81/D/1136/2002 para 7.2.

160 Human Rights Committee, 'General Comment No. 35 on Article 9 (Liberty and Security of Person)' (HRCttee 2014) UN Doc. CCPR/C/GC/35 para 12.

161 Human Rights Council, 'Report 10/34' (n 124) para 49. See also Human Rights Council, 'Resolution 32/5' (n 111) para 16.

162 See also Jorunn Brandvoll, 'Deprivation of Nationality' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 197; van Waas and Jaghai (n 126) 422.

163 See on the principle of proportionality also Thomas Cottier and others, 'The Principle of Proportionality in International Law: Foundations and Variations' (2017) 18 The Journal of World Investment & Trade 628; Walter Kälin and Jörg Künzli, 'Das Verhältnismässigkeitsprinzip als Bestandteil des zwingenden Völkerrechts? Gedanken zu Art. 139 Abs. 3 BV' [2014] Jusletter vom 23. Juni 2014; Anne Peters, 'Drei Versionen der Verhältnismässigkeit im Völkerrecht' in Giovanni Biaggini and others (eds), *Polis und Kosmopolis: Festschrift für Daniel Thürer* (Dike 2015) 596.

164 See also the case of *K2 v the UK* where the ECtHR argued that the standard of 'arbitrariness' is a stricter standard than that of proportionality, *K2 v UK* (n 126) para 61.

a measure is disproportionate, it is not necessarily also arbitrary. A measure can, for example, be disproportionate while not being arbitrary in the sense of being unjust, unreasonable or tyrannical. By contrast, if a measure is deemed to be arbitrary, it will always entail an element of disproportion.

The principle of proportionality also gains increasing importance in nationality matters. In principle, any state action must be proportionate, particularly where it possibly conflicts with individual rights.[165] The elements taken into consideration in the assessment of whether a measure is arbitrary or not, in practice, are often very similar to those of a proportionality test. The CJEU, for example, has long held that domestic nationality legislation and their implementation must be proportionate. In the case of *Rottman* and more recently in *Tjebbes* and *JY v Wiener Landesregierung* it held that the principle of proportionality requires that the consequences of loss of nationality for the situation of the person concerned, and possibly also for their relatives, must be taken into consideration and weighed against the gravity of the reason for withdrawing nationality.[166] The proportionality assessement therefore includes an examination whether a decision is consistent with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, especially the right to family life and the best interests of the child.[167] Moreover, the principle of proportionality impacts the right to nationality indirectly where nationality is seen as part of a person's social identity and thus as part of the right to private life. Within the framework of the ECHR, restrictions of the right to nationality should therefore comply with the requirements of Article 8 ECHR. Against that basis, an increasing number of authors argue that any restriction of the right to nationality may not only not be arbitrary but must also be proportionate.[168]

2.3 The Duty to Prevent and Reduce Statelessness

The IACtHR noted in the case of *Yean and Bosico* that states' sovereignty to determine who has a right to be a national:

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165 See eg Article 5 of the Swiss Constitution according to which "state activities must be conducted in the public interest and be proportionate to the ends sought". See also Kälin and Künzli, 'Das Verhältnismässigkeitsprinzip' (n 163) 2.

166 *Rottman* (n 51) para 56; *Tjebbes and Others v Minister van Buitenlandse Zaken* [2019] CJEU C-221/17 para 40; *JY v Wiener Landesregierung* [2021] CJEU C-118/20 para 58 ff.

167 *JY v Wiener Landesregierung* (n 166) para 61.

168 See eg Brandvoll (n 162); van Waas and Jaghai (n 126); Mantu, 'Terrorist Citizens' (n 73) 30; PACE, 'Withdrawing Nationality' (n 73) para 7. See however the ECtHR's approach in *Usmanov v Russia* [2020] ECtHR Application No. 43936/18.

> is limited, on the one hand, by their obligation to provide individuals with the equal and effective protection of the law and, on the other hand, by their *obligation to prevent, avoid and reduce statelessness*.[169] (emphasis added)

This obligation to prevent and reduce statelessness is the third transversal obligation underpinning the right to nationality.

The duty to prevent and reduce statelessness is the corollary of the right to nationality.[170] Statelessness, as the absence of nationality, fundamentally conflicts with the idea of a right to nationality. Moreover, in practice, statelessness still significantly affects the full and effective enjoyment of all other human rights.[171] Until today, some authors found that the right to nationality is limited to the avoidance of statelessness and the right of the individual not to be made stateless.[172] Some also describe the duty to prevent statelessness as a negative duty arising from the right to nationality.[173] While I argue in the following that this view on the right to nationality is too narrow, the duty to prevent and reduce statelessness remains a crucial element for the protection of the right to nationality.[174]

To prevent violations of fundamental human rights through statelessness, states should avoid the creation of statelessness in the first place. As the ILC notes in the commentary to the Draft Articles on Nationality, the duty to prevent and reduce statelessness cannot be understood as an obligation of result, but is primarily an obligation of conduct.[175] It shall guide the states in the application of nationality laws.[176] Nationality laws and their application

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169 *Yean and Bosico* (n 71) 140.

170 International Law Commission, 'Commentary Draft Articles on Nationality' (n 41) 27.

171 See generally Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008).

172 See eg Mohamed Bennouna, 'De la reconnaissance d'un "droit à la nationalité" en droit international' in Société française pour le droit international (ed), *Droit international et nationalité* (Editions Pedone 2012) 121; Smith (n 68) 386.

173 Jeffrey Blackman, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law' (1998) 19 Michigan Journal of International Law 1141, 1176; Chan (n 74) 13; Edwards (n 99) 27. See also already Hersch Lauterpacht, *An International Bill of the Rights of Man* (*Reprint*) (Oxford University Press 2013) 126.

174 See also Carol A Batchelor, 'Transforming International Legal Principles into National Law: The Right to a Nationality and the Avoidance of Statelessness' (2006) 25 Refugee Survey Quarterly 8, 13.

175 International Law Commission, 'Commentary Draft Articles on Nationality' (n 41) 28. See also UN General Assembly, 'Resolution 61/137 on the Office of the United Nations High Commissioner for Refugees' (UN General Assembly 2007) UN Doc. A/RES/61/137 para 7.

176 See also Human Rights Council, 'Resolution 20/5' (n 96) para 5.

shall prevent the creation of statelessness, eg by prohibiting deprivation of nationality resulting in statelessness or making renunciation of nationality conditional upon the acquisition of another nationality. They shall also reduce existing instances of statelessness, for example, by facilitating naturalization for stateless persons or allowing for the acquisition of nationality for otherwise stateless children.

The duty to prevent and avoid statelessness is reflected as an underlying principle in the 1930 Convention,[177] the 1954 and 1961 Conventions.[178] Moreover, it is mirrored in other international provisions protecting the right to nationality.[179] Soft law instruments regularly refer to the obligation of states to prevent and reduce statelessness.[180] UN General Assembly Resolution 50/152 on the Office of the UN High Commissioner for Refugees calls upon states "to adopt nationality legislation with a view to reducing statelessness, consistent with the fundamental principles of international law".[181] Despite these different legal sources, it is disputed whether the principle to prevent and avoid statelessness forms part of customary international law.[182] The IACtHR, however, seems to recognize a customary obligation to reduce statelessness when it argues that "[s]tates have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons".[183] Blackman supports that position:

177 Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April 1930, LNTS Vol. 179, p. 89 ('1930 Convention').

178 William Worster, 'The Obligation to Grant Nationality to Stateless Children Under Treaty Law' (2019) 24 Tilburg Law Review 204, 205.

179 Weissbrodt (n 18) 105.

180 Namely in UN Commission on Human Rights, 'Resolution 2005/45 on Human Rights and Arbitrary Deprivation of Nationality' (UN Human Rights Commission 2005) UN Doc. E/CN.4/RES/2005/45 para 4; Human Rights Council, 'Resolution 7/10 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2008) UN Doc. A/HRC/RES/7/10 para 4; Human Rights Council, 'Resolution 10/13 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2009) UN Doc. A/HRC/RES/10/13 para 4; Human Rights Council, 'Resolution 13/2 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2010) UN Doc. A/HRC/RES/13/2 para 4; Human Rights Council, 'Resolution 20/4' (n 22) para 3; Human Rights Council, 'Resolution 20/5' (n 96) paras 3, 5 and 9; Human Rights Council, 'Resolution 26/14' (n 156) paras 3, 5 and 10; Human Rights Council, 'Resolution 32/5' (n 111) para 5.

181 UN General Assembly, 'Resolution 50/152 on the Office of the United Nations High Commissioner for Refugees' (UN General Assembly 1996) UN Doc. A/RES/50/152 para 16.

182 See Kay Hailbronner and others (eds), *Staatsangehörigkeitsrecht* (6. Aufl., CH Beck 2017) 51. See also Chapter 4, III.

183 *Yean and Bosico* (n 71) para 142.

> Although a general right to a nationality has not become part of customary international law, the trend in international law suggests a strong presumption in favor of the prevention of statelessness in any change of nationality, including in a state succession. While a state may not have a positive obligation to confer its nationality on anyone, a state may have at least a negative duty not to create statelessness. This can be conceived both as a corollary to the emerging individual right to a nationality and as an independent obligation *ergo omnes*.[184] (original emphasis)

Overall, the opinion that the duty to prevent and reduce statelessness has acquired the rank of customary law seems to prevail.[185] Given the different sources reinforcing this obligation — including international treaty bodies and courts recognizing it as a principle of international law — it seems legitimate to take that position.[186]

The prohibition of discrimination and of arbitrariness and the duty to prevent and reduce statelessness discussed in the foregoing underpin the right to nationality in the sense of transversal obligations. These transversal obligations can, again, be summarized in table 3.

The prohibition of discrimination, the prohibition of arbitrariness and the duty to prevent and reduce statelessness inform the different specific obligations that can be derived from the right to nationality that will be discussed in the following sections.

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184 Blackman (n 173) 1183.

185 See eg Mirna Adjami and Julia Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27 Refugee Survey Quarterly 103; Sükrü Uslucan, *Zur Weiterentwicklungsfähigkeit des Menschenrechts auf Staatsangehörigkeit: Deutet sich in Europa ein migrationsbedingtes Recht auf Staatsangehörigkeit an — auch unter Hinnahme der Mehrstaatigkeit?* (Duncker & Humblot 2012) 118; Ziemele, 'State Succession' (n 48) 243.

186 Council of Europe, 'Explanatory Report to the European Convention on Nationality' (Council of Europe 1997) para 33; Edwards (n 99) 29; UNHCR, 'Expert Meeting — Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")' (UNHCR 2013) para 2 <https://www.refworld.org/docid/5333a754b4.html>. See also *Kurić and Others v Slovenia* (*Chamber*) [2010] ECtHR Application No. 26828/06 para 376. The ECtHR does however not always acknowledge the particular need for protection of stateless persons, see eg *Mogos et Krifka v Germany* (*Decision*) [2003] ECtHR Application No. 78084/01; *Dragan and others v Germany* (*Decision*) [2004] ECtHR Application No. 33743/03; *Konstatinov v The Netherlands* [2007] ECtHR Application No. 16351/03.

TABLE 3 Transversal obligations

	Prohibition of discrimination	**Prohibition of arbitrariness**	**Prevention and reduction of statelessness**
Acquisition			
At birth	Equal right to transmit nationality for men and women No discriminatory rules on birthright acquisition (born in/out of wedlock, children with disability …)	Procedural guarantees	Acquiring nationality at birth in the state of birth if otherwise stateless
Through naturalization	No discrimination in naturalization procedures	Availability of naturalization No excessive requirements Procedural guarantees	Facilitated acquisition of nationality for stateless persons
Enjoyment	No discrimination between mono and plural nationals No differential treatment in recognition of plural nationality	Procedural guarantees	Birth registration and issuance of nationality documentation
Change	No discrimination regarding change and renouncement of nationality	Procedural guarantees	Legitimate limitations of the right to change or renounce nationality to prevent statelessness
Loss	No loss based on discriminatory grounds	No arbitrary deprivation of nationality	No loss of nationality resulting in statelessness

3 *Obligations Regarding the Acquisition of Nationality*

The first element of the right to nationality that I now look at is the right to have a nationality — or more generally, the obligations under the right to nationality relating to the acquisition of nationality. Thereby, the acquisition of nationality is broadly understood as acquiring of nationality both at birth and later in life *ex lege,* as well as through naturalization based on an administrative decision.[187]

3.1 Right of the Child to Acquire a Nationality

The first obligation that can be derived from numerous international instruments is the right of the child to acquire a nationality.[188] On the one hand, the right of the child to a nationality is protected by general provisions granting a right to nationality to everyone. On the other hand, the child's right to a nationality is specifically enshrined in several international treaties — most notably Article 7 CRC, Article 24(3) ICCPR, Article 18(2) CRPD, but also Article 20 ACHR and Article 6 ECN at the regional level.[189]

The right of the child to a nationality aims to protect the particular needs and vulnerabilities of children.[190] Every child should have a nationality when they are born in order not to become stateless.[191] Children are particularly vulnerable to human rights violations. Statelessness increases this particular vulnerability.[192] As minors, children are therefore in need of special protection by the state, including a nationality.[193] Having a nationality from birth is essential for children to fully realize their rights.[194] As the ECtHR noted in *Mennesson v France*, not having a nationality has negative repercussions on the definition

187 See also Chapter 5, II.2.2.

188 Gerard-René de Groot, 'Children, Their Right to a Nationality and Child Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 144. See also Uslucan (n 185) 122.

189 See the more detailed discussion of these provisions in Chapter 4, II.

190 Human Rights Committee, 'General Comment No. 17' (n 8) para 1.

191 *ibid 8.*

192 See *Abdoellaevna v The Netherlands, Communication No 2498/2014* [2019] HRCttee UN Doc. CCPR/C/125/D/2498/2014 para 7.8; *Institute for Human Rights and Development in Africa* (*IHRDA*) *and Open Society Justice Initiative* (*on behalf of Children of Nubian Descent in Kenya*) *v the Government of Kenya* [2011] ACERWC Decision No 002/Com/002/2009 para 46.

193 Article 24 ICCPR, eg, obliges states to grant such special measures of protection, see eg *Abdoellaevna v Netherlands* (n 192) para 7.3.

194 See generally Jacqueline Bhabha (ed), *Children Without a State: A Global Human Rights Challenge* (The MIT Press 2014).

of a child's personal identity.[195] At the same time, the risk of long-term statelessness is heightened if a child does not acquire a nationality at the moment of birth.[196] Thus, the child's right to a nationality serves as protection against statelessness in the first place.[197]

As discussed in chapter 4, the instruments at the universal level do not specify in detail how children should acquire a nationality.[198] Nor do they indicate against which state has the duty to respect, protect and fulfil the child's right to a nationality.[199] In principle, the right of the child to a nationality equally binds any state to which a child has a significant link.[200] In most cases, nationality is acquired automatically at birth by operation of law on the basis of *jus sanguinis* or *jus soli*. The right of the child to a nationality does not necessarily oblige states to give nationality to every child born on their territory.[201] However, states have to adopt all appropriate measures to ensure that every child has a nationality at birth.[202] Moreover, states have to take proactive measures to ensure that a child can exercise its right to acquire a nationality.[203]

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195 *Mennesson v France* [2014] ECtHR Application No. 65192/11 para 97.

196 de Groot, 'Children's Right to Nationality' (n 188) 144.

197 See also Human Rights Council, 'Report 31/29' (n 85) paras 4 and 10; Jaap E Doek, 'The CRC and the Right to Acquire and to Preserve a Nationality' (2006) 25 Refugee Survey Quarterly 26, 28.

198 See eg Decaux (n 86) 245; Véronique Boillet and Hajime Akiyama, 'Statelessness and International Surrogacy from the International and European Legal Perspectives' (2017) 27 Swiss Review of International and European Law 513, 516 f.

199 de Groot, 'Children's Right to Nationality' (n 188) 145. See also Jill Stein, 'The Prevention of Child Statelessness at Birth: The UNCRC Committee's Role and Potential' (2016) 24 The International Journal of Children's Rights 599, 604.

200 de Groot, 'Children's Right to Nationality' (n 188) 147. The ACERWC noted that states should not only provide for acquisition of nationality for children born in the territory, but also children who have been residing in the state for a substantial portion of their childhood, African Committee of Experts on the Rights and Welfare of the Child, 'General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child: "Birth Registration, Name and Nationality"' (ACERWC 2014) ACERWC/GC/02 para 92 <http://citizenshiprightsafrica.org/wp-content/uploads/2016/01/ACERWC-General-Comment-Article-6-Eng.pdf>.

201 Human Rights Committee, 'General Comment No. 17' (n 8) para 8. See also *Denny Zhao v The Netherlands*, Communication No. 2918/2016 [2020] HRCttee UN Doc. CCPR/C/130/D/82918/2016 para 8.2.

202 Human Rights Committee, 'General Comment No. 17' (n 8) para 8. See also Bennouna (n 172) 121; *Abdoellaevna v Netherlands* (n 192) para 7.3; Human Rights Council, 'Resolution 20/4' (n 22) para 3.

203 *A.M. (on behalf of M.K.A.H.) v Switzerland, Communication No 95/2019* [2021] CtteeRC UN Doc. CRC/C/88/D/95/2019 para 10.10.

Such efforts include positive measures like, for instance, birth and civil registration or the issuance of identity documents but also access to a statelessness determination procedure to establish whether the child has a nationality in the first place.[204] The acquisition of nationality should take place at birth or as early as possible thereafter.[205] At the very least, states should provide for a meaningful opportunity to exercise the right to nationality before the age of maturity.[206]

The question is, then, what happens if a child cannot acquire any nationality at birth and risks being stateless? Following the predominant interpretation of Article 7 CRC and Article 24(3) ICCPR, in such situation the obligation to grant nationality falls on the state upon whose territory the child is born.[207] This default *jus soli* rule allows for the identification of the state that bears the obligation to effectively guarantee the right to a nationality — in the absence of any link to any other state.[208] Without such a default rule, the child would be stateless and the right of the child to a nationality would be rendered meaningless. Granting nationality to all children born on the territory who would otherwise be stateless provides an effective safeguard against childhood statelessness.[209] As the report of the UN Secretary General on arbitrary deprivation

204 *Denny Zhao v The Netherlands* (n 201) para 8.5; Human Rights Council, 'Resolution 13/2' (n 180) para 9; Doek (n 197) 27. See also below Chapter 5, III.4.

205 Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child, 'Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return' (CtteeMW and CtteeRC 2017) UN Doc. CMW/C/GC/4-CRC/C/GC/23 para 24. See also Doek (n 197) 27.

206 de Groot, 'Children's Right to Nationality' (n 188) 145. See similarly Human Rights Committee, 'Concluding Observations on the fifth periodic report of Senegal' (HRCttee 2019) UN Doc. CCPR/C/SEN/CO/5 para 33(d).

207 See Doek (n 197) 28; Worster, 'The Obligation to Grant Nationality under Treaty Law' (n 178). See also Human Rights Council, 'Report 31/29' (n 85) para 10. Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the initial report of Singapore' (CtteeERD 2022) UN Doc. CERD/C/SGP/CO/1 para 25; Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined tenth to twelfth periodic reports of Switzerland' (CtteeERD 2021) UN Doc. CERD/C/CHE/CO/10-12 para 26(g).

208 Douglas Hodgson, 'The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness' (1993) 7 International Journal of Law, Policy and the Family 255, 260.

209 Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 205) para 24.

of nationality of 2009 argues, the denial to grant a child a state's nationality where they were born in the territory, and they would otherwise be stateless, amounts to arbitrary denial of nationality.[210]

The right to nationality for children who would otherwise be stateless is explicitly enshrined in Article 20(2) ACHR.[211] Similarly, Article 6(4) of the African Children's Charter calls upon states to allow for the acquisition of nationality *jure soli* if the child would otherwise be stateless.[212] As the ACERWC argued in the case of *Children of Nubian Descent*, a state should allow a child to acquire its nationality if it is born on its territory and not granted nationality by another state.[213] The obligation can, moreover, be derived indirectly from Article 1 CRS.[214] The CtteeRC repeatedly recommended, based on Article 7 CRC, that states "establish all necessary safeguards to ensure that all children born in the State party are entitled to a nationality at birth if otherwise stateless" and that they adapt their domestic legislations accordingly.[215] The

210 Human Rights Council, 'Report 10/34' (n 124) para 64. A similar conclusion can be found in the ECtHR's judgment in *Genovese v Malta* where it found the impossibility of acquiring Maltese nationality amounted to a denial of citizenship, *Genovese v Malta* (n 114) para 33.

211 de Groot, 'Children's Right to Nationality' (n 188) 148.

212 See Chapter 4, II.2.3.3.

213 *Children of Nubian Descent v Kenya* (n 192) para 50.

214 Human Rights Council, 'Report 31/29' (n 85) para 10. See also de Groot, 'Children's Right to Nationality' (n 188) 149.

215 Committee on the Rights of the Child, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Chile' (CtteeRC 2015) UN Doc. CRC/C/CHL/CO/4-5 para 44; Committee on the Rights of the Child, 'Concluding Observations on the Combined Second to Fourth Periodic Reports of Turkmenistan' (CtteeRC 2015) UN Doc. CRC/C/TKM/CO/2-4 para 25; Committee on the Rights of the Child, 'Concluding Observations on the Combined Second to Fourth Periodic Reports of Switzerland' (CtteeRC 2015) UN Doc. CRC/C/CHE/CO/2-4 para 31; Committee on the Rights of the Child, 'Concluding Observations on the Third to Fifth Periodic Reports of Latvia' (CtteeRC 2016) UN Doc. CRC/C/LVA/CO/3-5 para 35; Committee on the Rights of the Child, 'Concluding Observations on the Fifth Periodic Report of Mongolia' (CtteeRC 2017) UN Doc. CRC/C/MNG/CO/5 para 20; Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Norway' (CtteeRC 2018) UN Doc. CRC/C/NOR/CO/5-6 para 15; Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Report of Lesotho' (CtteeRC 2018) UN Doc. CRC/C/LSO/CO/2 para 25; Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Italy' (CtteeRC 2019) UN Doc. CRC/C/ITA/CO/5-6 para 18; Committee on the Rights of the Child, 'Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Bahrain' (CtteeRC 2019) UN Doc. CRC/C/BHR/CO/4-6 para 22; Committee on the Rights of the Child, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Japan' (CtteeRC 2019) UN Doc. CRC/C/JPN/CO-4-5 para 23.

same recommendation is regularly made by other UN treaty bodies[216] and as a recommendation in the Universal Periodic Review of the UN Human Rights Council.[217]

Worster argues that the obligation to grant nationality to stateless children born in the territory has acquired the status of customary international law.[218] He refers to the international legal sources and state practice in the international context, as well as domestic nationality legislation to support the argument that a norm against statelessness has emerged. Other authors share his opinion that there is a customary obligation to grant nationality to children born on the territory who would otherwise be stateless.[219] This indicates increasing support for the argument that the right of the child to acquire a

216 See eg Human Rights Committee, 'Concluding Observations on the Second Periodic Report of Nepal' (HRCttee 2014) UN Doc. CCPR/C/NPL/CO/2 para 20; Human Rights Committee, 'Concluding Observations on the Second Periodic Report of Cambodia' (HRCttee 2015) UN Doc. CCPR/C/KHM/CO/2 para 27; Committee on the Elimination of Racial Discrimination, 'CO Latvia 2018' (n 136) para 21(f); Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Initial Report of Chile' (CtteeMW 2011) UN Doc. CMW/C/CHL/CO/1 para 33.

217 See eg Human Rights Council, 'Universal Periodic Review, First Periodic Review of Tuvalu' (HRC 2013) UN Doc. A/HRC/24/8, Recommendations 83.1 and 83.2; 'Universal Periodic Review, First Periodic Review of Romania' (HRC 2013) UN Doc. A/HRC/23/5, Recommendation 109.149; 'Universal Periodic Review, First Periodic Review of Tonga' (HRC 2013) UN Doc. A/HRC/23/4, Recommendation 79.53; 'Universal Periodic Review, First Periodic Review of Luxembourg' (HRC 2013) UN Doc. A/HRC/23/10, Recommendation 117.16; 'Universal Periodic Review, Second Periodic Review of Denmark' (HRC 2016) UN Doc. A/HRC/32/10, Recommendation 120.196; 'Universal Periodic Review, Third Periodic Review of Morocco' (HRC 2017) UN Doc. A/HRC/36/6, Recommendation 144.242; 'Universal Periodic Review, Third Periodic Review of Liechtenstein' (HRC 2018) UN Doc. A/HRC/38/16, Recommendation 108.126; 'Universal Periodic Review, Third Periodic Review of Botswana' (HRC 2018) UN Doc. A/HRC/38/8, Recommendation 128.74. Until 2017 47 recommendations were made addressing the acquisition of nationality at birth, see Institute on Statelessness and Inclusion, 'Statelessness and Human Rights: The Universal Periodic Review' (Institute on Statelessness and Inclusion 2017) 13 <http://www.statelessnessandhumanrights.org/assets/files/statelessness-and-upr.pdf>.

218 Worster, 'The Obligation to Grant Nationality under Treaty Law' (n 178); see already William Worster, 'The Presumption of Customary International Law: A Case Study of Child Statelessness' (2017) 10 <https://ssrn.com/abstract=3091912 or http://dx.doi.org/10.2139/ssrn.3091912>. See similarly Ineta Ziemele, 'Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents' in Eugeen Verhellen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Brill Nijhoff 2007) 28 f; Ziemele, 'State Succession' (n 48) 243; Foster and Baker (n 99), 101.

219 See also Chapter 4, III.

nationality entails an obligation for states to grant their nationality to children born on their territory if they would otherwise be stateless.[220] Ziemele, moreover, argues that this obligation to grant nationality also applies to the state in which a child is registered, even if it was not necessarily born there:

> It appears that, if a child would remain stateless for a considerable period of time because of the age requirement or for other reasons, this would violate his/her right to acquire the nationality of the State which has registered the child.[221]

Having in mind the overarching aim of protecting children against statelessness, this argument is convincing. For the same reason, states should also ensure the acquisition of nationality based on descent if a child born to a national abroad would otherwise be stateless.[222] This obligation can be derived both from Article 4 CRS and from Article 6(1)(a) ECN. Principle 1 of the Recommendation (2009)13 of the Council of Europe Committee of Ministers reflects this tradition, giving precedence to the acquisition of nationality based on descent over *jus soli* based acquisition.[223]

If nationality is not acquired automatically — and the child is not stateless — states have a certain degree of discretion in determining the criteria for children to acquire nationality when born in the territory.[224] Whether the acquisition of nationality occurs automatically based on *jus soli* or *jus sanguinis*, or otherwise on the basis of certain criteria, the right of the child to acquire a nationality, however, obliges states to ensure that such acquisition occurs without discrimination and in a non-arbitrary manner.[225] Children have the

220 See also Chan (n 74) 11; Peter J Spiro, 'A New International Law of Citizenship' (2011) 105 The American Journal of International Law 694, 720.

221 Ziemele, 'Article 7 CRC' (n 218) 31.

222 Human Rights Council, 'Report 31/29' (n 85) para 13. See also UNHCR, 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness' (UNHCR 2012) para 49 ff <http://www.refworld.org/docid/50d460c72.html>.

223 Council of Europe, Committee of Ministers, 'Recommendation CM/Rec(2009)13 of the Committee of Ministers of the Council of Europe on the Nationality of Children' (Committee of Ministers 2009) CM/Rec(2009)13. See also de Groot, 'Children's Right to Nationality' (n 188) 154 ff.

224 Human Rights Council, 'Report 10/34' (n 124) para 61; Human Rights Council, 'Report 13/34' (n 2) para 29; Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 205) para 25.

225 Human Rights Committee, 'General Comment No. 17' (n 8) para 5; Human Rights Council, 'Report 10/34' (n 124) paras 61 and 63. See also *Yean and Bosico* (n 71) para 141.

right to acquire a nationality, irrespective of their or their parents' race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other also their residence status.[226] If domestic law knows a right to nationality or the acquisition of nationality on certain grounds, such nationality must be available on equal basis.[227] Rules such as a recent amendment to the Danish citizenship act, according to which children born to Danish parents in 'conflict zones' do not acquire citizenship by birth, are highly problematic from that perspective.[228]

3.2 Acquisition of Nationality by Stateless Persons and Refugees

Stateless persons in the sense of the 1954 Convention, are not considered to be a national by any state under the operation of its laws.[229] Similarly, refugees are persecuted by or in their state of nationality and have effectively lost its protection.[230] Accordingly, refugees are sometimes described as *de facto* stateless.[231] Therefore, both stateless persons and refugees lack the effective protection that under normal circumstances is granted by the state of nationality. Naturalization in the state of protection would provide stateless persons and refugees with a durable solution.[232] Hence, it could be argued that recognized stateless persons and refugees should have a right to acquire the nationality of the state, at least in a facilitated manner, in order to overcome their precarious legal status.[233]

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226 Article 2 CRC. See also Human Rights Council, 'Report 31/29' (n 85) para 8. See eg also Committee on the Rights of the Child, 'CO Switzerland 2015' (n 207) para 31; Committee on the Rights of the Child, 'Concluding Observations Netherlands' (CtteeRC 2015) UN Doc. CRC/C/NLD/CO/4 para 33.

227 Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Ecuador' (HRCttee 1998) UN Doc. CCPR/C/79/Add.92 para 18.

228 Eva Ersbøll, 'Birthright Citizenship and Children Born in a Conflict Zone' (*European Network on Statelessness*, 5 February 2020) <https://www.statelessness.eu/blog/birthright-citizenship-and-children-born-conflict-zone>. See also Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined twenty-second to twenty-fourth periodic reports of Denmark' (CtteeERD 2022) UN Doc. CERD/C/DNK/CO/22-24 para 34 f.

229 Article 1 CSS. See also Chapter 4, II.1.2.1.

230 See for the definition of a refugee Article 1 CSR.

231 Ruth Donner, *The Regulation of Nationality in International Law* (2nd ed, Transnational Publishers 1994) 185. See for a discussion of the problems relating to the use of the notions *de jure* and *de facto* statelessness van Waas, *Nationality Matters* (n 171) 19 ff.

232 Reinhard Marx, 'Article 34, Naturalization' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 1442.

233 See eg Human Rights Council, 'Report 13/34' (n 2) para 61. See also Eva Mrekajová, 'Facilitated Naturalization of Stateless Persons' (2014) 19 Tilburg Law Review 203; Cathryn

The current international legal framework does not directly enshrine a provision that would grant stateless persons or refugees a right to nationality in a particular state.[234] Nevertheless, as discussed above, some international legal instruments — namely the 1954 Convention, the 1961 Convention and the 1951 Convention — address the acquisition of nationality by stateless persons and refugees and call facilitated access to nationality.[235] Moreover, the general duty of states to prevent and reduce statelessness underlines the obligation to, at least, enable stateless persons to acquire a nationality as a long-term perspective.[236] The UN Human Rights Committee has pointed to the right of stateless persons to the nationality of their state of residence in the case of *Stewart v Canada.*[237] It argued that stateless persons might have a right to enter their country of residence as their 'own country' under Article 12(4) ICCPR if they "arbitrarily deprived of the right to acquire the nationality of the country of [...] residence".[238] Thus, the HRCttee seems to imply that stateless persons do have a right to acquire the nationality of their state of residence.[239]

Articles 1 and 4 of the 1961 Convention address the acquisition of nationality by stateless persons. However, the provisions do not explicitly enshrine a right to nationality. As van Waas points out, the 1961 Convention, in that sense, "is not an international law on nationality but simply what the title depicts: a Convention on the Reduction of *Statelessness"* (original emphasis).[240] Its main rationale is to prevent future cases of statelessness and to promote the acquisition of nationality by persons who are already stateless. Nevertheless, in order to achieve the latter aim, it is clear that the CRS indirectly implies such a right to nationality for an otherwise stateless person who has a sufficient link to the state.[241] This applies particularly to children of stateless persons who should

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Costello, 'On Refugeehood and Citizenship' in Ayelet Shachar and others (ed), The Oxford Handbook of Citizenship (Oxford University Press 2017) 727.

234 See also Costello (n 233) 732.

235 See Chapter 4, II.1.2.

236 Human Rights Council, 'Report 13/34' (n 2) para 41. Similarly also the HRCttee which called upon Belgium to adopt legislation on statelessness for the granting of citizenship or residence permits for persons recognized as stateless, Human Rights Committee, 'Concluding observations on the sixth periodic report of Belgium' (HRCttee 2019) UN Doc. CCPR/C/BEL/CO/6 para 30(b).

237 See van Waas, *Nationality Matters* (n 171) 366 f.

238 *Stewart v Canada, Communication No 538/1993* [1996] HRCttee UN Doc. CCPR/C/58/D/538/1993 para 12.4.

239 See also van Waas, *Nationality Matters* (n 171) 366 f.

240 ibid 44.

241 See Batchelor, 'Resolving Nationality Status' (n 32) 161.

have a right to the nationality of the state of birth if they would otherwise remain stateless (Article 1 CRS).

Article 32 of the 1954 Convention and Article 34 of the 1951 Refugee Convention equally do not directly enshrine a right to nationality, but call upon states to 'facilitate as far as possible' the naturalization of stateless persons and refugees and to make naturalization procedures swift and accessible.[242] Increasingly, this call for a facilitation of naturalization in Articles 32 CSS and Article 34 CSR is interpreted as a stricter obligation for states to provide for the possibility of naturalization for stateless persons and refugees and to facilitate such naturalization.[243] States have to provide an effective possibility of naturalization for refugees and stateless persons and refrain from any limitations of access to citizenship which are disproportionate, discriminatory or arbitrary. In any case, it would violate the CSS and the CSR to impose a blanket ban on the possibility of stateless persons and refugees acquiring nationality.[244] This evolution is reflected at the regional level: both the ECN and the new Draft Protocol on Nationality of the AU[245] call upon states to facilitate the acquisition of nationality for stateless persons and refugees.[246] Article 6(4)(g) ECN requires lawful and habitual residence on the territory as a precondition for naturalization, while the AU Draft Protocol merely speaks of "stateless persons" and "refugees". In fact, the Explanatory Memorandum to the AU Draft Protocol points out that the criteria of lawful residence as the basis for an application for naturalization should not apply to stateless persons, as stateless persons run the risk of not being able to establish lawful residence due to the lack of documentation.[247]

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242 See Chapter 4, II.1.2.1. and II.1.2.3.

243 Atle Grahl-Madsen, *Commentary of the Refugee Convention 1951* (UNHCR 1997), Article 34 N 2; Marx (n 232) 1451; Ruvi Ziegler, *Voting Rights of Refugees* (Cambridge University Press 2017) 205.

244 Grahl-Madsen (n 243), Art. 34 N 2; James C Hathaway, *The Rights of Refugees Under International Law* (2nd ed, Cambridge University Press 2021) 1215 f.

245 Draft Protocol to the African Charter on Human and People's Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa, Draft adopted September 2015, revised June 2018 ('Draft Protocol on Nationality' or 'AU Draft Protocol)'.

246 Article 6(4)(g) ECN and Article 6(2)(f) and (g) Draft Protocol on Nationality. See also African Union, 'Explanatory Memorandum to the Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa' (AU 2017) para 56 <https://au.int/sites/default/files/newsevents/workingdocuments/34197-wd-draft_protocol_explanatory_memo_en_may2017-jobourg.pdf>.

247 *ibid 61*. See also *Sudita Keita v Hungary* [2020] ECtHR Application No. 42321/15 para 39.

Overall, these provisions do not create a hard obligation for the state of protection to grant stateless persons and refugees its nationality.[248] They do not codify a right to nationality or a right to (be considered for) naturalization as such.[249] The actual decision whether to grant nationality or not remains at the discretion of the state.[250] Nevertheless, states have an obligation to provide for the possibility of acquisition of nationality by stateless persons and refugees and may not arbitrarily deny it. Moreover, Article 32 CSS, Article 34 CRS[251] and Article 6(4)(g) ECN should be interpreted as obliging states to facilitate the naturalization of stateless persons and refugees.[252] Such facilitation can be achieved, for example, by lowering the standards relating to documentation, by introducing non-discretionary processes of acquisition, or by reducing residence requirements.[253] Thus, the development clearly goes in

248 Council of Europe, 'Explanatory Report ECN' (n 186) para 56.

249 See for the CSS Adjami and Harrington (n 185) 97; Katia Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons across EU States* (Brill Nijhoff 2018) 106; Nehemiah Robinson, *Convention Relating to the Status of Stateless Persons. Its History and Interpretation* (UNHCR 1955) <https://www.refworld.org/docid/4785f03d2.html> 64; van Waas, *Nationality Matters* (n 171) 73. For the 1951 Refugee Convention Grahl-Madsen (n 243) Article 34 N 2; Hathaway (n 244) 1211; Ziegler (n 243) 205; Costello (n 233) 732.

250 van Waas, *Nationality Matters* (n 171) 365.

251 Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 ('1951 Refugee Convention', 'CSR').

252 See for stateless persons Parliamentary Assembly of the Council of Europe, 'Resolution 1989 (2014) on Access to Nationality and the Effective Implementation of the European Convention on Nationality', 9 April 2014, para 5.2.3; Parliamentary Assembly of the Council of Europe, 'Resolution 2099 (2016) on the Need to Eradicate Statelessness of Children' (PACE 2016) para 12.2.3. For refugees: Council of Europe, Committee of Ministers, 'Recommendation No. R (84) 21 of the Committee of Ministers to Member States on the Acquisition by Refugees of the Nationality of the Host Country' (Committee of Ministers 1984) para i; Parliamentary Assembly of the Council of Europe, 'Resolution 417 (1969) on Acquisition by Refugees of the Nationality of Their Country of Residence' (PACE 1969) paras 3 and 4; Parliamentary Assembly of the Council of Europe, 'Recommendation 564 (1969) on Acquisition by Refugees of the Nationality of Their Country of Residence' (PACE 1969) 9.1.

253 Human Rights Council, 'Report 13/34' (n 2) para 41; African Union, 'Explanatory memorandum' (n 246) para 48. See also Laura van Waas, 'The UN Statelessness Conventions' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 73. See eg also Human Rights Council, 'Universal Periodic Review, Third Periodic Review of Canada' (HRC 2018) UN Doc. A/HRC/39/11, Recommendation 142.275, calling upon Canada to create a legal status for stateless persons that would include facilitated naturalization procedures; or Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Sixth

the direction of a right to facilitated naturalization for stateless persons and refugees.[254]

3.3 Acquisition in Situations of State Succession

The two major legal instruments governing the question of nationality in cases of state succession both guarantee a right to nationality for individuals affected by such succession. Article 1 ILC Draft Articles on Nationality of Natural Persons in Relation to the Succession of States[255] sets out the right to nationality:

> Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles.

The commentary to the Draft Articles stresses that the right to nationality in cases of state succession forms the very foundation and main principle of the instrument on which all other articles are based.[256] The aim of the provision is to apply the general principle of Article 15 UDHR to the particular situation of state succession.[257] The ILC builds on the premise that, in the specific context of state succession, it is possible to identify the state bearing the positive obligation corresponding to the right to nationality. "It is", as the commentary explains, "either the successor State, or one of the successor States when there are more than one, or, as the case may be, the predecessor State".[258] On that basis, the ILC Draft Articles combine the type of succession of states and the specific situation of the individual concerned with her links to the states involved in the succession to identify the state bearing the obligation to guarantee the right to nationality.[259] Depending on the concrete situation, the

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to Eighth Periodic Reports of Lithuania' (CtteeERD 2016) UN Doc. CERD/C/LTU/CO/6-8 para 27.

254 van Waas, *Nationality Matters* (n 171) 367.

255 See Chapter 4, II.1.3.2.

256 International Law Commission, 'Commentary Draft Articles on Nationality' (n 41) 25. See also Ziemele, 'State Succession' (n 48) 242.

257 Article 4 International Law Commission, Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, 3 April 1999, Supplement No. 10, UN Doc. A/54/10 ('ILC Draft Articles on Nationality'). See also International Law Commission, 'Commentary Draft Articles on Nationality' (n 41) 25.

258 *ibid.* See also Human Rights Council, 'Report 13/34' (n 2) para 50.

259 International Law Commission, 'Commentary Draft Articles on Nationality' (n 41) 25.

Draft Articles even foresee the possibility of acquiring the nationality of more than one of the states concerned. In any case, every individual affected by the succession should acquire at least one nationality: "Under no circumstances, however, shall a person be denied the right to acquire at least one such nationality".[260] Hence, the ILC Draft Articles are one of the very few instruments which can define clearly who, and under which circumstances, has a right to a nationality and which state bears the corresponding obligation to confer nationality.[261] Similarly, the proposed Article 20(3)(a) AU Draft Protocol stipulates a right to the nationality of at least one of the successor states. Article 2 of the 2006 Convention on the Avoidance of Statelessness in Relation to State Succession holds that all former citizens of a predecessor state have the right to the nationality of a successor state, provided the person concerned would otherwise be stateless. In contrast to the ILC Draft Articles, however, the right to nationality according to Article 2 of the 2006 Convention is conditional upon the person concerned being at risk of statelessness. The aim is merely to avoid that an individual loses their nationality as a consequence of state succession.[262]

Thus, as van Waas writes, the specific standards on state succession "clearly constitute the most progressive and detailed concretization to date of the right to a nationality and the principle of the avoidance of statelessness".[263] The reason for the relatively strong foundation for the right to nationality in situations of state succession is that the state bearing the obligation to grant nationality can be identified more easily.[264] One question that remains is whether the right to nationality in case of state succession applies to everyone within the territory of the state(s) concerned or whether it is based on certain criteria. Article 5 of the ILC Draft Articles provides for a presumption of nationality: persons with habitual residence in the territory affected by the succession are presumed to acquire the nationality of the successor state.[265] Article 5(1) of the Convention on the Avoidance of Statelessness also takes habitual residence as the main connecting factor for acquiring the nationality of the successor state,

260 *ibid, para 5.*

261 Blackman (n 173) 1173.

262 Council of Europe, 'Explanatory Report to the Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession' (Council of Europe 2006) para 12.

263 van Waas, *Nationality Matters* (n 171) 146. See also Blackman (n 173) 1173.

264 See also Ziemele, 'General Aspects' (n 137) 155. See also International Law Commission, 'Commentary Draft Articles on Nationality' (n 41) 25.

265 See also Article 20(3)(b) African Union Protocol on Nationality.

but limits it to habitual residents who had the nationality of the predecessor state at the time of succession and who would become stateless.[266] The presumption of acquiring nationality on the basis of habitual residence can be rebutted in case of other appropriate connections to one of the states involved in the succession.[267] However, the right to nationality in cases of state succession should not be made contingent upon a particular residence status, as this risks leaving individuals affected by succession stateless.

The presumption under traditional international law was that the nationality of the population automatically followed the change of sovereignty.[268] A more rights-based perspective raises the question of whether the individual should have a say in the change of nationality.[269] Article 11 ILC Draft Articles obliges states to give consideration to the will of persons whenever they qualify to acquire more than one nationality in situations of state succession. Moreover, states shall grant a right to opt for its nationality to individuals with an appropriate connection in cases where individuals would otherwise be stateless (Paragraph 2). The approach of the ILC Draft Articles is singular. As the ILC explains in the commentary, the right of option is not absolute but does come into play where persons fall within an area of overlapping state jurisdiction in the succession.[270] The 2006 Convention on the Avoidance of Statelessness, by contrast, leaves it to the state to decide whether an individual affected by the succession has a say in acquiring nationality or whether it is granted *ex lege* without explicit consent.[271] Article 18(2)(c) ECN calls upon states to take account of the will of the persons concerned in the granting of

266 Council of Europe, 'Explanatory Report Convention on the Avoidance of Statelessness' (n 262) para 18.

267 Article 5(2) Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, 19 May 2006, ETS No. 200 ('Convention on the Avoidance of Statelessness', '2006 Convention'). See also International Law Commission, 'Commentary Draft Articles on Nationality' (n 41) 29; Ziemele, 'General Aspects' (n 137) 156.

268 Crawford, *Brownlie's Public International Law* (n 36) 419; Hailbronner and others (n 182) 49; Christine Kreuzer, *Staatsangehörigkeit und Staatensukzession: die Bedeutung der Staatensukzession für die staatsangehörigkeitsrechtlichen Regelungen in den Staaten der ehemaligen Sowjetunion, Jugoslawiens und der Tschechoslowakei* (Duncker & Humblot 1998) 41. See also Council of Europe, 'Explanatory Report ECN' (n 186) para 108. Critical Peters, 'Extraterritorial Naturalizations' (n 63) 695.

269 See also International Law Commission, 'Commentary Draft Articles on Nationality' (n 41) 34. Interesting also Article 5 1933 Convention on Nationality, 26 December 1933, OAS Treaty Series No. 37 ('1933 Montevideo Convention on Nationality').

270 *ibid.*

271 Council of Europe, 'Explanatory Report Convention on the Avoidance of Statelessness' (n 262) para 19.

nationality in cases of state succession but does not grant individuals a right to opt. Peters argues that:

> International customary law therefore does not (yet) clearly impose on the States involved in a change of territorial sovereignty the obligation to grant to the inhabitants of the concerned territory the right to decline (or acquire) the nationality of those States.[272]

The discussion shows how the ILC Draft Articles, the CoE Convention and the AU Draft Protocol provide a relatively strong case for a right to nationality of the successor state on the basis of habitual residence or other appropriate connection for persons affected by a succession of states. The successor state must grant its nationality to all individuals affected by the succession, at very least where they would otherwise be stateless. Moreover, it should take the will of the person concerned into consideration if the person has links to more than one state.[273] As will be discussed in Chapter 6, these instruments provide interesting models for defineing the duty bearing state under the right to nationality. The ILC Draft Articles, however, are not binding, the AU Protocol is not yet in force and the CoE Convention has a territorially limited scope of application and very few ratifications. Therefore, their legal significance is limited. Moreover, the state practice relating to nationality in cases of state succession is diverse.[274] Thus, it is questionable whether one can speak of a customary right to acquire the nationality of the successor state. Nevertheless, it seems clear that in situations of state succession, the question of nationality needs to be addressed and that no person should become stateless as a result of a transfer of sovereignty.[275]

3.4 Prohibition of Extraterritorial Naturalizations

In the context of the acquisition of nationality, one might wonder whether states are free to attribute their nationality to any given individual or if the right to nationality imposes any limitations upon the conferment of nationality.

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272 Peters, 'Extraterritorial Naturalizations' (n 63) 697.

273 See already Donner (n 231) 310.

274 See Ziemele, 'State Succession' (n 48) 230. See also Donner (n 231) 268 ff; Kreuzer (n 268) 77 ff. See for the state practice in African states Manby, *Citizenship and Statelessness in Africa* (n 113) 323 ff.

275 See eg Batchelor, 'Transforming International Legal Principles' (n 174) 13; Blackman (n 173) 1192; Human Rights Council, 'Report 13/34' (n 2) para 54. More reluctant Hailbronner and others (n 182) 51 ff; Peters, 'Extraterritorial Naturalizations' (n 63) 696; Ziemele, 'State Succession' (n 48) 243.

Given the principle that states are largely free to determine the criteria for the acquisition of nationality, there are few rules that would oblige states *not* to grant their nationality to an individual. However, from the perspective of the right to nationality, the state's right to confer nationality is not unlimited.[276] Two scenarios seem especially problematic from an international legal perspective: forced naturalizations against the will of the person concerned (see immediately below chapter 5, III.3.5) and mass or collective naturalizations of nationals of another state, so called extraterritorial naturalizations.[277]

Extraterritorial naturalization policies provide for the attribution of nationality *ex lege* or through facilitated naturalization without residence requirements and are often linked to a certain ethnicity, religion or a particular disputed territory.[278] Moreover, extraterritorial naturalization policies often target not individual persons but a bigger group living in another state — often a particular minority sharing certain historical, cultural, religious or linguistic ties with the state granting citizenship. Examples for such extraterritorial, collective naturalization practices include the attribution of Russian passports in the separatist territories in Ukraine,[279] South Ossetia and Abkhazia,[280] or Hungarian and Polish ethnic preferential citizenship policies towards kin-minorities in neighboring states,[281] but also practices such as the granting of citizenship to Sephardic Jews by Spain[282] or the possibilities to acquire Italian citizenship for descendants of emigrants to Latin America.[283] Extraterritorial naturalizations are considered problematic primarily from an international law perspective as it amounts to an interference with the sovereignty of

276 See also Paul Weis, *Nationality and Statelessness in International Law* (2nd ed, Sijthoff & Noordhoff 1979) 102.

277 Stephan Hobe, *Einführung in das Völkerrecht* (10. Aufl., Francke 2014) 91.

278 See also Peters, 'Extraterritorial Naturalizations' (n 63) 691.

279 See eg Calamur (n 64). See also above Chapter 5, II.3.

280 See eg Peters, 'Extraterritorial Naturalizations' (n 63) 634 ff.

281 Magdalena Lesińska and Dominik Héjj, 'Pragmatic Trans-Border Nationalism: A Comparative Analysis of Poland's and Hungary's Policies Towards Kin-Minorities in the Twenty-First Century'(2021) 20 Ethnopolitics 53; Szabolcs Pogonyi, 'The Right of Blood: 'Ethnically' Selective Citizenship Policies in Europe' (2022) National Identities 1; Costica Dumbrava, 'The Ethno-Demographic Impact of Co-Ethnic Citizenship in Central and Eastern Europe' (2019) 45 Journal of Ethnic and Migration Studies 958.

282 Ley 12/2015 en materia de concesión de la nacionalidad española a los sefardíes originarios de España of 24 June 2015, <https://www.boe.es/boe/dias/2015/06/25/pdfs/BOE-A-2015-7045.pdf>. See also Alberto Martín Pérez, 'Spanish Congress Passes Law Granting Citizenship to Sephardic Jews' (*GLOBALCIT*, 17 June 2015) <http://globalcit.eu/spanish-congress-passes-law-granting-citizenship-to-sephardic-jews/>.

283 Guido Tintori, 'The Transnational Political Practices of "Latin American Italians"' (2011) 49 International Migration 168.

another state if naturalizations occur against the will of that state.[284] The aim of protecting good neighborly relations between states becomes apparent in Article 6(4) of the AU Draft Protocol on Nationality, which calls upon states to ensure that extraterritorial "conferral of nationality respects the principle of friendly, including good neighbourly, relations and territorial sovereignty, and should refrain from conferring nationality en masse" or Paragraph 36 of the Ljubljana Guidelines of the OSCE, according to which states should "avoid creating ambiguities in relation to jurisdiction".[285]

However, collective, extraterritorial naturalization schemes can also have more far reaching implications, especially in situations of conflict over territorial sovereignty, as the UN High Commissioner for Human Rights pointed out in a 2017 report on the situation in Ukraine:

> Imposing citizenship on the inhabitants of an occupied territory can be equated to compelling them to swear allegiance to a power they may consider as hostile, which is forbidden under the Fourth Geneva Convention. In addition to being in violation of international humanitarian law, the automatic citizenship rule raises a number of important concerns under international human rights law.[286]

Admittedly, these practices do not seem to amount to direct interference with the right to nationality so long as nationality is not attributed automatically or against the will of the person, but instead through individualized procedures and with the consent of the person concerned.[287] As Peters writes, collective naturalizations are compatible with international law if there is an individual right of refusal.[288] However, as the case of Ukraine shows, it can have serious human rights implications where individuals are indirectly forced to accept the new nationality or to renounce the former nationality, eg regarding access to employment, housing or social rights due to discrimination on the basis of

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284 See generally John Fischer Williams, 'Denationalization' (1927) 8 British Year Book of International Law 45, 60; Alexander N Makarov, *Allgemeine Lehren des Staatsangehörigkeitsrechts* (1. Aufl., W Kohlhammer 1947) 59 ff; Peters, 'Extraterritorial Naturalizations' (n 63); Spiro, 'New Citizenship Law' (n 220) 699. See implicitly also *Petropavlovskis v Latvia* [2015] ECtHR Application No. 44230/06 para 80.

285 Organization for Security and Co-operation in Europe, 'The Ljubljana Guidelines on Integration of Diverse Societies' (OSCE 2012) <https://www.osce.org/hcnm/ljubljana-guidelines>.

286 UN Office of the High Commissioner on Human Rights (n 64) para 57.

287 See also Weis, *Nationality in International Law* (n 276) 101.

288 Peters, 'Extraterritorial Naturalizations' (n 63) 692.

nationality, and it can be used as a targeted instrument of foreign relations to de-stabilize another regime.[289] Such an indirect forced imposition of nationality on an entire group would hardly be compatible with the right to nationality.

3.5 Prohibition of Forced Naturalization

Forced naturalization denotes the *conferment of nationality against the will* of the individual concerned. Other than extraterritorial naturalizations, forced naturalizations do not necessarily address a bigger group of persons, but target a specific individual and do not only take place outside the territory of the state concerned. The practice of forced naturalizations seems questionable from an individual rights perspective, as it fails to respect the will of the individual concerned, thus interfering with the negative right not to be forcibly attributed a nationality.

At birth, acquiring nationality, in principle, occurs automatically based on descent or place of birth, irrespective of the will of the child in question. In this situation an explicit consent of the child or its parents is not deemed to be necessary given the overriding interest to prevent childhood statelessness. In case of conferment of nationality at a later point in life — through naturalization — the forced attribution of nationality against the will of the individual concerned appears more problematic.[290] In these situation, naturalization should correspond to the explicit will of the person concerned or a person acting on their behalf.[291] Thus, naturalization requires the consent of the person concerned.[292] This consent requirement was traditionally motivated by the fact that a forced naturalization was seen as impeding the sovereignty of the other state of nationality and not by human rights considerations.[293] It was also seen as an expression of the principle of self-determination of

289 UN Office of the High Commissioner on Human Rights (n 64) para 55 ff; Bescotti et al (n 64).

290 See also Audrey Macklin, 'Sticky Citizenship' in Rhoda E Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015) 228.

291 the International Law Commission, 'Report on Nationality, Including Statelessness' (International Law Commission 1952) UN Doc. A/CN.4/50 7 <http://untreaty.un.org/ilc/documentation/english/a_cn4_50.pdf> ('Hudson Report') 8. See also already Makarov (n 284) 76.

292 Peters, 'Extraterritorial Naturalizations' (n 63) 666, referring to case law; Weis, *Nationality in International Law* (n 276) 110.

293 Hailbronner and others (n 182) 48; Peters, 'Extraterritorial Naturalizations' (n 63) 667. Reluctant to accept a prohibition of compulsory change of nationality in international law Ian Brownlie, 'The Relations of Nationality in Public International Law' (1963) 39 British Yearbook of International Law 284, 340.

minorities.[294] Under international human rights law, the requirement of consent as an expression of human dignity adds a third motivation for the consent principle.[295] Without individual consent, the attribution of nationality becomes unpredictable, inappropriate and therefore arbitrary.[296] Weis even compares the compulsory imposition of nationality without consent of the person concerned to an arbitrary arrest or forced marriage.[297] Hence, forced conferment of nationality upon non-stateless individuals against their will is, in principle, incompatible with the right to nationality.[298]

A situation, which today is often found to fall under the prohibition of forced naturalization, or rather forced attribution of nationality, is the *automatic change of nationality of married women* based on their husband's nationality.[299] This was not always the prevailing view. Until well into the second half of the 20th century, virtually all states knew rules where the nationality of a woman (and their children) automatically and involuntarily followed that of her husband.[300] This principle of dependent nationality was aimed at guaranteeing the unity of the family. The consent of the woman to follow the nationality of the man was, at best, implied — if not irrelevant.[301] This perspective changed with the growing recognition of the principle of equality of men and women. Thus, some of the provisions aimed at ensuring the equality of men and women in nationality matters implicitly entail a prohibition of forcibly changing the nationality of the woman concerned. Article 10 of the 1930

294 Peters, 'Extraterritorial Naturalizations' (n 63) 667. See also International Law Commission, 'Commentary Draft Articles on Nationality' (n 41) 34. See on the principle of self-determination and forced assimilation also Walter Kälin, 'Forced Assimilation' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010).

295 Peters, 'Extraterritorial Naturalizations' (n 63) 659.

296 See also Human Rights Council, 'Report 25/28' (n 93) para 8 n 20.

297 Weis, *Nationality in International Law* (n 276) 112.

298 McDougal, Lasswell and Chen (n 36) 920. See also Alice Sironi, 'Nationality of Individuals in Public International Law, A Functional Approach' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 54 f; Forlati (n 99) 23.

299 See also Brownlie (n 293) 309.

300 See generally Helen Irving, *Citizenship, Alienage, and the Modern Constitutional State: A Gendered History* (Cambridge University Press 2017); Karen Knop, 'Relational Nationality: On Gender and Nationality in International Law' in T Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001).

301 See eg *Mackenzie v Hare* [1915] US Supreme Court 239 U.S. 299. See also McDougal, Lasswell and Chen (n 36) 922.

Convention and Article 6 of the Convention on the Nationality of Women[302] already required a woman's consent to change her nationality. Article 9(1) CEDAW provides that states:

> shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall *automatically* change the nationality of the wife, render her stateless or *force upon her* the nationality of the husband. (emphasis added)

The provision guarantees a woman's right to decide freely on her nationality without external influence or force.[303] Similar provisions are found in Article 1 of the Convention on the Nationality of Married Women, and, more recently, Article 4(d) ECN and draft Article 9 of the AU Protocol on Nationality, which not only excludes automatic change of nationality for women, but also for children. Against that background, Hailbronner concludes that the principle that marriage shall not result in an automatic change of nationality has become a general principle of international law.[304]

One exception to the consent requirement is found in the context of state succession. As elaborated above, in case of a transfer of territorial sovereignty the successor state(s) have an obligation to secure everyone affected by the succession a nationality and to prevent statelessness.[305] In that specific context conferment of nationality by the successor state may be automatic without the consent of the individual concerned.[306] However, as stipulated by Article 11 ILC Draft Articles, states should, as far as possible, give consideration to the will of the individual concerned in the form of a right of option, particularly where persons have appropriate connections to more than one successor state.[307] In cases where the person concerned would become stateless as a result of the succession, the state's duty to prevent and reduce statelessness on these grounds must be balanced against the individual's choice of nationality and may, eventually, carry more weight.

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302 Convention on the Nationality of Women, 26 December 1933, OAS Treaty Series No. 4 ('CNW').

303 Caroni and Scheiber (n 87) para 28.

304 Kay Hailbronner, 'Nationality in Public International Law and European Law' in Rainer Bauböck and others (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries, Volume 1: Comparative Analyses* (Amsterdam University Press 2006) 58.

305 Peters, 'Extraterritorial Naturalizations' (n 63) 697. See chapter 5, III.3.3.

306 See also Hailbronner, 'Nationality in Public International Law' (n 304) 61 f.

307 See also McDougal, Lasswell and Chen (n 36) 924.

Finally, the question arises whether the duty to prevent and reduce statelessness justifies the forced attribution of nationality outside the context of state succession and acquisition of citizenship at birth. In other words, the question is whether the right to nationality allows individuals to voluntarily choose to be — or remain — stateless, be it by principle or regarding the acquisition of a particular nationality.[308] As Katja Swider points out, the right to nationality has different implications depending on whether the statelessness is voluntary or involuntary:

> Cases of involuntary statelessness, where an individual cannot access any nationality of any state whatsoever, are cases of a violation of a human right to a nationality. Cases of voluntary statelessness are, however, not a violation of the human right to a nationality, but merely a choice of an individual not to exercise that right in his or her specific circumstances.[309]

Similarly, Gibney argues that stateless persons have no (moral) duty to accept citizenship.[310] Kraus, by contrast, maintains that the *right* to nationality is complemented by a duty to become a member of a state without, however, further motivating that position.[311] Given the duty to prevent and reduce statelessness, automatic or forced attribution of nationality can be legitimate if it effectively protects the rights of an individual concerned as, for example, in cases of otherwise stateless children. Yet, if the forcibly attributed nationality is ineffective and does not contribute to the protection of the rights of an individual, this measure is questionable, even if that means that a person remains stateless.[312] In particular, programs like the agreement between the United Arab Emirates and Kuwait and the Comoros to purchase passports for their stateless minority — the Bidoons — seem highly problematic.[313] While passports formally attributed the Bidoons a nationality, it did not grant them an effective nationality in the Comoros as they were not allowed to enter the

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308 See for the concept of voluntary statelessness Katja Swider, 'A Rights-Based Approach to Statelessness' (University of Amsterdam 2018) 60 ff with more references.

309 *ibid 60.*

310 Matthew J Gibney, 'Statelessness and Citizenship in Ethical and Political Perspective' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 61 f.

311 Kraus (n 15) 185.

312 See also Swider, 'Rights-Based Approach to Statelessness' (n 308) 158 ff.

313 See on the policy to 'buy' Comoron passports for stateless bidoons in the Gulf states, Noora Lori, *Offshore Citizens: Permanent Temporary Status in the Gulf* (Cambridge University Press 2019) 195 ff.

country. The forced attribution of Comoros nationality, in fact, heightened the vulnerability of Bidoons making them effectively foreigners in their own country, thus hindering access to basic rights.[314]

Thus, the right to nationality thus protects not only access to a nationality for persons who are stateless, it also protects the negative freedom not to acquire a certain nationality. However, as in the case of state succession, the legitimate interest of preventing and reducing statelessness must be weighed against the will of the individual to remain stateless.

3.6 Right to Naturalization

At the national level, virtually all countries provide for some sort of naturalization mechanism, ie a procedure for voluntarily acquiring nationality after birth by administrative decision.[315] These domestic provisions on naturalization mostly see naturalization as a procedure that is open to non-citizens upon fulfilment of certain more or less restrictive criteria and subject to certain discretion. In general, however, naturalization is not considered to be an entitlement or a right.[316] As L.F.L. Oppenheim noted "although every alien may be naturalized, no alien has, according to the law of most states, a right to be naturalized".[317] In the European context only five states — Croatia, Germany, the Netherlands, Portugal and Spain — qualify naturalization as a legal entitlement if the conditions are met.[318] The ECtHR held in the case of *Petrovavlovskis v Latvia*:

> In accordance with international law, decisions on naturalisation or any other form of granting of nationality are matters primarily falling within the domestic jurisdiction of the State; they are normally based on various criteria aimed at establishing a link between the State and the person

314 *ibid 230 ff*.

315 de Groot and Vonk (n 54) 60; Spiro, 'New Citizenship Law' (n 220) 723. According to the GLOBALCIT database, 170 of the 174 states listed in the dataset on ordinary naturalization have a provision in domestic law allowing for ordinary naturalization, see Global Citizenship Observatory (GLOBALCIT), 'Global Database on Modes of Acquisition of Citizenship, Version 1.0' (GLOBALCIT 2017) <https://globalcit.eu/modes-acquisition-citizenship/>. No provisions on naturalization are listed for Lebanon, Myanmar, Nepal and Sri Lanka.

316 Forlati (n 99) 23; McDougal, Lasswell and Chen (n 36) 925.

317 Lassa Francis Lawrence Oppenheim, Robert Yewdall Jennings and Arthur Desmond Watts, *Oppenheim's International Law* (9th ed, Longman 1993) 876.

318 Parliamentary Assembly of the Council of Europe, 'Access to Nationality and the Effective Implementation of the European Convention on Nationality' (PACE 2014) Doc. 13392 (2014) para 42.

> requesting nationality [...]. The choice of the criteria for the purposes of a naturalisation procedure is not, in principle, subject to any particular rules of international law and the States are free to decide on individual naturalisation [...].[319] (original emphasis)

This general rejection of any relevant standards at the international level on naturalization, however, does not accurately reflect the legal situation. Two aspects must be distinguished when answering the question of whether there is a right to naturalization: First, whether there is a right to be naturalized, meaning a right to be granted nationality and, second, whether there is a right to be granted the possibility of naturalization, meaning a right to access the naturalization procedure, subject to certain criteria determined by the state. In other words, one must distinguish between the right to *be naturalized* and the right to *apply for naturalization*.[320]

The former — the *right to be naturalized* — is effectively the same as a general right to the nationality of a specific state. As the discussion in this and the previous chapter shows, the international legal framework does currently not provide for a general right to the nationality of a specific state. In other words, the right to nationality a it is currently codified in international law does not grant a right to be naturalized in a particular state.[321] How such a right could be realized will be the subject of Chapter 6.

The situation is different regarding the latter — the *right to apply for naturalization*. At the regional level, Article 6(3) ECN calls upon member states to provide in their internal law "for the possibility of naturalisation of persons lawfully and habitually resident" on the territory and to limit the required residence period to a maximum of ten years. So far, this is the only international instrument setting up specific limitations upon state discretion when determining naturalization criteria.[322] Yet, the AU Draft Protocol on Nationality suggests similar provisions.[323] Hence, there is a growing consensus that the

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319 *Petropavlovskis v Latvia* (n 284) para 80.

320 See also Forlati (n 99) 23.

321 *Advisory Opinion OC-4/84* (n 100) para 42.

322 de Groot and Vonk (n 54) 60.

323 African Union, 'Explanatory memorandum' (n 246) para 47; Council of Europe, 'Explanatory Report ECN' (n 186) para 52. See also Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Second Periodic Report of Kuwait' (CtteeERD 2011) UN Doc. CCPR/C/KWT/CO/2 para 23; Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Seventeenth to Twenty-Second Periodic Reports of Cyprus' (CtteeERD 2013) UN Doc. CERD/C/CYP/CO/17-22 para 18.

availability of naturalization might be required as a matter of law.[324] States should provide for the possibility of acquiring nationality through naturalization. In particular, long-term residents or persons with another significant link to the state, namely, persons offered international protection through recognition of refugee status or statelessness, should be granted the possibility to apply for naturalization.[325] In the case of Denmark, the CtteeERD, for example, criticized that the increasingly restrictive naturalization criteria prevent young migrants from applying for naturalization, ultimately having a negative impact on their relationship with the Danish state.[326] If there is no possibility of acquiring nationality at all this amounts to an arbitrary denial of nationality.[327] Naturalization procedures, therefore, have to be accessible for everyone.

In principle, states can determine the conditions and procedures for granting nationality through naturalization.[328] A number of criteria can be identified that seem to be legitimate.[329] The main criteria used by states, such as residence requirements, language skills, civic knowledge, economic resources or financial independence, social contacts to locals and a clean criminal record, seem to be compatible with the relevant international standards.[330] Equally, a

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324 Peter J Spiro, 'Citizenship, Nationality, and Statelessness' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 288; Human Rights Council, 'Report 13/34' (n 2) para 40. See also the judgment of the Swiss Federal Administrative Court in *F-7013/2017, Urteil vom 6 Februar 2020* [2020] para 7.3.

325 See Council of Europe, 'Explanatory Report ECN' (n 186) para 51; Council of Europe, Committee of Ministers, 'Recommendation No. R (84) 9 on Second-Generation Migrants', 20 March 1984, para III.b; Council of Europe, Committee of Ministers, 'Recommendation Rec(2000)15 of the Committee of Ministers to Member States Concerning the Security of Residence of Long-Term Migrants' (Committee of Ministers 2000) para 2; Parliamentary Assembly of the Council of Europe, 'Resolution 1989 (2014)' (n 252) para 8.2. See also Liav Orgad, 'Naturalization' in Ayelet Shachar and others (ed), The Oxford Handbook of Citizenship (Oxford University Press 2017), 349; Spiro, 'New Citizenship Law' (n 220) 695 and 718; van Waas, *Nationality Matters* (n 171) 366. On the possibility of naturalization for stateless persons and refugees, see above chapter 5, III.3.2.

326 CtteeERD, CO Denmark 2022 (n 228) para 34.

327 See also *Advisory Opinion OC-4/84* (n 100) para 42.

328 See also *Alpeyeva and Dzhalagoniya v Russia* [2018] ECtHR Application Nos. 7549/09 and 33330/11 para 123. See however Daniel Sharp, 'Why Citizenship Tests Are Necessarily Illiberal: A Reply to Blake' (2022) 15 Ethics and Global Politics 1 ff.

329 See also Seyla Benhabib, *The Rights of Others, Aliens, Residents, and Citizens* (5th printing, Cambridge University Press 2007) 139.

330 See for the main criteria for naturalization also Parliamentary Assembly of the Council of Europe, 'Access to Nationality' (n 318) para 40. See also Irene Bloemraad and Alicia Sheares, 'Understanding Membership in a World of Global Migration: (How) Does Citizenship Matter?' (2017) 51 International Migration Review 829; Ricky van Oers,

requirement of lawful residence is considered to be legitimate.[331] Moreover, states can require a certain period of residence for eligibility for naturalization. However, an increasing number of instruments foresee maximum periods of residence — usually ten years.[332] Language tests or civil knowledge tests, as well as requirements relating to participation in the labor market or economic self-sufficiency, in principle, are legitimate.[333] Moreover, requirements relating to allegiance or loyalty are considered lawful and not in conflict with the freedom of expression or assembly, so long as they relate to the state or constitutional principles and not to a government or certain political party and are not disproportionate.[334] However, there are certain limitations upon permissible naturalization requirements. Naturalization requirements may not be discriminatory and may not be so excessive that they make naturalization virtually impossible.[335] Where naturalization requirements are discriminatory or excessive, this amounts to arbitrary denial of nationality. Problematic in this regard are requirements such as, for example, handshake or no-veiling requirements during naturalization ceremonies that directly or indirectly target particular religious minorities.[336] Hence, in order not to be discriminatory, naturalization procedures hence must consider particular needs and vulnerabilities — for example, of persons with disabilities — and competing rights.[337] Moreover, if a person fulfills the criteria, naturalization must be granted. A refusal of

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Deserving Citizenship. Citizenship Tests in Germany, the Netherlands and the United Kingdom (Brill Nijhoff 2013); Orgad, 'Naturalization' (n 325) 343 ff.

331 See Article 6(3) ECN. Note, however, that such requirements of lawful stay might be problematic for stateless persons, *Sudita v Hungary* (n 247) para 39.

332 Article 6(3) ECN; Article 6(1) AU Draft Protocol. The PACE suggests even a maximum of five years, Parliamentary Assembly of the Council of Europe, 'Resolution 1989 (2014)' (n 252) para 8.2.

333 CtteeEDAW, 'General Recommendation No. 32' (n 44) para 55. See however the judgment in *1D_6/2018* (n 133), where the Swiss Federal Court denied any possibly discriminatory effect of a ten-year self-sufficiency requirement in a case concerning a single mother with a disabled child.

334 *Petropavlovskis v Latvia* (n 284) para 85.

335 Human Rights Council, 'Report 13/34' (n 2) para 29. See eg CtteeERD, CO Denmark 2022 (n 228) para 34 f. See also chapter 5, III.2.1.1.

336 See regarding such criteria Iffath Unissa Syed, 'Hijab, Niqab, and the Religious Symbol Debates: Consequences for Health and Human Rights' (2021) 25 The International Journal of Human Rights 1420, 1423; Anika Seemann, 'The Mandatory Handshake in Danish Naturalisation Procedures: A Critical Race Studies Perspective' (2020) 3 Nordic Journal on Law and Society 1 ff.

337 CtteeERD, 'General Recommendation No. XXX' (n 123) para 13. See eg also Committee on the Elimination of Racial Discrimination, 'CO Latvia 2018' (n 136) paras 20 and 21.

naturalization if the person fulfills all applicable criteria would equally amount to an arbitrary denial of nationality.[338]

To sum up, the current international legal framework together with consistent state practice on naturalization, therefore, supports the interpretation that states are required to provide for the possibility of naturalization, but are allowed to determine certain prerequisites for such naturalization provided those criteria are not arbitrary or discriminatory.[339] The right to naturalization, hence, is not a right to be granted nationality, but a right to apply for the procedure to be granted nationality. The right to be granted the nationality of a specific state itself, however, remains hardly protected in the current international legal framework.

4 *Obligations Regarding the Effective Enjoyment of Nationality*

We have seen that the sources codifying the right to nationality usually mention the right to (acquire) a nationality, the right to change one's nationality and the right not to be arbitrarily deprived of one's nationality. What most sources do not touch upon, however, is the enjoyment of nationality or, more precisely, the preconditions to make possession of nationality effective. Without protection of effective enjoyment of nationality, one is essentially deprived of the benefits attached to citizenship. Therefore, the effective enjoyment of nationality is an important element of the right to nationality.

Nationality can only be enjoyed effectively if access to documentation and registration is guaranteed. Registration and documentation serve as the proof of nationality. Without such proof, individuals risk falling short of the protection and rights derived from nationality.[340] While the lack of documentation does not necessarily imply that a person does not have a nationality, it may make it difficult for them to prove their nationality and leave them at a heightened risk of becoming stateless.[341] As the 2013 Report of the UN Secretary

338 See at the domestic level eg the Swiss Federal Court who argued that denying naturalization to a person who fulfills all the criteria would be arbitrary, see *1D_1/2019, Urteil vom 18 Dezember 2019* [2019] para 2.7. See also the judgment of the Swiss Federal Administrative Court *F-7013/2017* (n 324).

339 Spiro, 'New Citizenship Law' (n 220) 723. See for the domestic level also Andrea Marcel Töndury, 'Existiert ein ungeschriebenes Grundrecht auf Einbürgerung?' in Patricia M Schiess Rütimann (ed), *Schweizerisches Ausländerrecht in Bewegung?* (Schulthess 2003) 189, 210 ff.

340 See on the need of stateless persons for documentation and travel documents van Waas, *Nationality Matters* (n 171) 370 ff.

341 Sophie Nonnenmacher and Ryszard Cholewinski, 'The Nexus Between Statelessness and Migration' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 254. See also Human Rights

General points out, "holding documentation attesting nationality is not imperative to enjoying a nationality, but may have great practical significance".[342] A recent example for the importance of registration and documentation for the protection of the right to nationality is the current check of citizens' registers in the Indian state of Assam, which lead to the erasure of hundred thousands of Muslim Indians from the registers, leaving them effectively stateless and without legal status.[343] Having documentation is, moreover, directly linked to the right to freedom of movement and the right to leave any country.[344] Only if one has a nationality and can prove that nationality by means of a passport or other identity documents, can one also make use of the right to freedom of movement, leave a state, and later, return and thus exercise the rights tied to citizenship.[345]

Registration includes registration at birth through birth certificates as well as subsequent registrations in civil registries. Registration allows state authorities to verify the citizenship status of the population.[346] In practice, birth registration is often central for subsequent registration in civil registries.[347] As the ACERWC noted in the case of the *Children of Nubian Descent in Kenya*:

Council, 'Report 23/23' (n 116) para 24; Human Rights Council, 'Report 25/28' (n 93) para 36; CtteeEDAW, 'General Recommendation No. 32' (n 44) para 57.

342 Human Rights Council, 'Report 25/28' (n 93) para 35.

343 Rahman (n 108); Salah Punathil, 'Precarious Citizenship: Detection, Detention and 'Deportability' in India' (2022) Citizenship Studies. See on the discriminatory character of this practice above chapter 5, III.2.1.1.

344 As illustrated, for example, by Article 18 CRPD which covers both the right to liberty of movement and to a nationality. See also Rachele Cera, 'Article 18 [Liberty of Movement and Nationality]' in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer International Publishing 2017) 346; Human Rights Committee, 'General Comment No. 27: Article 12 (Freedom of Movement)' (HRCttee 1999) UN Doc. CCPR/C/21/Rev.1/Add.9 para 9. The importance of documentation is also highlighted in Objective 4 of the GCM, see UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration,General Assembly Resolution 73/195' (UN General Assembly 2018) UN Doc. A/RES/73/195.

345 See also Lauri Philipp Rothfritz, *Die Konvention der Vereinten Nationen zum Schutz der Rechte von Menschen mit Behinderungen: Eine Analyse unter Bezugnahme auf die deutsche und europäische Rechtsebene* (Peter Lang 2010) 456.

346 See implicitly also the proposed Article 12 AU Draft Protocol on Nationality on registry documents as "evidence of entitlement to nationality".

347 Peter Rodrigues and Jill Stein, 'The Prevention of Child Statelessness at Birth: A Multilevel Perspective' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking stock after 25 years and looking ahead* (Brill Nijhoff 2017) 395. See eg also the CtteeERD criticizing that ethnic minorities in Croatia face difficulties in obtaining the necessary documentation to acquire citizenship, Committee on

> It is rightly said that birth registration is the State's first official acknowledgment of a child's existence, and a child who is not registered at birth is in danger of being shut out of society — denied the right to an official identity, a recognized name and a nationality.[348]

For that reason, every birth should be registered and those registrations documented in birth certificates or civil registry documents, so that the acquisition or possession of nationality can be verified.[349]

Documentation, by contrast, is the certificate of nationality available to the individual that serves as a proof for nationality *vis-à-vis* private actors and third states in particular. A passport or other form of identity document is often an essential practical prerequisite to access services such as health care, education, financial services, property ownership and housing, and also to maintain a formal employment. The main internationally recognized form of documentation of nationality is a passport.[350] Other forms of documentation cover identity or travel documents, such as ID cards, birth certificates or other forms of civil registry certificates or consular documents.[351] These documents, according to the UNHCR, create the "*prima facie* presumption that the holder is a national of the country of issue" (original emphasis).[352] Holding a passport creates a presumption of nationality that shifts the burden of proving that the information contained in the passport is not conclusive to the authorities.[353]

Hence, the registration of nationals and the issuance of documents attesting nationality should be seen as a separate obligation under the right to nationality.[354] The state has a positive duty provide passports or other proof of nationality to fully realize the right to nationality. A number of legal sources enshrine

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the Elimination of Racial Discrimination, 'Concluding Observations on the Eigth Periodic Report of Croatia' (CtteeERD 2009) UN Doc. CERD/C/HRV/CO/8 para 17; Human Rights Council, 'Report 13/34' (n 2) para 38.

348 *Children of Nubian Descent v Kenya* (n 192) para 38.

349 Human Rights Council, 'Report 25/28' (n 93) para 37.

350 *ibid.* See also Adam I Muchmore, 'Passports and Nationality in International Law' (2005) 26 Immigration and Nationality Law Review 327, 317 ff; Weis, *Nationality in International Law* (n 276) 222. See on the history of the passport John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (2nd ed, Cambridge University Press 2018).

351 Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016) 75 ff.

352 UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (UNHCR 2019) para 93.

353 *Dadouch v Malta* [2010] ECtHR Application No. 38816/07 para 58.

354 Human Rights Council, 'Report 25/28' (n 93) para 37.

the obligation to provide for registration and documentation explicitly.[355] Article 18(1)(b) CPRD obliges states to ensure that persons with disabilities "are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification". The provision shows that the right to nationality not only protects access to nationality documentation and registration, but also the possession and use of such documentation. Article 7(1) CRC obliges states to register children immediately after birth.[356] Article 21 CMW prohibits the destruction of passports or equivalent documents of migrant workers or members of their nationality. In conjunction with Article 29 CMW this provision grants a right to nationality documents at least for children. Article 9 CEDAW (in conjunction with Article 15(4) CEDAW) entails an explicit right to nationality documents and to birth registration for women.[357] An extensive provision on documentation of nationality is, furthermore, foreseen in Article 13 of the African Union Protocol on Nationality. The provision, namely, obliges states to provide for the right to a certificate of nationality in domestic law (Paragraph 1) and to issue nationality documents to all nationals without discrimination (Paragraphs 2 and 3) and prohibits the arbitrary cancellation, non-renewal, confiscation or destruction of nationality documents (Paragraph 4). The Convention on the Issue of a Certificate of Nationality[358] of the International Commission on Civil Status also addresses the issuance of nationality documents but does not grant individual rights.[359]

In the absence of an explicit right to nationality the ECtHR has dealt with the question of documentation primarily under the right to freedom of movement and the right to leave any country according to Article 2(2) of Protocol No. 4 to the Convention.[360] In a number of cases the Court found a violation of Article 2(2) of Protocol No. 4 based on the refusal of the national authorities to

355 Interestingly, Article 42 EUCFR also grants a right of access to documents issued by the EU for all EU citizens as well as permanent resident third country nationals and legal persons with a registered office in the EU.

356 See also Rodrigues and Stein (n 347) 395.

357 Caroni and Scheiber (n 87) para 41 ff; Goonesekere (n 90) 245.

358 Convention No. 28 on the Issue of a Certificate of Nationality, 14 September 1999.

359 As the preamble to the Convention stipulates, it builds on the ECN which itself does not address nationality documentation.

360 In the case of *Kerimli v Azerbaijan* the applicant brought a complaint under Article 8 ECHR but the Court decided that the case more properly falls under Article 2 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16 September 1963, ETS No. 046 ('Protocol No. 4'), *Kerimli v Azerbaijan* [2015] ECtHR Application No. 3967/09 para 36.

issue international travel passports necessary to travel outside the country.[361] In the 2014 case of *Battista v Italy*, for example, the ECtHR summarized its practice on restrictions of the freedom to leave a country and noted that a refusal to issue a passport and the cancellation of identity documents amounted to an interference with that right.[362] Since the automatic and unlimited refusal to issue a passport or identity documents on account of a failure to make maintenance payments for the applicant's children was not proportionate, as the restriction imposed did not ensure payment of the sums due, the Court found a violation of Article 2(2).[363] The Court also addressed the issue of documentation under the right to private life as protected by Article 8 ECHR. In *Alpeyeva and Dzhalagoniya v Russia*, it referred explicitly to the prohibition of arbitrary deprivation of citizenship under Article 8 ECHR when assessing the lawfulness of the seizure and non-renewal of the applicants' passports.[364] It found that the seizure and non-renewal effectively deprived the applicants of their Russian citizenship and rendered them stateless, thus violating Article 8 ECHR.[365] In the case of *M. v Switzerland* the Court found that the refusal of the Swiss authorities to renew the passport of the applicant residing in Thailand amounted to an interference with the right to private life. However, the measure was considered necessary and proportionate as the applicant refused to return to Switzerland where he was charged with a criminal offense. For that reason the Court rejected a violation of Article 8 ECHR.[366] In the case of *Ahmadov v Azerbaijan* the ECtHR ruled that the refusal to grant the applicant identity documents effectively resulted in a denial of citizenship, which was not accompanied by procedural safeguards and hence was arbitrary and in violation of Article 8.[367] Finally, in *Veselyashkin and Veselyashkina v Russia* the ECtHR found a violation of Article 6 ECHR regarding the difficulties for

361 *Napijalo v Croatia* [2003] ECtHR Application No. 66485/01; *Bartik v Russia* [2006] ECtHR Application No. 55565/00; *Kerimli v Azerbaijan* (n 360); *Vlasov and Benyash v Russia* [2016] ECtHR Application Nos. 51279/09 and 32098/13; *Berkovich and others v Russia* [2018] ECtHR Application Nos. 5871/07, 61948/08, 25025/10.

362 *Battista v Italy* [2014] ECtHR Application No. 43978/09 36.

363 *ibid 46.*

364 *Alpeyeva and Dzhalagoniya v Russia* (n 328). See on the case in more detail Katja Swider, 'ECHR Alpeyeva and Dzhalagoniya v Russia: Mass-Confiscation of Passports Violates Article 8' (*Globalcit*, 16 July 2018) <http://globalcit.eu/echr-alpeyeva-and-dzhalagoniya-v-russia-mass-confiscation-of-passports-violates-article-8/>. See also *Smirnova v Russia* [2003] ECtHR Application No. 46133/99, 48183/99; *Iletmis v Turkey* [2005] ECtHR Application No. 2987/96.

365 *Alpeyeva and Dzhalagoniya v Russia* (n 328) para 125.

366 *M v Switzerland* [2011] ECtHR Application No. 41199/06 para 64 ff.

367 *Ahmadov v Azerbaijan* [2020] ECtHR Application No. 32538/10.

two stateless persons to obtain a domestic court ruling to issue identity and residence papers enforced.[368]

The Human Rights Committee also addressed complaints regarding the denial of nationality documents under the right to freedom of movement and to leave any state including one's own. In the case of *Loubna El Ghar v Libya* the Committee found that the refusal to issue a passport was a violation of the right to leave.[369] While the state may, under certain circumstances, have a right to refuse to issue a passport, it must provide a valid justification and may not do so for an unreasonable length of time.[370] In *El Dernawi v Libya*, the HRCttee found that the confiscation of a passport and the failure to restore the document equally amounted to a violation of the right to freedom of movement.[371]

Of interest for the question of access to nationality documents, finally, is the case of *The Nubian Community in Kenya v Kenya* of the ACmHPR concerning the acquisition of ID documents by members of the Nubian community in Kenya.[372] The Commission ruled that the vetting process Nubians have to comply with was irrational and consequently unjustifiable and found a violation of the principle of equality and non-discrimination (Articles 2 and 3 ACHPR) and the right to respect of human dignity (Article 5 ACHPR) as the lack of identity documents effectively rendered the Nubians stateless and left them outside the state's juridical system.[373] In consequence, the denial of identity documents hindered the persons concerned from voting or contesting for public office, having access to public services, registering their marriages, opening bank accounts and moving freely within the country, thereby, violating a number of other provisions of the Charter.[374]

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368 *Veselyashkin and Veselyashkina v Russia* [2008] ECtHR Application No. 5555/06. See however *Naumov v Albania* where the ECtHR found that Article 6 ECHR was not applicable in cases concerning nationality, *Naumov v Albania* (*Decision*) [2002] ECtHR Application No. 10513/03.

369 *Loubna El Ghar v Socialist People's Libyan Arab Jamahiriya, Communication No 1107/2002* [2004] HRCttee UN Doc. CCPR/C/82/D/1107/2002. See also already *Sophie Vidal Martins v Uruguay, Communication No 57/1979* [1982] HRCttee UN Doc. CCPR/C/15/D/57/1979.

370 *Loubna El Ghar v Libya* (n 369) para 7.3 f.

371 *Farag El Dernawi v Socialist People's Libyan Arab Jamahiriya, Communication No 1143/2002* [2007] HRCttee UN Doc. CCPR/C/90/D/1143/2002 [6.2]. See also *Rafael Marques de Morais v Angola, Communication No 1128/2002* [2005] HRCttee UN Doc. CCPR/C/83/D/1128/2002.

372 *The Nubian Community in Kenya v The Republic of Kenya* [2015] ACmHPR Communication No. 317/06. See similarly also *Malawi Africa Association and others v Mauritania* [2000] ACmHPR Communications No. 54/91, 61/91, 96/93, 98/93, 164/97, 196/97, 210/98, 11 May 2000.

373 *The Nubian Community v Kenya* (n 372) paras 133, 148, 151.

374 Articles 12, 13, 15, 16 and 17(1) ACHPR. See *The Nubian Community v Kenya* (n 372) 168.

To sum up, the right to nationality entails a positive obligation to register nationals and provide them with nationality documentation to guarantee the effective enjoyment of nationality. Moreover, states may not seize or withdraw nationality documents in an arbitrary or discriminatory manner. The (unjustified) denial or withdrawal of identity documents is not only a violation of the right to nationality itself, but brings with it the violation of other human rights, namely, the right to freedom of movement and to leave any country, and potentially also political rights.

5 *Obligations Regarding Change of Nationality*

The right to change one's nationality is a third element of the right to nationality. The process of changing one's nationality, ie acquiring a new nationality that differs from one's original or former nationality, implies the question of what happens to the former nationality. Either, one gives up the former nationality, or one keeps it while acquiring an additional, new nationality. In the former situation, the *right to change one's nationality* (III.5.1) also implies the *right to renounce one's nationality* (III.5.2). In the latter context of acquiring a new nationality without giving up one's former nationality, the question of a *right to dual or multiple nationality* (III.5.3) arises.

5.1 The Right to Change One's Nationality

The right to change one's nationality refers to the process of acquiring a new nationality, different from the nationality one previously held. In the context of international migration being able to change one's nationality to the nationality of the state to which one has the closest or most important connection has become increasingly important.[375] Therefore, the right to change (and renounce) one's nationality is often linked to the right to leave.[376]

The right to change one's nationality is enshrined in different legal instruments. Article 15(2) UDHR provides that "no one shall be arbitrarily deprived of his nationality nor *denied the right to change his nationality*" (emphasis added). Article 20(3) ACHR has largely the same wording. The right to change one's nationality is also protected by Article 9(1) CEDAW and Article 18(1)(a) CRPD.[377] The younger instruments — particularly the ECN and the draft AU

375 Human Rights Council, 'Report 13/34' (n 2) para 42. See also chapter 6.

376 See eg McDougal, Lasswell and Chen (n 36) 934 f. See on the impact of the right to renounce one's citizenship in the context of forced migration also Macklin, 'Sticky Citizenship' (n 290).

377 Article 9(1) CEDAW holds that "States Parties shall grant women equal right with men to […] change […] their nationality", see Committee on the Elimination of All Forms of

Protocol on Nationality — in contrast, do not address the change of nationality. However, both instruments call upon states to allow for the (voluntary) renunciation of nationality.[378] Haro Van Panhuys described the "right to expatriate", which is implied by the right to change one's nationality, as "perhaps the most substantial right offered by Article 15", underlining "that the right to nationality is a *fundamental* right" (original emphasis).[379]

Some authors argue that — following a literal interpretation of Article 15(2) UDHR — the right to change one's nationality only prohibits the arbitrary refusal to change one's nationality.[380] Peters, for example, argues that the right to change one's nationality was "not intended as an unfettered right to switch, and should not be conceived as such".[381] An alternative interpretation, she argues, would fail to take into account that the right is not absolute and can be restricted in cases of overriding public interests.

The right to change one's nationality is not absolute in the sense that states may impose certain conditions for the exercise of the right. As Chan writes, "there seems to be a general consensus that everyone is entitled to change his nationality. However, different countries may attach different conditions for the exercise of such right."[382] A central condition for the exercise of the right to change one's nationality is the duty to prevent statelessness.[383] As implied by Article 7(2) 1961 Convention, the right to change one's nationality presupposes a parallel acquisition of a new nationality, otherwise, the person concerned risks becoming stateless. Hence, states may make the change of nationality dependent on the possibility of possessing, or at least having a real perspective of acquiring, a new nationality in order to comply with their duty to prevent statelessness.

If it is not supposed to result in statelessness, the right to change nationality implicitly entails a right to acquire another nationality.[384] In that context,

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Discrimination against Women, 'General Recommendation No. 21 on Equality in Marriage and Family Relations' (CtteeEDAW 1994) UN Doc. A/49/38 para 6.

378 Article 8(1) ECN and Article 15(1) AU Draft Protocol on Nationality. The Explanatory Memorandum to the Draft Protocol notes that the provision on renunciation of nationality reflects "general principles of international law on the right of any person to change their nationality", see African Union, 'Explanatory memorandum' (n 246) para 92.

379 van Panhuys (n 23) 222. Similarly also McDougal, Lasswell and Chen (n 36) 929.

380 Chan (n 74) 3; McDougal, Lasswell and Chen (n 36) 928. Others do not address the criteria of arbitrariness at all, eg Donner (n 231) 190.

381 Peters, 'Extraterritorial Naturalizations' (n 63) 663.

382 Chan (n 74) 8.

383 See Human Rights Council, 'Report 13/34' (n 2) para 42. See also Chan (n 74) 8.

384 Donner (n 231) 190.

Manby suggests that the right to change one's nationality should be interpreted as including a duty of a state "to provide access to nationality for a person who as a matter of fact has the closest connections to that state, but may have the (even theoretical) right to another nationality".[385] This interpretation might go beyond the current international legal framework. However, it shows that the right to nationality cannot be fully effective if it is not understood as guaranteeing an effective claim to a particular nationality under certain circumstances.

5.2 The Right to Renounce One's Nationality

The counterpart to the right to change one's nationality is the right to renounce one's nationality.[386] Renunciation of nationality is the voluntary loss of citizenship at the request of the individual concerned.[387] Renunciation of nationality does not only occur if the individual concerned no longer wants to retain a particular nationality. It can also be the consequence of changing one's nationality if the new state of nationality does not allow for dual citizenship. In the latter situation the refusal of the former state of nationality to release a person from citizenship amounts to an arbitrary denial of the right to change one's nationality.[388] Hence, the arbitrary denial to renounce one's nationality could be said to amount to a form of arbitrary denial of the new nationality.

Historically, the right to renounce one's nationality was primarily seen as an obligation for other states, including the former state of nationality, to recognize the new nationality.[389] At the same time the refusal of renunciation of nationality was often seen as a safeguard against statelessness.[390] Today, the right to renounce one's nationality is understood as an expression of an actual, intentional connection and will of the individual.[391] Article 8(1) ECN allows states to refuse the renunciation of nationality if the person concerned would become stateless as a consequence. Thus, the duty to prevent statelessness forms a legitimate limitation of the right to renounce one's citizenship.

385 Manby, *Citizenship and Statelessness in Africa* (n 113) 456.

386 McDougal, Lasswell and Chen (n 36) 929.

387 Renunciation of nationality can be based on declaration or on release. In the latter case the renunciation is conditional on the state's approval of the renunciation, see Rainer Bauböck and Vesco Paskalev, 'Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation' (2015) 30 Georgetown Immigration Law Journal 47, 54.

388 Peters, 'Extraterritorial Naturalizations' (n 63) 664.

389 Brownlie (n 293) 343.

390 See eg the prohibition of loss of citizenship in the early years of the Swiss Confederation, Brigitte Studer, Gérald Arlettaz and Regula Argast, *Das Schweizer Bürgerrecht: Erwerb, Verlust, Entzug von 1848 bis zur Gegenwart* (Verlag Neue Zürcher Zeitung 2008) 48 f.

391 Council of Europe, 'Explanatory Report ECN' (n 186) para 78.

This principle is also reflected in the Protocol Amending the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of 1977, Article 7(1) 1961 Convention and, indirectly, in Article 7 1930 Convention and Article 15 AU Draft Protocol. In fact, the obligation to prevent statelessness might go so far as obliging states to readmit individuals as nationals when they fail to acquire a new nationality and risk becoming stateless.[392] In practice, however, not all states know a safeguard against statelessness in their domestic nationality laws on renunciation of nationality.[393]

Generally, states may introduce other limitations upon the right to renounce one's nationality. Article 8(2) ECN foresees that states make the right to renounce one's nationality conditional upon residence abroad. The provision mirrors Article 6(2) of the 1930 Convention according to which renunciation may not be refused in cases of habitual residence abroad. Other possible conditions for the right to renounce one's nationality is the lawfulness of the new nationality's acquisition, the absence of an abuse of rights, majority or legal capacity and that the state concerned not be at war.[394] Moreover, it might be possible in the interest of preventing childhood statelessness and guaranteeing the best interests of the child is a limitation of the child's right to renounce his or her nationality if a parent still holds that nationality.[395] In the case of *Riener v Bulgaria*, the ECtHR further accepted outstanding tax debts as a reason to refuse the renunciation of nationality. While the Court did not exclude that the arbitrary refusal of a request to renounce citizenship might raise an issue under Article 8 ECHR, it found no violation of the right to private life in the case at hand as the distress caused by the refusal was not substantive enough to interfere with Article 8 ECHR.[396] The Court noted, however, that the

392 ibid 79.

393 van Waas, *Nationality Matters* (n 171) 80.

394 Richard Plender, 'The Right to a Nationality as Reflected in International Human Rights Law and the Sovereignty of States in Nationality Matters' (1995) 49 Austrian Journal of Public and International Law 43, 52. See for a similar catalogue McDougal, Lasswell and Chen (n 36) 932 f.

395 See Article 15(2) African Union Protocol on Nationality.

396 *Riener v Bulgaria* (n 155) paras 154 and 158. In a dissenting opinion Judge Maruste argued for a violation of Article 8 pointing out that the nationality as part of someone's identity covers the right to self-determination in respect of nationality and citizenship and thus the negative right to renounce it and that a refusal of renunciation was unnecessary in case of unpaid tax debts, see European Court of Human Rights, 'Dissenting Opinion Judge Maruste in *Riener v Bulgaria*' (2006) Application No. 46343/99.

refusal to release the applicant from her Bulgarian nationality had no impact on her acquiring Austrian citizenship.[397]

A majority of states know the renunciation of nationality in the domestic nationality legislation, either by declaration or by release.[398] In Europe, all countries grant the right to renounce one's citizenship.[399] A number of states, however, still have no specific provision that addresses the renunciation of nationality. Among them, mainly Middle Eastern, but also South American and African states.[400] Considering the relevant international standards, it is questionable whether such a general prohibition of renunciation of nationality is compatible with the right to nationality.

5.3 A Right to Dual or Multiple Nationality?

The right to change one's nationality also provokes the question of whether dual or even multiple nationality is permissible.[401] What are the circumstances under which a person can retain her nationality and, in addition, acquire a second or even more nationalities? Does the right to nationality, in other words, entail a right to dual or multiple nationality?

Dual or even multiple nationality was long considered an "abomination" in international law.[402] In an international system of nation states, individuals

397 *Riener v Bulgaria* (n 155) para 156.

398 See the GLOBALCIT Database on renunciation of citizenship, Global Citizenship Observatory (GLOBALCIT), 'Global Database on Modes of Loss of Citizenship, Version 1.0' (GLOBALCIT 2017) <https://globalcit.eu/modes-loss-citizenship/>.

399 Gerard-René de Groot and Maarten Vink, 'Loss of Citizenship. Trends and Regulations in Europe' (EUDO Citizenship Observatory 2010) 40 ff <http://cadmus.eui.eu/bitstream/handle/1814/19575/LossOfCitizenship_rev_20101014.pdf?sequence=1&isAllowed=y>.

400 According to the GLOBALCIT Database 21 states, namely: Argentina, Costa Rica, Dominican Republic, Guatemala, Honduras, Uruguay, Bhutan, Nepal, Equatorial Guinea, Saudi Arabia, Egypt, Oman, United Arab Emirates, Yemen, Qatar, Kuwait, Libya, Lesotho, Liberia, Niger and North Korea. Among the states not recorded in the GLOBALCIT Database, Iran also does not allow native-born citizens to renounce their nationality.

401 See for a discussion of the different categories of multiple citizenship Patrick Wautelet, 'The Next Frontier: Dual Nationality as a Multi-Layered Concept' (2018) 65 Netherlands International Law Review 391.

402 Peter J Spiro, 'Dual Citizenship as Human Right' (2010) 8 International Journal of Constitutional Law 111, 111. The role of plural citizenship in international law has been widely discussed in the literature, see among many Raymond Aron, 'Is Multinational Citizenship Possible?' (1974) 41 Social Research 638; Alfred M Boll, *Multiple Nationality and International Law* (Martinus Nijhoff 2007); Linda Bosniak, 'Multiple Nationality and the Postnational Transformation of Citizenship' in David A Martin and Kay Hailbronner (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects* (Kluwer Law International 2003); Ruth Donner, 'Dual Nationality in International Law' (2006) 47 Acta Juridica Hungarica 15; Thomas Faist (ed), *Dual Citizenship in Europe: From*

were supposed to have one nationality, and one nationality only.[403] The principle of singular nationality served the function of avoiding conflicts of jurisdiction between states.[404] Many bi- or multilateral treaties addressed the avoidance and consequences of dual or multiple nationality.[405] However, despite the importance of the avoidance of dual or multiple nationality for inter-state relationships, there never was an explicit prohibition of plural nationality in international law.[406]

There has been a significant change both in state practice and legal opinion on the question of dual and multiple nationality in recent decades.[407] With increasing international migration and globalization, dual and multiple citizenship has become widespread and tolerated, if not accepted. A recent study shows that since the 1960 the rate of states accepting dual citizenship globally has increased from one-third to three-quarters.[408] Spiro describes plural citizenship today as "a commonplace of globalization".[409]

Nationhood to Societal Integration (Ashgate 2007); Kay Hailbronner, 'Rights and Duties of Dual Nationals: Changing Concepts and Attitudes' in David A Martin and Kay Hailbronner (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects* (Kluwer Law International 2003); Karin Kammann, *Probleme mehrfacher Staatsangehörigkeit unter besonderer Berücksichtigung des Völkerrechts* (Peter Lang 1984); Katharina Mauerhofer, *Mehrfache Staatsangehörigkeit — Bedeutung und Auswirkungen aus Sicht des schweizerischen Rechts* (Helbing Lichtenhahn 2004); Tanja Brøndsted Sejersen, '"I Vow to Thee My Countries" — The Expansion of Dual Citizenship in the 21st Century' (2008) 42 The International Migration Review 523; Peter J Spiro, 'Dual Nationality and the Meaning of Citizenship' (1997) 46 Emory Law Journal 1411; Peter J Spiro, *At Home in Two Countries: The Past and Future of Dual Citizenship* (New York University Press 2016); Ana Tanasoca, *The Ethics of Multiple Citizenship* (Cambridge University Press 2018); Olivier Vonk, *Dual Nationality in the European Union, A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States* (Martinus Nijhoff 2012).

403 See eg Recital 2 of the preamble to the 1930 Convention.

404 Spiro, 'Dual Citizenship as Right' (n 402) 111. See also Weis characterizing plural nationality as a conflict of laws, Weis, *Nationality in International Law* (n 276) 169 ff.

405 Eg the Protocol relating to Military Obligations in Certain Cases of Double Nationality to the 1930 Convention or the Council of Europe Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality. See in more detail chapter 3, III.

406 Uslucan (n 185) 405.

407 See on the history of the acceptance of dual nationality Spiro, 'Dual Nationality' (n 402).

408 Maarten Vink and others, 'The International Diffusion of Expatriate Dual Citizenship' (2019) Migration Studies 362. See also Sejersen (n 402).

409 Peter J Spiro, 'Multiple Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 621.

The changing state practice is reflected in international legal norms. While early international legal instruments were aimed at preventing dual or multiple nationality, later instruments are neutral on the question of plural citizenship or even explicitly allow it.[410] The Second Protocol to the 1963 Convention reflects this paradigm shift; while the 1963 Convention wanted to reduce multiple nationality, the Protocol of 1993 allowed states to tolerate plural nationality, namely for children and spouses.[411] The ECN of 1999 adopts a neutral position. The preamble to the ECN states:

> Noting the varied approach of States to the question of multiple nationality and recognizing that each State is free to decide which consequences it attaches in its internal law to the fact that a national acquires or possesses another nationality;
>
> Agreeing on the desirability of finding appropriate solutions to consequences of multiple nationality and in particular as regards the rights and duties of multiple nationals;[412]

On that basis, Article 14 ECN requires states to at least allow for multiple nationality if it is acquired *ex lege* based on birth, in cases of children or by marriage. If multiple nationality arises for other reasons, states are free to decide whether they accept it or not (Article 15 ECN). The ILC Draft Articles also imply the acceptance of dual or even multiple nationality in the context of state succession, but stipulate a right to *at least one* of the nationalities of the states involved in the succession.[413] The AU Draft Protocol on Nationality suggests that "every person has the right to the nationality of *at least one state* where he or she has an appropriate connection" (emphasis added).[414] Draft Article 11 explicitly recognizes — even welcomes[415] — the possibility of multiple nationality and obliges states to permit multiple nationality if it is acquired automatically at birth or through marriage. A right of option between two

410 See Hailbronner, 'Rights and Duties of Dual Nationals' (n 402) 21; Otto Kimminich, 'The Conventions for the Prevention of Double Citizenship and Their Meaning for Germany and Europe in an Era of Migration' (1995) 38 German Yearbook of International Law 224.

411 de Groot and Vonk (n 54) 220. See further also Parliamentary Assembly of the Council of Europe, 'Recommendation 1081 (1988) on Problems of Nationality of Mixed Marriages' (PACE 1988).

412 Preamble to the ECN, Recitals 8 and 9.

413 International Law Commission, 'Commentary Draft Articles on Nationality' (n 41) 25.

414 Article 3(2)(c) AU Draft Protocol on Nationality.

415 See indirectly African Union, 'Explanatory memorandum' (n 246) para 77.

nationalities may only be imposed after attaining the age of majority and if a reasonable period of reflection is granted.

Today, the principle of singular nationality is no longer seen in the context of preventing statelessness. From an individual rights perspective, statelessness and plural nationality cannot be compared.[416] While the prevention of statelessness aims at the protection of individual, the avoidance of plural nationality is less concerned with individual rights and more with the avoidance of jurisdictional conflicts between states.[417] The possible human rights implications of dual or multiple citizenship are less obvious and less compelling. Plural citizenship, in principle, does not generally diminish rights but, rather, expands them from one to two or more states.[418]

Another important element of the growing acceptance of dual or multiple citizenship in international law is the principle of equality of women and men superseding the 'unity of the family' in nationality matters.[419] Granting women equal rights to men in the acquisition, possession, loss and transmission of nationality increased the likelihood of dual, or even multiple, nationality on the part of the women and, particularly, children. As already discussed above, this paradigm change was prompted by the Convention on the Nationality of Women, the CNMW and eventually also by Article 9 CEDAW.[420] Granting women and men an equal right to nationality, particularly an equal right to transmit their nationality to their children, however, leads to dual or even multiple nationality.[421] Children of binational couples that have the right to acquire the nationality of both parents will have, at least, two nationalities. Therefore, the principle of equality of men and women in nationality matters presupposes the acceptance of dual or even multiple nationality.[422] But does this suffice to argue that the right to nationality contains a right to dual or multiple nationality?[423] As Spiro points out "[i]t is one thing to frame plural citizenship as an individual interest, another to frame it as an individual right".[424]

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416 See also Donner, 'Dual Nationality' (n 402) 17.

417 McDougal, Lasswell and Chen (n 36) 981.

418 *ibid.* See also Bauböck and Paskalev (n 387) 52. The problem of diplomatic in the relationship between the two states of nationality is less urgent today given the complementary protection through international human rights law.

419 Knop (n 300). See also Jesserun d'Oliveira (n 126) 30.

420 See above chapter 5, III.3.5.

421 See also Human Rights Council, 'Report 23/23' (n 116) para 26.

422 *ibid 27.*

423 Spiro, 'Dual Citizenship as Right' (n 402) 116.

424 *ibid 118.*

Nevertheless, Spiro claims that the right to dual citizenship has become a human right, arguing that the right to freedom of association and political rights of self-governance imply the acceptance of plural citizenship.[425] While his arguments are normatively convincing, it is doubtful whether the current international legal framework allows for such a conclusion.[426] Two questions must be distinguished in that context. On the one hand, the question of whether states have an obligation to accept dual or multiple nationality. For example, this might be the case where a national has been granted a second nationality by a state that may not require individuals to give up one of several citizenships.[427] This corresponds to a *negative obligation not to interfere with the right to* (*dual or plural*) *nationality*. On the other hand, the question of whether states have an obligation to grant dual or multiple nationality. This amounts to a *positive obligation to grant a second* (*or third*) *nationality* if the person in question already has a nationality. When answering these questions, the reason for the occurrence of plural nationality can make a difference.[428] The negative obligation to accept dual or multiple nationality seems less controversial. It is established in some of the younger legal instruments, namely the ECN, the ILC Draft Articles on Nationality and the AU Draft Protocol, which reflect the current state of public international law.[429] Moreover, it is connected to other principles, namely the equality of men and women.[430] In cases where a second or additional nationality is to be acquired *ex lege* — particularly by descent — or in cases of overriding principles — such as equality of the sexes — states have a negative obligation to accept plural nationality. Based on this obligation, a state may, in certain situations, be obliged to grant a second nationality, even if the person concerned already has another nationality. This indirectly amounts to a right to a dual nationality.[431] Such is the case where the second

425 *ibid 118 ff.*

426 Neither does it find support in constitutional practice as he writes himself, *ibid 118 and 129 f.*

427 See eg the recommendation to Norway to allow for dual citizenship to prevent the risk of statelessness, Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Ninth Periodic Report of Norway' (CtteeEDAW 2017) UN Doc. CEDAW/C/NOR/CO/9 para 33. Similarly also Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Third Periodic Report of Mexico' (CtteeMW 2017) UN Doc. CMW/C/MEX/CO/3 para 58.

428 See also Wautelet who distinguishes between birthright dual nationality and voluntary dual nationality, Wautelet (n 401).

429 Hailbronner, 'Rights and Duties of Dual Nationals' (n 402) 21.

430 See Boll (n 402) 242 ff.

431 See also de Groot and Vonk (n 54) 220.

nationality is acquired *ex lege* or due to an overriding principle — for example, when a child already has the nationality of the mother and acquires the second nationality by descent from the father. In cases where the second (or third) nationality is acquired voluntarily upon application, there are no international standards that would establish an entitlement to dual or multiple nationality.[432] In these situations, limitations of capacity to voluntarily acquire more than one nationality might be permissible, so long as they do not amount to arbitrary denial or deprivation of nationality. However, even in these cases, the tendency goes in the direction of acceptance.[433] Considering the rise of dual or multiple nationality caused by international migration, this increasing acceptance is to be welcomed.

Finally, the transversal obligation of non-discrimination prohibits states to discriminate based on possessing more than one nationality. The contemporary rise in plural nationality only increased the importanct of the prohibition of discrimination.[434] The increasing securitization of citizenship heightens the vulnerability of individuals with more than one nationality, particularly where the deprivation of nationality is concerned.[435] Moreover, the principle of non-discrimination prohibits allowing dual citizenship only some nationalities but not for others.

Overall, the right to change one's nationality is linked both to the right to renounce one's nationality and the right not to be refused dual or multiple nationality, at least where it is acquired *ex lege*. The right to change one's nationality and the right to dual or multiple nationality are, thereby, illustrative of the changing importance of state membership in the 21st century. As Bosniak notes, this tendency reflects "ensuring rights and recognition for all of a community's residents, [...] an individual's choice of membership identity

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432 Boll (n 402) 242.

433 Wautelet (n 401) 398 f.

434 The CtteeRPD, for example, criticized Uganda for its nationality legislation which denies persons with psychosocial or intellectual disabilities the acquisition of dual citizenship, see Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Uganda' (CtteeRPD 2016) UN Doc. CRPD/C/UGA/CO/1 para 36. See also Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Rwanda' (CtteeERD 2016) UN Doc. CERD/C/RWA/CO/18-20 para 8; Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Eighth to Eleventh Periodic Reports of Turkmenistan' (CtteeERD 2017) UN Doc. CERD/C/TKM/CO/8-11 para 16.

435 See Human Rights Council, 'Report 25/28' (n 93) para 6. See also Macklin, 'Securitization' (n 73); Midtbøen (n 73); Jesserun d'Oliveira (n 126) 32 ff; Spiro, 'Multiple Citizenship' (n 409) 637.

and, above all, [...] the plurality of affiliations and identities that characterize the lives of increasing numbers of people".[436]

6 *Obligations Regarding Involuntary Loss of Nationality*

The right to nationality not only covers the acquisition and change of nationality, but also loss of nationality. Loss of nationality, as a general term, can refer to all forms of loss of nationality irrespective of whether it has been voluntary or not and whether it has been initiated by the person concerned or the state. Loss of nationality, in a more narrow sense, usually refers to the automatic lapse of nationality *ex lege* without administrative decision or interference.[437] Deprivation of nationality, by contrast, denotes the unilateral, non-consensual revocation of nationality by the state through an administrative or judicial act.[438] Following Bauböck and Paskalev, five grounds for deprivation of nationality can be distinguished: deprivation with the aim of protecting national or public security; deprivation as a consequence of non-compliance with citizenship duties and disloyalty; deprivation as a consequence of lapse of genuine links or conflicts of allegiance; annulment due to flawed acquisition of nationality; and derivative loss of nationality.[439] By contrast, voluntary loss of nationality which occurs at the initiative of the individual is usually referred to as renunciation of nationality.[440] From the perspective of the individual, voluntary and involuntary loss of nationality clearly have to be distinguished.

Loss of nationality based on any of these ground transforms a former citizen into a non-citizen; a foreigner without the rights attached to citizenship. Having this transformation in mind, Gibney describes the involuntary deprivation of nationality as:

> an extreme act of state, one analogous to the death penalty. While capital punishment involves the *physical* death of one of its members,

436 Bosniak, 'Multiple Nationality' (n 402) 48.

437 UNHCR, 'Tunis Conclusions' (n 186) para 9. *Ex lege* loss of nationality is sometimes also referred to as *lapse* of nationality, see also Bauböck and Paskalev (n 387) 54.

438 Human Rights Council, 'Report 25/28' (n 93) para 3. See also Articles 5 ff 1961 Convention. Sometimes the notion of denationalization is used to refer to deprivation of nationality, or also the notion of denaturalization if deprivation affects only naturalized citizens. See further eg Matthew J Gibney, 'Denationalization' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 361; van Waas and Jaghai (n 126) 416.

439 Bauböck and Paskalev (n 387) 56. See also the modes of loss on the GLOBALCIT Database, Global Citizenship Observatory (GLOBALCIT), 'Database Loss of Citizenship' (n 398).

440 See above chapter 5, III.5.2. See also Human Rights Council, 'Report 13/34' (n 2) para 23.

> denationalization involves, in principle, the individual's *civic* death, the severing of the ties of responsibility between the state and its citizen.[441] (original emphasis)

At a societal level, studies have shown that deprivation of nationality destabilizes social cohesion and puts the very reason of citizenship as a durable legal status in question.[442] Notwithstanding these severe consequences of depriving an individual of their nationality, international law does not, in principle, prohibit the deprivation of nationality.[443] However, deprivation of nationality violates international legal standards where it is arbitrary (III.6.1). In addition, it will be argued that deprivation of nationality of children (III.6.2) and mass deprivation of nationality (III.6.3) are problematic from an international legal perspective.

6.1 The Prohibition of Arbitrary Deprivation of Nationality

International law, as it currently stands, does not generally prohibit deprivation of nationality.[444] If adopted, Article 16(1) of the AU Protocol on Nationality would be the first international instrument explicitly calling upon states not to deprive citizens of their nationality at all.[445] Under the current international legal framework deprivation of nationality is allowed so long as it is not arbitrary.[446] From the perspective of the individual, the prohibition of arbitrary deprivation of nationality implies a positive right to retain nationality under certain circumstances.[447]

The prohibition of arbitrarily depriving nationality was already enshrined in Article 15(2) UDHR and has since been codified in a number of other instruments.[448] Article 9 1961 Convention prohibits deprivation of nationality based

441 Gibney, 'Discrimination' (n 126) 2551. See similarly Audrey Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' (2014) Vol. 40 Queen's Law Journal 1, 7.

442 See also Matthew J Gibney, 'Should Citizenship Be Conditional? The Ethics of Denationalization' (2013) 75 The Journal of Politics 646; van Waas and Jaghai (n 126).

443 Molnár (n 99) 76.

444 See already Brownlie (n 293) 339 f.

445 Article 16(1) AU Draft Protocol on Nationality states that "a state party shall not provide for the loss of its nationality". Article 16(2), (3) and (4) allow for limited exceptions to this rule.

446 See also Human Rights Council, 'Report 10/34' (n 124) para 49.

447 See Molnár (n 99) 71. See also *Yean and Bosico* (n 71) para 174.

448 Article 18(1)(a) CRPD provides that persons with disability shall neither be deprived of their nationality arbitrarily nor based on their disability. Article 9 1961 Convention prohibits deprivation of nationality based on racial, ethnic, religious or political grounds.

on racial, ethnic, religious or political grounds. Article 18(1)(a) CRPD not only prohibits the arbitrary deprivation of nationality, but also the deprivation of nationality on the basis of disability. Implicitly, a prohibition of arbitrary deprivation of nationality is also enshrined in Article 5(d)(iii) CERD.[449] Moreover, the UN has repeatedly called upon states not to deprive individuals arbitrarily of their nationality.[450] At the regional level, Article 20(3) ACHR and Article 29 ArCHR prohibit the arbitrary deprivation of nationality. Article 16(5) of the Draft AU Protocol on Nationality calls upon states not to deprive arbitrarily any person or group of their nationality, including on racial, ethnic, religious or political grounds or on grounds related to the exercise of rights established by the ACHPR. The ECN recognizes the prohibition of arbitrary deprivation of nationality as a general principle.[451] The ILC Draft Articles on the Expulsion of Aliens prohibit deprivation of nationality for the sole purpose of expulsion, arguing that this would be arbitrary.[452] Even the ECtHR has repeatedly confirmed that the "arbitrary revocation of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of its impact on the private life of the individual".[453] However, it also noted that revocation or annulment of citizenship is not *per se* incompatible with the ECHR.[454] Moreover, as discussed previously, the prohibition of arbitrary deprivation of nationality is increasingly recognized as a norm of customary international law.[455]

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449 Human Rights Council, 'Report 13/34' (n 2) para 25. See also Foster and Baker (n 99) 140.

450 See in particular UN Commission on Human Rights, 'Resolution 1999/28 on Human Rights and Arbitrary Deprivation of Nationality' (UN Human Rights Commission 1999) UN Doc. E/CN.4/RES/1999/28; UN Commission on Human Rights, 'Resolution 2005/45' (n 180); Human Rights Council, 'Resolution 7/10' (n 180); Human Rights Council, 'Resolution 10/13' (n 180); Human Rights Council, 'Resolution 13/2' (n 180); Human Rights Council, 'Resolution 20/5' (n 96); Human Rights Council, 'Resolution 26/14' (n 156); Human Rights Council, 'Resolution 32/5' (n 111).

451 Article 4(c) ECN. See also Parliamentary Assembly of the Council of Europe, 'Resolution 2263 (2019) on Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach?' (PACE 2019).

452 Article 8 International Law Commission Draft Articles on the Expulsion of Aliens, UN Doc. A/69/10. See immediately below chapter 5, III.6.1.3.

453 *Ramadan v Malta* (n 153) para 85. See also *K2 v UK* (n 126) para 49; *Said Abdul Salam Mubarak v Denmark* (*Decision*) [2019] ECtHR Application No. 74411/16 para 62. Currently pending, *El Aroud v Belgium* [pending] ECtHR Application No. 25491/18; *Soughir v Belgium* [pending] ECtHR Application No. 27629/18. See on the nullification of citizenship *Alpeyeva and Dzhalagoniya v Russia* (n 328) para 110 ff.

454 *Usmanov v Russia* (n 168) para 65.

455 See chapter 4, III.

But when is the deprivation of nationality considered to be *arbitrary*? A broad interpretation of the notion of arbitrariness prevails.[456] Generally, arbitrariness covers all state action — legislative, administrative and judicial — that contains elements of inappropriateness, injustice, illegitimacy or a lack of predictability.[457] In the case of *Usmanov v Russia* the ECtHR specified the criteria it applies when examining whether a revocation of citizenship amounts to a violation of Article 8 ECHR.[458] It specified that in order to determine arbitrariness, it examines whether the measure in question was in accordance with the law, accompanied by the necessary procedural safeguards, including the possibility of judicial review, and whether the authorities acted diligently and swiftly.[459] This means that the measure in question must have some basis in domestic law that is formulated in clear terms, accessible to the person concerned and foreseeable and that the legal basis in question must indicate the scope of discretion awarded to the authorities and the manner of its exercise with sufficient clarity.[460] Therefore, deprivation of nationality must be considered to be arbitrary where it is clearly inappropriate, does not have a legal basis or clearly contradicts the relevant regulatory framework, is unpredictable or generally is unjust or amounts to a denial of justice. Accordingly, any measure ordering deprivation of nationality must have a sufficient legal basis, comply with procedural and substantive standards — including the principle of proportionality — and serve a legitimate purpose that is consistent with international law and the objectives of international human rights law. Otherwise the measure will be considered arbitrary.[461] Thus, arbitrariness can relate both to the procedure and to the substantive grounds of deprivation of nationality.[462]

Regarding the *procedure*, deprivation of nationality is considered to be arbitrary — and thus unlawful — if the procedure leading to the deprivation lacks a legal basis, disregards due process guarantees or there is no possibility of judicial or administrative review.[463] Procedural safeguards are essential

456 See chapter 5, III.2.2. See also Iseult Honohan, 'Just What's Wrong with Losing Citizenship? Examining Revocation of Citizenship from a Non-Domination Perspective' (2020) 24 Citizenship Studies 355, 358; Sandra Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives* (Brill Nijhoff 2015) 31.

457 Human Rights Council, 'Report 13/34' (n 2) para 25. See also Molnár (n 99) 77.

458 *Usmanov v Russia* (n 168) para 52 ff. See chapter 4, II.2.2.1.2.

459 *ibid 54*.

460 *ibid 64*.

461 Human Rights Council, 'Report 13/34' (n 2) para 25.

462 *ibid.*

463 Eg Article 8(4) 1961 Convention. See also Human Rights Council, 'Report 25/28' (n 93) para 31 ff; *K2 v UK* (n 126) para 50; *Partial Award — Civilians Claims: Eritrea's Claims 15, 16, 23 &*

to prevent arbitrary decisions and the abuse of law.[464] The procedure leading to the deprivation must be predictable and have a sufficient legal basis in domestic law.[465] Any discretion granted to the authorities must be clearly indicated.[466] Legal provisions allowing for the deprivation of nationality may not be applied by analogy or retroactively.[467] The individual concerned should be adequately informed about the procedure.[468] The authority in charge of the deprivation measure must be competent and should act diligently and swiftly.[469] The decision to deprive an individual of her nationality must be ordered in writing and with reasons.[470] It must be open to judicial or administrative review before a court or another independent body who has the competence to overturn the decision.[471] Moreover, the judicial remedy against the deprivation measure should have suspensive effect.[472] Finally, individuals arbitrarily deprived of their nationality must have access to an effective remedy, including, but not limited to, the restoration of nationality.[473] Effective remedies should also entail reparations for any other violations of rights that might have occurred.[474] The procedural requirements are also well-illustrated by the case law of the CJEU in the cases of *Rottman* and *Tjebbes*.[475] As the CJEU

27–32 (Eritrea Ethiopia Claims Commission) para 71. See for the procedural standards under the right to nationality also chapter 5, III.7.

464 Molnár (n 99) 77.

465 ibid 76 f; UNHCR, 'Tunis Conclusions' (n 186) para 16. See also *Ivcher Bronstein* (n 156) para 95.

466 *Usmanov v Russia* (n 168) para 64.

467 Molnár (n 99) 76 f; UNHCR, 'Tunis Conclusions' (n 186) para 16.

468 *Partial Award — Civilians Claims: Eritrea's Claims 15, 16, 23 & 27–32* (n 463) para 71.

469 *K2 v UK* (n 126) para 50; *Ivcher Bronstein* (n 156) para 96.

470 Article 11 ECN. See also Brandvoll (n 162) 197; *Partial Award — Civilians Claims: Eritrea's Claims 15, 16, 23 & 27–32* (n 463) para 72.

471 Article 8(4) 1961 Convention, Article 12 ECN. See also Human Rights Council, 'Resolution 32/5' (n 111) para 13; Human Rights Council, 'Report 13/34' (n 2) paras 43–44; *Said Abdul Salam Mubarak v Denmark* (n 453) para 65. See also UNHCR, 'Tunis Conclusions' (n 186) para 26.

472 UNHCR, 'Tunis Conclusions' (n 186) para 26. See indirectly also *Rottman* (n 51) para 58.

473 Human Rights Council, 'Report 13/34' (n 2) para 46; Human Rights Council, 'Resolution 10/13' (n 180) para 9; Human Rights Council, 'Resolution 13/2' (n 180) para 11; Human Rights Council, 'Resolution 20/5' (n 96) para 12; Human Rights Council, 'Resolution 26/14' (n 156) para 15; Human Rights Council, 'Resolution 32/5' (n 111) para 15. See also *Tjebbes* (n 166) para 42.

474 Human Rights Council, 'Report 25/28' (n 93) para 34. See also *Kurić and Others v Slovenia* (*Grand Chamber*) [2012] ECtHR Application No. 26828/06 para 412; Molnár (n 99) 85.

475 *Rottman* (n 51); *Tjebbes* (n 166); see also Caia Vlieks, 'Tjebbes and Others v Minister van Buitenlandse Zaken: A Next Step in European Union Case Law on Nationality Matters?' (2019) 24 Tilburg Law Review 142. The two cases did not directly concern deprivation of

stressed in *Rottman*, a measure leading to the loss of nationality requires a sufficient legal basis, a legitimate public interest, be — overall — proportionate, have regard to the consequences for the individual concerned and possibly her family members and be open to judicial review.[476] In *Tjebbes* the Court added that the principle of proportionality requires an individual examination of the consequences of the measure for the person concerned and her family.[477] Moreover, according to *jy v Wiener Landesregierung*, a decision to revoke the grant of nationality must be proportionate to the gravity of the offences that oppose the granting of nationality.[478] Similarly, the UNHCR stresses the importance of an individual assessment:

> [...] consideration must be given to the strength of the link of the person with the State in question, including birth in the territory, length of residence, family ties, economic activity as well as linguistic and cultural integration. The time that has passed since the act in question is also relevant for the assessment as to whether the gravity of the act justifies deprivation of nationality. The longer the period elapsed since the conduct, the more serious the conduct required to justify deprivation of nationality.[479]

Regarding the *substantive grounds*, a deprivation measure is arbitrary if it has no — or no sufficient — legal basis, if the reasons for deprivation are unreasonable or unjust or if the effects of deprivation are disproportionate.[480] Effectively, deprivation of nationality must serve a legitimate purpose and be proportionate — this means that it must be the least intrusive means available to achieve the intended purpose, be applied as a measure of last resort and be proportionate to the legitimate interest pursued by the state.[481] Given the severe implications of depriving an individual of their nationality, any

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nationality but generally loss of nationality due to nullification of naturalization and lapse of nationality causing the loss of EU citizenship. Nevertheless the rulings of the CJEU can be applied to the case of deprivation of nationality.

476 *Rottman* (n 51) 48 ff.

477 *Tjebbes* (n 166) para 41 ff. See also *JY v Wiener Landesregierung* (n 166) para 59.

478 *JY v Wiener Landesregierung* (n 166) para 73.

479 UNHCR, 'Tunis Conclusions' (n 186) para 21.

480 See eg Chan (n 74) 8; Macklin, 'Citizenship Revocation' (n 441) 15.

481 UNHCR, 'Tunis Conclusions' (n 186) paras 19 and 20. See also Human Rights Council, 'Resolution 32/5' (n 111) para 16; Molnár (n 99) 77. The ECtHR, by contrast, examines the arbitrariness and the proportionality of a deprivation measure separately, see *Said Abdul Salam Mubarak v Denmark* (n 453) para 62 ff. See on the distinction of the standard of arbitrariness and the principle of proportionality chapter 5, III.2.2.

deprivation that does not comply with these standards risks being arbitrary.[482] Against that background, deprivation of nationality as a counter-terrorism strategy seems questionable, as it remains highly doubtful whether deprivation of nationality can prevent terrorist acts both in the country of (former) nationality or in third countries.[483] Less intrusive measures such as confiscation of travel documents, travel bans or restrictions of the freedom of movement seem to be able to achieve the same goal while interfering less with the rights of the person concerned.[484] Such measures — namely the confiscation of identity documents or the refusal to issue such documents — can indirectly also amount to an arbitrary revocation or denial or citizenship.[485]

In addition to not being arbitrary, a deprivation of nationality may also not be based on grounds that are protected by fundamental human rights.[486] This includes three constellations that shall be examined in more detail: deprivation on discriminatory grounds (III.6.1.1); deprivation resulting in statelessness (III.6.1.2); and deprivation for the sole purpose of expulsion (III.6.1.3).

6.1.1 *Prohibition of Deprivation of Nationality on Discriminatory Grounds*

Deprivation of nationality is discriminatory, when a state deprives a person of their nationality based on an unreasonable and discriminatory classification such as namely race, ethnicity, national origin, disability or religion.[487] If deprivation of nationality is based on discriminatory grounds and cannot be justified by very weighty reasons, it violates relevant international legal standards and hence has to be considered to be unlawful and arbitrary.[488] Weis has found that:

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482 See also *Modise v Botswana* (n 154) para 97; PACE, 'Resolution 2263 (2019)' (n 451) para 46 ff.

483 PACE, 'Withdrawing Nationality' (n 73) para 8. See also Bauböck and Paskalev (n 387) 72 f; Boekestein and de Groot (n 123) 328; van Waas and Jaghai (n 126) 419.

484 Critically Alison Harvey, 'Recent Developments on Deprivation of Nationality on Grounds of National Security and Terrorism Resulting in Statelessness' (2014) 28 Journal of Immigration, Asylum and Nationality Law 336, 347 ff. See also Esbrook (n 73) 1312 ff; PACE, 'Withdrawing Nationality' (n 73) para 50.

485 See in particular the case law of the ECtHR in *Alpeyeva and Dzhalagoniya v Russia* (n 328); *Ahmadov v Azerbaijan* (n 367).

486 Hailbronner and others (n 182) 60. See also Article 16(5) AU Draft Protocol on Nationality and *Tjebbes* (n 166) para 45.

487 See also UN Special Rapporteur on Racism (n 125) para 11.

488 See Adjami and Harrington (n 185) 102; Bialosky (n 158) 190; Brandvoll (n 162) 196; Brownlie (n 293) 344; Chan (n 74) 8; Council of Europe, 'Explanatory Report ECN' (n 186) para 36; Govil and Edwards (n 121) 190; Hall (n 12) 594; Macklin, 'Sticky Citizenship' (n 290) 15; Foster and Baker (n 99) 145. See also *Yean and Bosico* (n 71) para 174.

> Considering that the principle of non-discrimination may now be regarded as a rule of international law or as a general principle of law, prohibition of discriminatory denationalization may be regarded as a rule of present-day general international law.[489]

Which protected grounds do fall within the prohibition of discriminatory deprivation of nationality is subject to debate.[490] Article 9 1961 Convention establishes an absolute prohibition of deprivation of nationality on racial, ethnic, religious or political grounds. It is, thereby, irrelevant whether the person concerned becomes stateless as a result of the deprivation or whether the deprivation measure is in any other way arbitrary.[491] Any discriminatory deprivation of nationality on the basis of race, color or national or ethnic origin is, moreover, prohibited by Article 5(d)(iii) CERD.[492] In addition, a prohibition of depriving nationality solely on the ground of gender would be incompatible with Article 9 CEDAW. The same goes for deprivation on the ground of disability which violates Article 18(1)(b) CRPD. The ECN prohibits the deprivation of nationality on discriminatory grounds based on the general prohibition of discrimination in Article 5 in conjunction with the provision on loss of nationality in Article 7.[493] Under the ECHR, discriminatory deprivation or denial of nationality is prohibited by Article 8 in conjunction with Article 14 ECHR. According to the case of *Slepcik v the Netherlands and the Czech Republic* deprivation of citizenship might even constitute degrading treatment prohibited under Article 3 if the differential treatment is based on the ground of race or ethnicity.[494] The UN Commission on Human Rights and the Human Rights Council have adopted different resolutions prohibiting deprivation of nationality on the grounds of race, national origin, ethnicity, religion or gender, but

489 Weis, *Nationality in International Law* (n 276) 125.

490 See namely van Waas, *Nationality Matters* (n 171) 101 ff.

491 See also Molnár (n 99) 79; van Waas and Jaghai (n 126) 423.

492 CtteeERD, 'General Recommendation No. XXX' (n 123) para 14; Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 34' (n 11) para 48.

493 Thomas Cassuto, 'Identity and Nationality' in Council of Europe (ed), *Challenges to National and International Law on Nationality at the Beginning of the New Millenium, Proceedings of the 2nd European Conference on Nationality* (Council of Europe 2001) 47; Hall (n 12) 598.

494 *Slepcik v the Netherlands and the Czech Republic* [1996] ECtHR Application No. 30913/96 para 3. See for a deprivation case under Article 3 ECHR also *AS v France* [2020] Application No. 46240/15.

also color, political or other opinion, sex, language, social origin, property, birth or other status.[495]

Overall, these different sources support the conclusion that international law does not allow for the deprivation of nationality on discriminatory grounds, particularly not on the grounds of race, color, ethnicity, national origin, religion, gender or disability.[496] The prohibition of discriminatory deprivation of nationality not only covers direct discrimination in the sense of direct differences in treatment, but also indirect forms of discrimination, ie deprivation measures that disproportionately affect persons of a certain race, ethnicity, national origin, religion, gender or disability without explicitly targeting these groups.[497] Moreover, deprivation measures targeting only dual or plural nationals, persons who acquired nationality at birth and those who acquired it subsequently (often by naturalization) seem problematic.[498] This is true not only if birth and other status are itself considered to be protected grounds, but also because such differentiation between mono and dual/plural nationals risks discriminating indirectly on the grounds of ethnicity or religion as persons with a migration background and a minority ethnicity or religion are more likely to have dual or plural citizenship.[499] Any differentiation on the basis of prohibited grounds or on the basis of nationality status, therefore, is only compatible with the right to nationality if it can be justified by very weighty reasons.[500]

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495 UN Commission on Human Rights, 'Resolution 1999/28' (n 450) para 2; UN Commission on Human Rights, 'Resolution 2005/45' (n 180) para 2; Human Rights Council, 'Resolution 7/10' (n 180) paras 2 and 3; Human Rights Council, 'Resolution 10/13' (n 180) paras 2 and 3; Human Rights Council, 'Resolution 13/2' (n 180) paras 2 and 3; Human Rights Council, 'Resolution 20/5' (n 96) paras 2 and 4; Human Rights Council, 'Resolution 26/14' (n 156) paras 2 and 4; Human Rights Council, 'Resolution 32/5' (n 111) paras 2 and 4.

496 UN Special Rapporteur on Racism (n 125) para 57.

497 *ibid 27*. See eg also Boekestein and de Groot (n 123); Elke Winter and Ivana Previsic, 'The Politics of Un-Belonging: Lessons from Canada's Experiment with Citizenship Revocation' (2019) 23 Citizenship Studies 338.

498 Organization for Security and Co-operation in Europe, 'The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations' (OSCE 2008) 11 <https://www.osce.org/hcnm/bolzano-bozen-recommendations>. See by analogy also *Biao v Denmark* (GC) (n 136).

499 See Boekestein and de Groot (n 123) 324 f; van Waas and Jaghai (n 126). See by analogy also *Biao v Denmark* (GC) (n 136). In the case of *K2 v the United Kingdom* the ECtHR was able to leave the question open as the applicant had not exhausted all domestic remedies, *K2 v UK* (n 126) para 68 ff.

500 Foster and Baker (n 99) 145; *Biao v Denmark* (GC) (n 136) para 93.

6.1.2 *Prohibition of Deprivation of Nationality Resulting in Statelessness?*

Some authors argue that the consequence of statelessness weighs so heavily that a deprivation of nationality resulting in statelessness is *per se* arbitrary.[501] Chan, for example, argues that a "deprivation resulting in statelessness could hardly be compatible with the aims and objectives of the Universal Declaration".[502] Such a prohibition of deprivation of nationality resulting in statelessness can be derived from the duty to prevent and reduce statelessness. Nevertheless, it continues to be disputed as to whether the deprivation of nationality resulting in statelessness is always a form of arbitrary deprivation and, as such, prohibited.[503] Article 8(1) of the 1961 Convention calls upon states not to deprive a person of her nationality, if such deprivation would render her stateless. Paragraphs 2 and 3 of Article 8, however, allow certain exceptions to that principle:

- if the person concerned has acquired nationality by naturalization, resided abroad for more than seven consecutive years and did not declare the intention to retain his nationality (Article 8(2)(a) in conjunction with Article 7(4));
- if the person concerned was born abroad and did not lodge a declaration or take up residence in the state of nationality until one year after attaining majority (Article 8(2)(a) in conjunction with Article 7(5));
- if nationality has been obtained by misrepresentation or fraud (Article 8(2)(b)); or
- if the state party concerned has lodged an application at the time of signature, ratification or accession specifying the retention of such right in case of a breach of loyalty by rendering services to or taking emoluments from another state or acting contrary to vital interests of the state, or in case of a breach of allegiance (Article 8(3)(a) and (b)).[504]

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501 Adjami and Harrington (n 185) 103; Brandvoll (n 162) 197; Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff Publishers 1995) 92; William Worster, 'International Law and the Expulsion of Individuals with More than One Nationality' (2009) Vol. 14 UCLA Journal of International Law & Foreign Affairs 423, 451.

502 Chan (n 74) 3. See also already Donner (n 231) 195.

503 See Brandvoll (n 162) 197 ff. See with regard to Article 18 CRPD Rothfritz (n 345) 461. See eg also the statement of the Swiss Federal Council in reply to Motion 19.3305, Jean-Luc Addor, Entzug des Schweizer Bürgerrechts nicht nur für Dschihadisten mit doppelter Staatsbürgerschaft, 22 March 2019. See for a historical perspective Donner (n 231) 245; Fischer Williams (n 284) 52; Weis, *Nationality in International Law* (n 276) 125.

504 Currently, ten states have a submitted a declaration to Article 8(3), see Boekestein and de Groot (n 123) 42.

While the 1961 Convention does not generally prohibit deprivation resulting in statelessness, these exceptions establish a high threshold for doing so.[505] The ECN, in contrast, is stricter and only allows deprivation of nationality resulting in statelessness if nationality was acquired fraudulently in the first place (Article 7(3) ECN). If adopted, the AU Draft Protocol on Nationality would be the first instrument prohibiting loss or deprivation of nationality under any circumstances if the person would become stateless (Article 16(7)).

Soft law instruments, equally, do not absolutely prohibit the deprivation of nationality that results in statelessness. Human Rights Council Resolution 26/14 emphasizes that "where States take any measure that would render individuals stateless by depriving them of nationality, they should endeavor to do so in a limited manner".[506] The UN Secretary General noted that "deprivation of nationality resulting in statelessness will generally be arbitrary unless it serves a legitimate purpose and complies with the principle of proportionality".[507] Only the UNHCR points out that loss and deprivation that results in statelessness will generally be arbitrary because the impact on the individual far outweighs the interests of the state.[508]

The reluctance to prohibit deprivation of nationality that results in statelessness absolutely is mirrored in current state practice. In particular in the context of national security and counter-terrorism measures, states — namely European states — try to reaffirm their competence to deprive individuals of nationality.[509] The UK even decided to allow for the deprivation of nationality of naturalized citizens regardless of whether it results in statelessness.[510]

505 UNHCR, 'Tunis Conclusions' (n 186) para 68.

506 Human Rights Council, 'Resolution 26/14' (n 156) para 13.

507 Human Rights Council, 'Report 10/34' (n 124) para 51.

508 UNHCR, 'Tunis Conclusions' (n 186) para 23.

509 Brandvoll (n 162) 208; Esbrook (n 73) 1284 ff; Gibney, 'Should Citizenship Be Conditional?' (n 442) 646; van Waas and Jaghai (n 126) 419 ff; Worster, 'Explusion of Individuals' (n 501) 453 ff. See for a current overview on state practice Institute on Statelessness and Inclusion and Global Citizenship Observatory GLOBALCIT, 'Instrumentalising Citizenship in the Fight against Terrorism. A Global Comparative Analysis of Legislation on Deprivation of Nationality as a Security Measure' (2022) <https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf>. Switzerland, for example, ordered the first deprivation of nationality in case of a Swiss-Turkish dual national who was convicted for supporting a terrorist organization in September 2019. Only in 2018 a new, more detailed provision on deprivation of nationality was introduced (Article 30 Swiss Citizenship Ordinance, SR 141.01). See also Staatssekretariat für Migration, 'Zugehörigkeit zu einer terroristischen Organisation: SEM entzieht Doppelbürger das Schweizer Bürgerrecht' (Staatssekretariat für Migration (SEM) 2019) <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-76358.html>.

510 See for the cases of France and the UK also Mantu, 'Terrorist Citizens' (n 73) 31 ff.

Nevertheless, the number of cases where this has actually been done is still relatively small.[511]

The case law, finally, is inconclusive. The Eritrea-Ethiopia Claims Commission found deprivation of nationality resulting in statelessness to violate international law.[512] Arguing on the basis of Article 15(2) UDHR, the Commission found that deprivation of nationality was arbitrary if it resulted in persons being rendered stateless.[513] The ECtHR, for example, accepts that statelessness is an element in the assessment of whether deprivation or denial of nationality is proportionate and not arbitrary.[514] Nevertheless, the Court did not find a violation of the right to private life in the case of *Ramadan v Malta*, where the applicant's citizenship was revoked due to irregularities in the acquisition process, even though the applicant became stateless as a consequence.[515] Interestingly, however, it stressed that the applicant had not presented proof that the renunciation of his former nationality was effective or that he had no possibility of reacquiring that nationality.[516] Similarly, in *K2 v the UK*, the Court accepted that the applicant was not rendered stateless by the decision to deprive him of British citizenship although the applicant was in fact stateless for a certain time before he was able to reacquire his former nationality.[517] This shows that the Court is not entirely at ease with the fact that a person could be rendered permanently stateless by a decision to deprive or revoke nationality. However, this has never been translated into finding a violation of the Convention in a deprivation case so far.[518] The CJEU has been, so far, able to avoid the question. In *Rottman* it noted that the 1961 Convention and the ECN allow for the deprivation of nationality leading to statelessness, at least where nationality was acquired fraudulently.[519]

Overall, it seems clear that there is only narrow room for a deprivation measure leaving the person concerned stateless to be considered lawful.

511 See on the practice of declarations to Article 8(3) 1961 Convention also Boekestein and de Groot (n 123).

512 *Partial Award — Civilians Claims: Eritrea's Claims 15, 16, 23 & 27–32* (n 463) para 57 ff.

513 *ibid 60.*

514 *Said Abdul Salam Mubarak v Denmark* (n 453) para 69; *Ghoumid and others v France* [2020] ECtHR Application Nos. 52273/16, 52285/16, 52290/16, 52294/16 and 52303/16; *Adam Johansen v Denmark* [2022] ECtHR Application No. 27801/19.

515 *Ramadan v Malta* (n 153).

516 *ibid 92.*

517 *K2 v UK* (n 126) para 62.

518 See, however, the pending cases *Soughir v Belgium* (n 453); *El Aroud v Belgium* (n 453).

519 *Rottman* (n 51) para 29. In *Tjebbes* the applicant was not at risk of becoming stateless, see *Tjebbes* (n 166) para 37; see also Vlieks (n 475) 145.

Statelessness is an important element in the determination of whether deprivation is proportionate and thus lawful.[520] States have an obligation to prevent statelessness from occurring.[521] This obligation, combined with the severity of interfering with the rights of the individual, will usually outweigh any possible legitimate public interest. Thus, a deprivation of nationality resulting in statelessness will hardly ever be proportionate and will usually lead to an arbitrary deprivation of nationality. Less intrusive, alternative measures will most likely be more effective, given also that stateless persons cannot normally be expelled and that therefore the main aim of the deprivation order of protecting national security can most likely not be reached if the person affected becomes stateless.[522] Exceptions to that rule — ie situations where the state interest is so weighty that even statelessness is a proportionate outcome and no alternative measure is available — are extremely narrow. Moreover, for states who have ratified the ECN or the 1961 Convention and have not lodged a declaration to Article 8(3), the deprivation of nationality resulting in statelessness will never be lawful, except where it is based on fraudulent acquisition and the period between the nationality's acquisition and withdrawal is not too long.[523] Hence, it would probably go too far to claim that there already is an absolute prohibition of the deprivation of nationality resulting in statelessness in current international law.[524] Nevertheless, the trend towards the recognition of the deprivation of nationality resulting in statelessness, as a form of arbitrary deprivation of nationality, seems to continue.[525]

6.1.3 *Prohibition of Deprivation of Nationality for the Sole Purpose of Expulsion*

States often make use of deprivation measures in order to be able to deport a person or — in the context of so called foreign terrorist fighters participating in armed conflicts abroad — to prevent their return.[526] Article 8 of the

520 *Said Abdul Salam Mubarak v Denmark* (n 453) 69.

521 See in that sense also Human Rights Council, 'Resolution 26/14' (n 156) para 13; Parliamentary Assembly of the Council of Europe, 'Resolution 1989 (2014)' (n 252) para 5.5.1; UN General Assembly, 'Resolution 50/152' (n 181) para 16.

522 See also immediately below chapter 5, III.6.1.3.

523 Macklin, 'Citizenship Revocation' (n 441) 14.

524 Mantu, 'Terrorist Citizens' (n 73) 30.

525 Adjami and Harrington (n 185) 103; Henckaerts (n 501) 92; Rainer Hofmann, 'Denaturalization and Forced Exile' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) para 18; Molnár (n 99) 80; van Waas and Jaghai (n 126) 417; Ziemele, 'Article 7 CRC' (n 218) 15.

526 See Gibney, 'Denationalization' (n 438) 361.

ILC Articles on the Expulsion of Aliens clearly stipulates that "a state shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her". Following this position, it is not compatible with the prohibition of arbitrary deprivation of nationality to deprive a person of nationality for the *sole* purpose of expulsion. The commentary to the Draft Articles argues that such deprivation of nationality, which has no other justification than the desire to expel an individual, "would be abusive, indeed arbitrary within the meaning of Article 15, Paragraph 2, of the Universal Declaration of Human Rights".[527] This interpretation is shared by a number of authors.[528] Jean-Marie Henckaerts argues that a combination of the deprivation of nationality and the expulsion of a person would not only be arbitrary, but also violate the right to return for nationals if implemented.[529] Others, in contrast, are more reluctant to accept a prohibition of deprivation of nationality for the purpose of expulsion.[530] Weis, for example, argues that the right to return or the duty to (re-)admit does not invalidate the deprivation of nationality as such. It just limits its extraterritorial effect.[531] This argument, however, is not convincing. A deprivation measure that cannot be implemented nor the purpose of expulsion realized, because it is not externally recognized or the person concerned becomes stateless and no other state would be willing to admit the person concerned, amounts to a humiliation without legitimate aim, and therefore must be considered to be arbitrary.

In the case of *Said Abdul Salam Mubarak v Denmark*, which concerned a deprivation of nationality and subsequent expulsion to Morocco, the ECtHR weighed the consequences of revoking Danish nationality against the interests of the state.[532] Without assessing the fact that the deprivation directly occurred for the purpose of expulsion, the Court found that the revocation of citizenship was not disproportionate and thus did not violate Article 8 ECHR.[533] Similarly in *Ghoumid and others v France* where the Court stressed that the loss of French nationality did not *automatically* entail deportation,

527 International Law Commission, 'Commentary on the Draft Articles on the Expulsion of Aliens' (ILC 2014) Yearbook of the International Law Commission, 2011, Vol II, Part Two 13.

528 Mantu, 'Terrorist Citizens' (n 73) 38; Molnár (n 99) 84 f. Similarly also PACE, 'Withdrawing Nationality' (n 73) para 48.

529 Henckaerts (n 501) 87.

530 Eg Hofmann (n 525); Worster, 'Explusion of Individuals' (n 501). Left open in Human Rights Council, 'Report 25/28' (n 93) para 26.

531 Weis, *Nationality in International Law* (n 276) 126.

532 *Said Abdul Salam Mubarak v Denmark* (n 453).

533 *ibid* para 69 ff.

but would be ordered separately and would be subject to judicial review.[534] In *Usmanov v Russia* the annulment of citizenship also did not automatically result in the removal of the applicant, but the ECtHR nevertheless found that the annulment was arbitrary.[535]

The aim of expulsion or the prevention of re-entry is also impeded by the right to enter one's own country based on Article 12(4) ICCPR.[536] As the Human Rights Committee has repeatedly confirmed, the scope of 'his own country' is broader than the concept 'country of his nationality' and, for example, also covers "nationals of a country who have there been stripped of their nationality in violation of international law".[537] The Committee, moreover, explicitly addressed deprivation of nationality for the purpose of expulsion and held that "a State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to her or her own country".[538] This line of case law under the right to enter one's own country re-inforced the prohibition of deprivation of nationality for the sole purpose of explusion. If the right to return to one's own country still applies — even in cases where nationality is deprived — the aim of expulsion is rendered futile.[539] Given that the right to return still applies, it seems disproportionate and therefore arbitrary to deprive a person of nationality for the sole purpose of expulsion which cannot even be upheld.[540]

6.2 Prohibition of Deprivation of Nationality of Children

In the context of the prohibition of arbitrary deprivation of nationality, it is increasingly argued in legal scholarship that children may not be deprived of their nationality on any ground.[541] Both Article 7 CRC and Article 24(3) ICCPR guarantee the right to *acquire* a nationality and do not address loss or deprivation of nationality. Article 8(1) CRC, however, obliges states with an undertaking to respect the right of the child to *preserve* his or her identity, including nationality, without unlawful interference. Based on this provision, Doek argues that the deprivation of a child's nationality requires, at least, a legal basis and must respect the rights of the child and the best interest of

534 *Ghoumid and others v France* (n 514) para 50.
535 *Usmanov v Russia* (n 168) para 57.
536 Macklin, 'Citizenship Revocation' (n 441) 10 ff.
537 Human Rights Committee, 'General Comment No. 27' (n 344) para 20.
538 *ibid 21.*
539 See similarly also Fischer Williams (n 284) 56 ff. Critical Hofmann (n 525) para 28.
540 See also Mantu, 'Terrorist Citizens' (n 73) 30.
541 Human Rights Council, 'Report 31/29' (n 85) para 14. Similarly Parliamentary Assembly of the Council of Europe, 'Resolution 2263 (2019)' (n 451) para 9.8.

the child.[542] Deprivation of a child's nationality resulting in statelessness can never be in the best interest of the child. But even where it does not result in statelessness, it could be questioned whether the deprivation of children's nationality can ever be compatible with the best interest of the child, considering that having one or more nationalities generally increases the rights and protections of children. The CtteeRC pointed in this direction in its 2019 Concluding Observations to Australia in which it urged the state to revoke a new law that would allow for loss of citizenship for children if they engage in terrorist activities.[543] Statelessness can never be in the best interest of the child, and, as discussed in the foregoing, a child has a right to the nationality of the state in which it was born if it would otherwise be stateless. Given these points, it can be argued that at the very least, depriving children of their nationality is never permissible if it results in statelessness.

6.3 Prohibition of Mass Deprivation of Nationality

The previous sections looked at the question of deprivation of nationality of an individual. However, it is also conceivable that an entire group of persons could be deprived of their nationality. Such situation is described as mass deprivation of nationality or mass denationalization.[544]

Historically, mass denationalization was often used to exclude and expel ethnic, racial or religious minorities, or political opponents. Cases of mass denationalization occurred, for example, in the Soviet Union in the context of the 1919 revolution, Italy under the fascist regime and Nazi Germany. After World War II, examples can be found in Czechoslovakia, Poland, Yugoslavia and in African states in the context of decolonization.[545] These instances of mass denationalization during and immediately after World War II prompted the adoption of Article 15 UDHR and with it the basis for the recognition of the right to nationality in international human rights law.[546] More recent examples

542 Doek (n 197) 29.

543 Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia' (CtteeRC 2019) UN Doc. CRC/C/AUS/CO/5-6 para 23 (b).

544 Hofmann (n 525) para 3.

545 Paul Abel, 'Denationalization' (1942) 6 The Modern Law Review 57; Fischer Williams (n 284) 45 ff; Hofmann (n 525) para 4 ff. On mass denationalizations in Africa see Manby, *Citizenship and Statelessness in Africa* (n 113) 212 ff.

546 Adjami and Harrington (n 185) 96; Gibney, 'Discrimination' (n 126) 2559; Gunnar G Schram, 'Article 15 UDHR' in Asbjørn Eide and others (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992) 232 f. See also chapter 4, I.1.

include the deprivation of nationality against Eritrean-Ethiopian dual citizens by Ethiopia during the war in the late 1990s or the denial of nationality and subsequent expulsion of Rohingya in Myanmar since the 1980s.

Similar to collective, extraterritorial naturalizations, mass denationalizations are problematic from an international law perspective as they amount to an interference with the sovereignty of other states.[547] Mass denationalization is often linked to forced expulsion, which aims to force the individuals concerned to leave the country, or deny their return.[548] Thereby, mass denationalization places an undue burden on the state that has to receive the individuals deprived of citizenship and interferes with its sovereignty.[549]

From a human rights perspective, mass denationalizations seem in violation of international law where they are based on discriminatory grounds such as race, ethnicity, political opinions or religion.[550] In such cases, denationalization would also violate Article 9 1961 Convention. Moreover, considering the duty to prevent and reduce statelessness, the legality of mass deprivation of nationality is questionable where it results in the statelessness of the persons concerned.[551] Most importantly, however, the principle of proportionality makes mass denationalizations affecting large groups problematic. Specifically, mass denationalizations will often not be based on individual decisions and therefore not meet the requisite procedural standards.[552] Because of this disregard of due process guarantees mass denationalizations amount to arbitrary deprivation of nationality and *per se* violate the right to nationality. This understanding is mirrored in the award of the Eritrea Ethiopia Claims Commission of 2004, which found that the denationalization of about 50'000 Eritrean-Ethiopian dual nationals was arbitrary, as the persons concerned were not individually identified and had no apparent possibility of review or appeal.[553]

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547 Schram (n 546) 232 f. See also chapter 5, III.3.4.

548 See also Alberto Achermann, *Die völkerrechtliche Verantwortlichkeit fluchtverursachender Staaten: ein Beitrag zum Zusammenwirken von Flüchtlingsrecht, Menschenrechten, kollektiver Friedenssicherung und Staatenverantwortlichkeit* (Nomos Verlagsgesellschaft 1997) 114; Fischer Williams (n 284) 54 ff; Henckaerts (n 501) 87. See on the implications of mass arbitrary deprivation of nationality for the purposes of international criminal law Cóman Kenny, 'Legislated Out of Existence: Mass Arbitrary Deprivation of Nationality Resulting in Statelessness as an International Crime' (2020) 20 International Criminal Law Review 1026.

549 Achermann (n 548) 183; Schram (n 546) 232 f. See also Organization for Security and Cooperation in Europe, 'Bolzano Recommendations' (n 498) para 11.

550 Hofmann (n 525) para 19; Ziemele, 'Article 7 CRC' (n 218) 16.

551 Hofmann (n 525) para 19.

552 Hailbronner, 'Nationality in Public International Law' (n 304) 71.

553 *Partial Award — Civilians Claims: Eritrea's Claims 15, 16, 23 & 27–32* (n 463) para 75.

Overall, there seems to be very little room for a mass deprivation of nationality that could possibly be proportionate and not contradict the right to nationality and the prohibition of arbitrary deprivation of nationality.[554]

7 *Obligations Regarding the Procedure*

A final element that must be taken into consideration in a discussion of the obligations derived from the right to nationality is the procedural aspect. Rights can only be protected effectively if they are complemented by effective procedural guarantees.[555] Victims of human rights violations must have adequate judicial and administrative instruments to raise possible claims of violations of a right at the national level.[556] The duty to respect, protect and fulfill a human right includes access to justice and certain procedural safeguards.[557] These procedural safeguards are necessary to prevent the abuse of rights.[558] While procedural rights are most developed in criminal matters, a number of due process guarantees also apply to administrative proceedings.[559] The right to nationality entails a procedural dimension. As the 2009 report of the UN Secretary General on human rights and arbitrary deprivation of nationality notes, states are "expected to observe minimum procedural standards in order to ensure that decisions on nationality matters do not contain any element of

554 See Abel (n 545) 64 f. Hailbronner, by contrast, finds that the majority of legal scholars does not consider mass or collective deprivation of nationality to violate international law, Hailbronner and others (n 182) 62.

555 See Human Rights Council, 'Report 13/34' (n 2) para 43.

556 Human Rights Committee, 'General Comment No. 31' (n 39) para 15. See also Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 492 ff.

557 See also UN Special Rapporteur on the Human Rights of Migrants, 'Report of the Special Rapporteur on the Human Rights of Migrants' (Special Rapporteur on the Rights of Migrants 2016) UN Doc. A/71/285 para 30.

558 Human Rights Council, 'Report 10/34' (n 124) 3.

559 See also Kälin and Künzli, *Menschenrechtsschutz* (n 17) 556 ff. The ECtHR has held in the case of *X v Austria* that nationality matters are of public law nature and do not fall under Article 6 ECHR, *X v Austria* (*Decision*) [1972] ECtHR Application No. 5212/71. See also *Naumov v Albania* (n 368). This not only applies to nationality matters, generally migrant rights are largely found to be administrative matters and thus outside the scope of the fair trial guarantees under Article 6 ECHR. See further Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 506. However, the Court has found a violation of Article 6 ECHR in a number of cases concerning stateless persons who were not able to effectively claim their rights due to their statelessness, see *Pekinel v Turkey* [2008] ECtHR Application No. 9939/02; *Veselyashkin and Veselyashkina v Russia* (n 368).

arbitrariness".[560] Three dimensions of procedural obligations under the right to nationality shall be discussed in the following: access to procedures relating to nationality (III.7.1), fairness and effectiveness of those procedures (III.7.2) and the possibility of having decisions reviewed by independent bodies (III.7.3).

7.1 Access to the Procedure

The international system of human rights protection requires that individuals have access to a procedure that allows them to claim their rights and challenge the denial or violation of rights.[561] Access to the procedure presupposes that procedures are available, that the individuals concerned know about them and that they are accessible to everyone affected. Article 21(1) of the AU Draft Protocol, for example, suggests a provision calling upon states to ensure that rules governing nationality are clear and accessible and officially published. Procedures should, moreover, consider particular needs, limitations or vulnerabilities — including the situation of children in particular.[562]

Where acquiring nationality is concerned, access to the procedure implies that procedures exist and are not only theoretical, but that they are effectively accessible in practice. Naturalization procedures, for example, must be accessible for persons eligible for naturalization. This requires that naturalization procedures are accessible for everyone on an equal, non-discriminatory basis.[563] If nationality procedures, for example, would only generally be accessible for a particular group, the obligation to guarantee effective and equal access to naturalization procedures would be violated.[564] Accordingly, the CtteeERD has criticized Croatia for excluding persons belonging to ethnic minorities from citizenship by requiring documentation to acquire nationality that these persons cannot obtain without difficulties.[565] Accessibility of procedures, moreover, is hampered where the fees of such procedures are excessive.[566] Thus,

560 Human Rights Council, 'Report 13/34' (n 2) para 43.

561 Kälin and Künzli, *Menschenrechtsschutz* (n 17) 556.

562 Human Rights Committee, 'General Comment No. 31' (n 39) para 15. Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Seventh Periodic Report of Italy' (CtteeEDAW 2017) UN Doc. CEDAW/C/ITA/CO/7 para 33; Council of Europe, Committee of Ministers, 'Recommendation (2009)13' (n 223) para 20.

563 Human Rights Council, 'Report 10/34' (n 124) para 61.

564 See with regard to the possibility of acquiring nationality on the basis of descent that must be available — and accessible — without discrimination *Genovese v Malta* (n 114) para 34.

565 Committee on the Elimination of Racial Discrimination, 'CO Croatia 2009' (n 347) 17.

566 See eg Committee on the Elimination of All Forms of Discrimination against Women, 'CO Italy 2017' (n 562) para 33.

Article 13 ECN calls upon states to ensure that fees for the acquisition, retention, loss, recovery or certification of nationality should be reasonable.[567] Fees should not be used as an instrument to hinder certain persons or groups from acquiring, retaining, recovering, changing nationality or have one's statelessness determined.[568] Finally, information about nationality procedures has to be publicly available.

The obligation to provide for accessibility of nationality procedures can be interpreted as indirectly obliging states to provide for a statelessness determination procedure.[569] The effective protection of stateless persons requires their identification through a dedicated statelessness determination procedure when there is no (immediate) possibility for them to acquire nationality.[570] As the HRCttee noted in the case of *Denny Zhao v The Netherlands*, states may not hinder access to a statelessness determination procedure by registering individuals under a different status or label, such as "unknown nationality" if that prevents them from accessing the procedure.[571] The question of how statelessness determination procedures should be designed to best protect the rights of stateless persons has been broadly discussed in the academic literature.[572] Statelessness determination procedures must be accessible.[573] That means

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567 Similarly also Article 32 CSS and Article 34 CSR.

568 Council of Europe, 'Explanatory Report ECN' (n 186) para 91.

569 UNHCR, 'Handbook on Protection of Stateless Persons, under the 1954 Convention Relating to the Status of Stateless Persons' (UNHCR 2014) para 8 <http://www.refworld.org/docid/53b676aa4.html>. See implicitly also *Hoti v Croatia* (n 78); Katja Swider, 'Hoti v Croatia' (2019) 1 The Statelessness and Citizenship Review 184, 189; *A.M.* (*on behalf of M.K.A.H.*) *v Switzerland, Communication No 95/2019* (n 203) para 1010.

570 See also Gábor Gyulai, 'The Determination of Statelessness and the Establishment of a Statelessness-Specific Protection Regime' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 116.

571 *Denny Zhao v The Netherlands* (n 201).

572 See namely Katia Bianchini, 'A Comparative Analysis of Statelessness Determination Procedures in 10 EU States' (2017) 29 International Journal of Refugee Law, 42; Bianchini (n 249); European Network on Statelessness, 'Statelessness Determination and the Protection Status of Stateless Persons' (European Network on Statelessness (ENS) 2013) <http://www.refworld.org/docid/53162a2f4.html>; Gyulai (n 570); UNHCR, 'Handbook Statelessness' (n 569); Caia Vlieks, 'Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?' (European Network on Statelessness (ENS) 2014) 09/14 <http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS%20Discussion%20Paper_September%202014.pdf>; van Waas, *Nationality Matters* (n 171).

573 UNHCR, 'Handbook Statelessness' (n 569) 68. See eg also Committee on the Elimination of All Forms of Discrimination against Women, 'CO Italy 2017' (n 562) para 34.

that stateless persons must be informed about the existence of procedures that are accessible for everyone, in the entire territory of the state concerned.[574] Access to procedure can be strengthened if potentially stateless persons are referred to the determination procedure *ex officio*.[575] Other requirements relating to the accessibility of statelessness determination procedures are the possibility to lodge oral applications, the absence of requirements relating to the residence status, the waiving of time limits and the granting of legal aid.[576]

Regarding loss of nationality, a distinction must be made as to whether the loss is initiated by the person concerned — as in the case of renunciation — or by the state through deprivation. Regarding the renunciation of nationality at the initiative of the person concerned, the requirement of accessibility requires that such renunciation procedures are equally accessible for everyone that fulfils the possible requirements for such renunciation.[577] Where the renunciation requires approval or release by authorities, such decisions should not be withheld arbitrarily and should be granted without undue delay.

The deprivation of nationality is conceptually different, in the sense that the decision to withdraw nationality is taken by the state. Thus, access to procedures in the context of deprivation does not refer to the availability and accessibility of deprivation procedures. Instead, the procedural obligation to ensure that access to the deprivation procedure is guaranteed requires that deprivation procedures are not secret and that the person concerned is granted the right to be heard.[578] The individual concerned must be informed about the decision to withdraw nationality and granted the right to participate in that procedure.

7.2 Due Process

The procedures relating to nationality matters must, further, be fair and effective. This entails that the procedure is set out in law and follows transparent rules.[579] This standard is also set out in Article 8(4) 1961 Convention. The UNHCR Handbook on the Protection of Stateless Persons notes with regard to statelessness determination procedures that establishing such procedures in law ensures fairness, transparency and clarity of these procedures.[580]

574 UNHCR, 'Handbook Statelessness' (n 569) 69.
575 *ibid 68.*
576 Gyulai (n 570) 129 f.
577 See also above chapter 5, III.5.2.
578 Indirectly *K2 v UK* (n 126) para 55.
579 Adjami and Harrington (n 185) 101. See also Article 21(1) AU Draft Protocol on Nationality.
580 UNHCR, 'Handbook Statelessness' (n 569) 71.

In order to be fair, decisions should be reasoned[581] and issued in writing so that effective review is possible.[582] The Explanatory Report to the ECN elaborates that "as a minimum, legal and factual reasons need to be given".[583] At least a minimum amount of information necessary to lodge a meaningful appeal must be given, even in cases concerning national security.[584] In the case of *Q. v Denmark*, the Human Rights Committee saw a violation of the right to equality and equal protection of the law under Article 26 ICCPR in a naturalization case.[585] The state was found to have failed to provide any information regarding the substantive grounds for refusing an exemption from a language test in cases of persons with mental disability. The Committee ruled that the state party was not able to demonstrate that the decision was based on reasonable and objective grounds.[586] Where decisions on nationality are taken by the legislative branch of government, there is a high probability that the requirement of a reasoned, written decision cannot be complied with.[587] Decisions should be taken individually and not extended to family members or dependents.[588] Individuals must be granted the right to be heard.[589] This, however, does not necessarily require that the individual concerned is present in the country.[590] In the case of *Ramadan v Malta*, the ECtHR found that the

581 Human Rights Committee, 'Concluding Observations on the Second Periodic Report of Kuwait' (HRCttee 2011) UN Doc. CCPR/C/KWT/CO/2 para 12.

582 Article 11 ECN and Article 17 ILC Draft Articles on Nationality (n 257). See also Human Rights Council, 'Report 10/34' (n 124) para 56; Human Rights Council, 'Report 13/34' (n 2) para 43. See further *K2 v UK* (n 126) para 55.

583 Council of Europe, 'Explanatory Report ECN' (n 186) para 86.

584 ibid; *K2 v UK* (n 126) 55.

585 *Q v Denmark, Communication No 2001/2010* [2015] HRCttee UN Doc. CCPR/C/113/D/2001/2010.

586 *ibid* para 7.4 f.

587 Council of Europe, 'Explanatory Report ECN' (n 186) para 86. See with regard to the discussion on the constitutionality of naturalization decisions by the communal assembly in Switzerland eg Alberto Achermann and Barbara von Rütte, 'Kommentar zu Art. 38 BV' in Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (eds), *Bundesverfassung* (Helbing Lichtenhahn 2015) 790 n 39; see also the judgment of the Swiss Federal Court *1D_7/2017, Urteil vom 13 Juli 2018* [2018] para 5.2. The law allows for naturalization decisions by the communal assembly (Article 15(2) Federal Act on Swiss Citizenship, 20 June 2014, SR 141.0, 'SCA'). Naturalization decisions by ballot box vote were declared unlawful by the Swiss Federal Court in 2003, *BGE 129 I 217* (n 100); *BGE 129 I 232*.

588 Human Rights Council, 'Resolution 32/5' (n 111) para 17; UNHCR, 'Handbook Statelessness' (n 569) 71. See also Article 21(3) AU Draft Protocol on Nationality.

589 See eg Article 8(4) 1961 Convention. See also *Legal Resources Foundation v Zambia* [2001] ACmHPR Communication No. 211/98, 7 May 2001.

590 *K2 v UK* (n 126) para 57.

procedural safeguards in a procedure concerning the nullification of nationality were sufficient as the applicant had the opportunity to participate in a number of hearings, lodge oral and written submissions, was assisted by a lawyer and had the opportunity to challenge the decision.[591]

In order to be effective, procedures should be swift and without undue delays.[592] Article 10 ECN obliges member states to process applications relating to the acquisition, retention, loss, recovery or certification of nationality within a reasonable time.[593] The reasonable length of a procedure, thereby, has to be determined in light of the circumstances of a case.[594]

Evidentiary requirements should be reasonable and may not be excessive.[595] This is especially the case in the context of statelessness determination, where applicants are faced with the challenge of proving a negative fact — the non-possession of any nationality — the standard of proof should not be excessive.[596] Requirements concerning the issue of nationality documents or proof of nationality should be reasonable.[597] Regarding the burden of proof, the African Court of Human and People's Rights held in the case of *Anudo v Tanzania* that the burden of proof shifts to the government if it does

591 *Ramadan v Malta* (n 153) para 87. See however the dissenting opinion of Judge Pinto de Albuquerque which is highly critical of the serious shortcomings of the revocation procedure which in his opinion call into question the fairness and proportionality of the measure taken, see European Court of Human Rights, 'Dissenting Opinion Ramadan v Malta' (n 101) para 19. See on the procedural safeguards also *Usmanov v Russia* (n 168).

592 *Ramadan v Malta* (n 153) para 88; *K2 v UK* (n 126) para 50; *Alpeyeva and Dzhalagoniya v Russia* (n 328) para 109. See also Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Initial Report of Switzerland' (CtteeERD 1998) UN Doc. CERD/C/304/Add.44 para 6.

593 Similarly also Article 17 ILC Draft Articles on Nationality (n 257).

594 Council of Europe, 'Explanatory Report ECN' (n 186) para 85.

595 See also Dembour, *When Humans Become Migrants* (n 559) 507.

596 See eg Committee on the Elimination of All Forms of Discrimination against Women, 'CO Italy 2017' (n 562) para 33.

597 Article 21(2) AU Draft Protocol on Nationality. See eg also Committee on the Rights of the Child, 'Concluding Observations on the Fifth Periodic Report of Pakistan' (CtteeRC 2016) UN Doc. CRC/C/PAK/CO/5 para 29; Committee on the Rights of the Child, 'Concluding Observations on the Combined Third and Fourth Periodic Reports of Uzbekistan' (CtteeRC 2013) UN Doc. CRC/C/UZB/CO/3-4 para 28; Committee on the Rights of the Child, 'Concluding Observations on the Consolidated Third and Fourth Periodic Reports of Egypt' (CtteeRC 2011) UN Doc. CRC/C/EGY/CO/3-4 para 43; Human Rights Council, 'Report 31/29' (n 85) para 25; *Yean and Bosico* (n 71) para 165; Gerard-René de Groot, 'The European Convention on Nationality: A Step towards a Ius Commune in the Field of Nationality Law' (2000) 7 Maastricht Journal of European and Comparative Law 117, 149.

not accept the proof of nationality offered by an individual.[598] *In casu*, the applicant had presented different documents, including a passport and a birth certificate, that confirmed his Tanzanian nationality. The state, however, contested his nationality without offering any additional evidence to support its claim.[599]

Any procedure relating to the acquisition, retention, loss, recovery or certification of nationality, or statelessness determination, must be child friendly.[600] Children shall be granted the right to be heard where they are affected by nationality procedures (Article 12(2) CRC).[601] The best interest of the child must be the primary consideration (Article 3(1) CRC).[602] This implies that procedures should be timely, non-discriminatory, child-sensitive and apply a standard of shared burden of proof.[603] Procedures, moreover, should be gender sensitive.[604]

7.3 Right to Review

Finally, effective protection of human rights entails the possibility to have a decision reviewed. Several instruments guarantee the right to an effective remedy, including Article 2(3) ICCPR. Article 8(4) 1961 Convention states that deprivation of nationality in any case requires the possibility of review by a court or other independent body.[605] Similarly, Article 12 ECN provides generally that decisions on nationality must be open to administrative review.[606] In principle, the obligation to provide for an effective remedy extends to all procedures relating to nationality — its acquisition, retention, loss, recovery and

598 *Anudo Ochieng Anudo v United Republic of Tanzania* [2018] ACtHPR Application No. 012/2015 para 80; Bronwen Manby, 'Anudo Ochieng Anudo v Tanzania (African Court on Human and Peoples' Rights, App No 012/2015, 22 March 2018)' (2019) 1 The Statelessness and Citizenship Review 170, 176.

599 *Anudo v Tanzania* (n 598) para 82.

600 Human Rights Committee, 'General Comment No. 31' (n 39) para 15. See also *Yean and Bosico* (n 71) 165 ff.

601 Council of Europe, Committee of Ministers, 'Recommendation (2009)13' (n 223) para 19.

602 Human Rights Council, 'Report 31/29' (n 85) para 9. See also Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para 1)' (CtteeRC 2013) General Comment UN Doc. CRC /C/GC/14.

603 Jyothi Kanics, 'Preventing Statelessness: Ensuring Migrant and Refugee Children's Right to Acquire a Nationality' [2019] Schweizerische Zeitschrift für Asylrecht und -Praxis ASYL 10, 15.

604 See eg Committee on the Elimination of All Forms of Discrimination against Women, 'CO Italy 2017' (n 562) para 34.

605 See also van Waas, *Nationality Matters* (n 171) 114.

606 Similarly also Article 17 ILC Draft Articles on Nationality (n 257).

certification, as well as determinations of statelessness.[607] The right to review under Article 12 ECN is, however, limited to administrative or judicial review in conformity with internal law.

The right to administrative or judicial review in nationality matters is also confirmed by case law.[608] In the case of *Borzov v Estonia*, for example, the Human Rights Committee stressed the importance of the genuine substantive review of nationality decisions through domestic courts in the context of naturalization.[609] Similarly, in *Denny Zhao v The Netherlands* it noted that the right to acquire a nationality under Article 24(3) ICCPR includes the right to an effective remedy.[610] The ECtHR seems, however, to have taken a different position in the case of *Petropavlovskis v Latvia*.[611] That case concerns the refusal by Latvia to naturalize a prominent political representative of the Russian minority in the country, and the subsequent lack of judicial review for such a 'political decision'. The Court found that the requirement of allegiance in Latvian nationality does not interfere with the right to freedom of expression or assembly, as there is no right to acquire a specific nationality or even a general right to a nationality under the Convention, and states are free to lay down the criteria for acquiring nationality.[612] Accordingly, the applicant had no arguable complaint that would require the provision of a domestic remedy under Article 13 ECHR.[613] In other words, the Court found that, since there is no right to nationality under the ECHR, states are free to qualify naturalizations

607 See with regard to legal review of naturalization procedures the Concluding Observations of the CtteeERD on Switzerland pointing out that 'the right to appeal against decisions [...] in matters relating to naturalization have to be made an integral part of the policy on naturalization', Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Second and Third Periodic Reports of Switzerland' (CtteeERD 2002) UN Doc. CERD/C/60/CO/14 para 10. Such appeals procedure must be independent and uniform, Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Switzerland' (CtteeERD 2014) UN Doc. CERD/C/CHE/CO/7-9 para 13. See with regard to the possibility of review in procedures concerning the acquisition of nationality at birth Human Rights Committee, 'CO Kuwait 2011' (n 581) para 12.

608 See among many *Sipin v Estonia, Communication No 1432/2005* [2008] HRCttee UN Doc. CCPR/C/93/D/1423/2005 para 7.4; *Q v Denmark* (n 585) para 9; *Tsarjov v Estonia, Communication No 1223/2003* [2007] HRCttee UN Doc. CCPR/C/91/D/1223/2003 para 7.5; *Borzov v Estonia* (n 159) para 7.4; *Benon Pjetri v Switzerland* (n 122) para 7.7; *Anudo v Tanzania* (n 598) 116.

609 *Borzov v Estonia* (n 159) para 7.4.

610 *Denny Zhao v The Netherlands* (n 201) para 8.5.

611 *Petropavlovskis v Latvia* (n 284).

612 *ibid 85.*

613 *ibid 92.* Similarly also *Borisov v Lithuania* [2011] ECtHR Application No. 9958/04 para 116.

as political decisions, which are not subject to judicial or administrative review. This ruling is not convincing. It is not necessary that the Convention be violated for Article 13 to be applicable. Article 13 merely requires that an individual alleging a violation of the ECHR does have a remedy to have this claim decided and, if appropriate, to obtain redress.[614] As the Court repeatedly held that the (arbitrary) denial of nationality can give rise to a violation of the Convention, naturalization decisions, cannot be declared to be 'political' and excluded from judicial review entirely.

In order to be effective, a remedy must allow for judicial or administrative review of the impugned decision by an independent authority that the competence to review and possibly overturn the decision and order reparation. An effective remedy does not, however, necessarily imply review by a court. A judicial review can also be done by an administrative body. The review should cover not only procedural aspects but also substantive issues.[615] In short, the review should be meaningful[616] — or as the HRCttee held in *Borzov v Estonia*, it should be a "genuine substantive review".[617] In the case of *Benon Pjetri v Switzerland*, the Committee on the Elimination of All Forms of Racial Discrimination found that the applicant's claims were thoroughly reviewed by three tribunals, including two courts.[618] On these grounds, the CtteeERD rejected the applicant's complaint that the right to protection and judicial remedy against racial discrimination, as guaranteed by Article 6 CERD, was violated.[619] He had, the Committee stated, sufficient opportunity to have his case thoroughly examined by national courts. Effectiveness of the review also implies that the review takes places without undue delay and that the appeal has suspensive effect.[620] Moreover, the effectiveness of administrative or judicial review should not be hindered by excessive fees (Article 13(2) ECN).[621]

The obligation to provide for an effective judicial or administrative review of nationality decisions calls into question the widespread practice of fully discretionary nationality decisions, in particular decisions concerning the

614 *Klass and others v Germany* [1978] ECtHR Application No. 5029/71 para 64.

615 Human Rights Council, 'Report 25/28' (n 93) para 31. See also UNHCR, 'Handbook Statelessness' (n 569) 77.

616 International Law Commission, 'Commentary Draft Articles on Nationality' (n 41) 38.

617 *Borzov v Estonia* (n 159) para 7.4.

618 *Benon Pjetri v Switzerland* (n 122) para 7.3.

619 *ibid 7.7*.

620 Human Rights Council, 'Resolution 20/4' (n 22) para 9; Human Rights Council, 'Report 25/28' (n 93) para 33.

621 Council of Europe, 'Explanatory Report ECN' (n 186) para 92.

acquisition of citizenship by naturalization.[622] Naturalizations are not political acts of grace but subject to a procedure that must comply with elementary due process requirements.[623] Considering the potentially far reaching consequences of decisions concerning nationality, and the broad prohibition of arbitrariness, procedural safeguards are, moreover, particularly important in the context of deprivation of nationality. Deprivation measures must, therefore, be open to independent judicial or at least administrative review.[624] The suspensive effect of a remedy is crucial where deprivation of nationality is ordered in connection with a deportation measure.[625] Moreover, in order to be effective, the remedy must allow for effective reparation, including the restoration of nationality in cases where the deprivation is found to be unlawful.[626]

IV Lawful Interference with the Right to Nationality?

Most human rights are not absolute.[627] There may be competing rights or countervailing public interests that clash with certain human rights in a particular situation.[628] Consequently, human rights may, under certain circumstances, lawfully be restricted to protect an overweighing public interest.[629] As the UN Human Rights Convention noted regarding the rights protected in the ICCPR:

> [W]here such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of

622 Despite the contradictory ruling in *Petropavlovskis v Latvia* (n 284).

623 *Benon Pjetri v Switzerland* (n 122) para 7.3.

624 See eg clearly *Alpeyeva and Dzhalagoniya v Russia* (n 328) para 109; *Ramadan v Malta* (n 153) para 86 ff; *K2 v UK* (n 126) para 50. See also Human Rights Committee, 'Concluding Observations on the Fifth Periodic Report of Jordan' (HRCttee 2017) UN Doc. CCPR/C/JOR/CO/5 para 25.

625 Human Rights Council, 'Report 25/28' (n 93) para 33.

626 Human Rights Council, 'Resolution 10/13' (n 180) para 9; Human Rights Council, 'Resolution 32/5' (n 111) para 15. See also Human Rights Council, 'Report 10/34' (n 124) para 59.

627 Kälin and Künzli, *Human Rights Protection* (n 3) 90. Absolute guaranties are rights such as the prohibition of genocide, the prohibition of torture, the prohibition of slavery and the principle of *nulla poena sine lege*.

628 Peters, 'Extraterritorial Naturalizations' (n 63) 663.

629 Lawful limitations of human rights have to be distinguished from the question of lawfulness of derogation from particular guarantees in times of emergency, see above chapter 5, II.4.

> Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.[630]

In principle, a restriction is only legitimate if it is necessary and proportionate to the legitimate aim pursued. Many civil rights include a limitation clause specifying that limitations must be based in law, serve a specific legitimate aim and be necessary.[631] Other rights prohibit arbitrary interferences. In these cases, limitations are lawful so long as they are not arbitrary, while arbitrary interferences are absolutely prohibited.[632] In practice, the prohibition of arbitrary interferences comes close to a limitation clause as interferences that are not based on a legitimate aim or are disproportionate are equally arbitrary.[633]

These considerations also apply to the right to nationality. The right to nationality is not absolute but may be restricted under certain circumstances.[634] In case of the right to nationality, there is no general limitation clause. However, as we have seen, different standards prohibit arbitrary interferences with the right to nationality.[635] Thus, the prohibition of arbitrariness provides the scope for limitations of the right to nationality.[636] Most international legal standards codifying the right to nationality would prohibit arbitrary interferences. As seen above, the standard of non-arbitrariness requires that interferences with the right to nationality comply with both procedural and substantive requirements, and contain no elements of inappropriateness, injustice, illegitimacy or a lack of predictability.[637]

As the 2009 Report on Arbitrary Deprivation of Nationality of the UN Secretary General notes:

> [...] in order not to be arbitrary, deprivation of nationality must be in conformity with domestic law and in addition comply with specific

630 Human Rights Committee, 'General Comment No. 31' (n 39) para 6.

631 For example, Articles 12(3), 18(3), 19(3), 22(2) ICCPR; Articles 10(2), 13(2), 14(3), 15(2) CRC; Articles 9(2), 10(2), 11(2) ECHR; Articles 12(3), 13(2), 15, 16 (2), 22(2) ACHR. See also Kälin and Künzli, *Human Rights Protection* (n 3) 91 ff.

632 See with regard to discriminatory deprivation of nationality on the basis of disability Rothfritz (n 345) 461.

633 Kälin and Künzli, *Human Rights Protection* (n 3) 95.

634 See Forlati (n 99) 27; Mantu (n 456) 33; Peters, 'Extraterritorial Naturalizations' (n 63) 668. With regard to Article 18 CRPD Rothfritz (n 345) 460 ff.

635 See above chapter 5, III.2.2.

636 See also *Genovese v Malta* (n 114) para 30; *Riener v Bulgaria* (n 155) para 154; *Yean and Bosico* (n 71) para 172 ff; *Modise v Botswana* (n 154). See further Human Rights Council, 'Report 10/34' (n 124) para 61; Bialosky (n 158) 189.

637 Human Rights Council, 'Report 13/34' (n 2) para 25.

> procedural and substantive standards, in particular the principle of proportionality. Measures leading to deprivation of nationality must serve a legitimate purpose that is consistent with international law and in particular the objectives of international human rights law. Such measures must be the least intrusive instrument amongst those which might achieve the desired result and they must be proportional to the interest to be protected.[638]

Following this, in essence, in order not to be considered an arbitrary interference, any limitation upon the right to nationality must be provided for in law (IV.1), serve a legitimate purpose consistent with international law (IV.2) and be proportionate to the individual case (IV.3).[639]

1 *Legality of Interference*

In order to comply with the requirement of *legality*, interferences with the right to nationality should be provided for in law.[640] Domestic nationality laws should specify the conditions for acquiring nationality *ex lege* and by decision, for changing it and for renunciation. Moreover, domestic law must specify the criteria, conditions and procedure under which a person may be deprived of her citizenship, but also the conditions under which access to nationality must be granted or refused. In order not to be arbitrary, the legal basis must be accessible and sufficiently clear.[641]

2 *Legitimacy of Interference*

In order not to be considered arbitrary, a restriction of the right to nationality, moreover, must be legitimate, ie pursue a legitimate public interest compatible with international law.[642] In the context of both the acquisition and deprivation of nationality, for example, the legitimate interest of protecting national security is often invoked.[643] The Human Rights Committee has repeatedly accepted national security as a legitimate aim in the exercise of a state's

638 Human Rights Council, 'Report 10/34' (n 124) para 49. See also Human Rights Council, 'Resolution 32/5' (n 111) para 16.

639 See with regard to loss of nationality *Anudo v Tanzania* (n 598) para 79. See also Mantu, 'Terrorist Citizens' (n 73) 30; van Waas and Jaghai (n 126) 424.

640 See also *Ramadan v Malta* (n 153) para 86; *K2 v UK* (n 126) para 52; *Said Abdul Salam Mubarak v Denmark* (n 453) para 64.

641 *Anudo v Tanzania* (n 598) para 79.

642 See also *ibid.*

643 PACE, 'Withdrawing Nationality' (n 73) para 3.

sovereignty in the granting of nationality.[644] The ECtHR equally recognizes the protection of national security as a legitimate public aim to deprive someone of their nationality.[645] In the case of *Tjebbes*, the CJEU recognized that the protection of a genuine link between a citizen and the state can be a legitimate aim, justifying loss of nationality in case of permanent residence abroad.[646] Similarly, naturalization requirements relating to loyalty towards the state might be legitimate in their protection of the function of nationality as a legal bond, as the ECtHR noted in the case of *Petropavlovskis v Latvia*.[647] Equally, requirements aimed at protecting the ideas and values of a democratic society are legitimate limitations upon the right to nationality.[648] The protection of the rights of a third party can be a legitimate interest, as can a protection of the rights associated with the person concerned themselves. For example, it can be legitimate to make the renunciation of nationality conditional upon the acquisition of another nationality in order to prevent the person concerned from becoming stateless.[649] A further legitimate interest is the prevention of abuse of rights.[650] In that context, it is recognized that nationality may be withdrawn (or nullified) if it was acquired fraudulently, even if that would render the person concerned stateless.[651] Peters lists other grounds, such as the preservation of statehood, the protection of territorial sovereignty and considerations of inter-state-relationships as legitimate interests of the states in the context of nationality.[652]

Overall, the range of legitimate public interests is generally broad.[653] However, restrictions of the right to nationality are not always suitable to achieve the legitimate interest, nor are they necessarily the least intrusive

644 *Borzov v Estonia* (n 159) para 7.3; *Tsarjov v Estonia* (n 608) para 7.3; *Sipin v Estonia* (n 608) para 7.2.

645 See K2 v UK (n 126); *Said Abdul Salam Mubarak v Denmark* (n 453); *Ghoumid and others v France* (n 514); *Johansen v Denmark* (n 514).

646 *Tjebbes* (n 166) para 33.

647 *Petropavlovskis v Latvia* (n 284) para 84 f.

648 *ibid 72.*

649 Forlati (n 99) 27. See however on the discussion of voluntary statelessness Swider, 'Rights-Based Approach to Statelessness' (n 308).

650 Hailbronner, 'Nationality in Public International Law' (n 304) 46 ff; Peters, 'Extraterritorial Naturalizations' (n 63) 675 ff; Andrew Walmsley, 'Misuse of Nationality Laws' in Council of Europe (ed), *Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality* (Council of Europe 1999).

651 See eg Article 8(2)(b) 1961 Convention; Article 7(3) ECN. See also *Ramadan v Malta* (n 153) 89.

652 Peters, 'Extraterritorial Naturalizations' (n 63) 669 ff.

653 Kälin and Künzli, *Human Rights Protection* (n 3) 92.

means of doing so.[654] In the case of *Borzov v Estonia* the UN Human Rights Committee hinted at that considerations related to national security may not always serve as a legitimate aim to restrict access to citizenship.[655] Very often, less intrusive means, such as travel bans, surveillance or even a temporary confiscation of a passport, may be better apt to pursue national security interests than the deprivation of nationality.[656] Sometimes, deprivation of nationality may even shift a possible risk to national security to other states and hamper the effective monitoring and prosecution of possibly dangerous individuals.[657]

3 *Balancing of Interests*

Thirdly, in order not to be arbitrary, a restriction of the right to nationality must strike a fair balance between the legitimate aim pursued by the state and the consequences for the individual concerned. Effectively, a restriction of the right to nationality must, therefore, also be proportionate to the interest protected.[658]

In practice, it is this criterion of proportionality that often seems most problematic. An interference with the right to nationality has far reaching consequences for the individual concerned, particularly when considering the deprivation of nationality. Any interference with the right to nationality is absolute in the sense that nationality cannot be deprived or granted only a little. It is either granted or not, it is either taken away or retained. At worst, a restriction of the right to nationality can mean that the person concerned is left stateless and in a state of extreme vulnerability.[659] Therefore, the UN Secretary General argues that "the consequences of any withdrawal of nationality must

654 See eg UN Special Rapporteur on Racism (n 125) para 57. See critically with regard to the effectiveness of citizenship stripping as a measure to protect national security also van Waas and Jaghai (n 126).

655 *Borzov v Estonia* (n 159) para 7.3. In the case of Estonia as a newly independent state, however, it accepted national security arguments.

656 See also PACE, 'Withdrawing Nationality' (n 73) para 50.

657 *ibid 49.*

658 *Anudo v Tanzania* (n 598) para 79; *JY v Wiener Landesregierung* (n 166) para 73. See above chapter 5, III.2.2.

659 *Hoti v Croatia* (n 78); Human Rights Council, 'Report 25/28' (n 93) para 4. See also European Court of Human Rights, 'Dissenting Opinion Ramadan v Malta' (n 101) para 20, criticizing the failure of the Court to take the consequences of the revocation measure into consideration. See further Marie-Bénédicte Dembour, 'Ramadan v Malta: When Will the Strasbourg Court Understand That Nationality Is a Core Human Rights Issue?' (*Strasbourg Observers*, 22 July 2016) <http://blogs.brighton.ac.uk/humanrights/2016/07/22/ramadan-v-malta-when-will-the-strasbourg-court-understand-that-nationality-is-a-core-human-rights-issue/>.

be carefully weighed against the gravity of the behaviour or offence for which the withdrawal of nationality is prescribed".[660] But even if a measure does not entail the risk of statelessness, it can have severe implications, for example on the right to family life if individuals are not allowed to change their nationality, or transmit their nationality to their children.[661] In the case of *Borzov v Estonia,* the Human Rights Committee noted that the denial of Estonian citizenship affected the applicant's enjoyment of certain rights under the Covenant, namely the political rights guaranteed by Article 25 ICCPR.[662] Hence, persons denied acquisition of nationality or deprived of their nationality are deprived not only of their right to nationality, they are additionally deprived of their political rights, residence rights and possibly a whole range of other rights; namely, social welfare rights.[663] The loss (or denial of) political rights, as highlighted in the *Borzov* case, can have significant weight, given the importance of political participation in democratic states. Overall, the far-reaching implications for the acquisition or loss of nationality should be taken into consideration and the threshold for an interference with the right to nationality to be proportionate should be high, particularly in cases where nationality is lost and the person concerned is at risk of statelessness.[664]

In practice, such a strict standard is not always upheld. In the case of *Benon Pjetri v Switzerland*, the CtteeERD applied a much lower threshold. As long as the restriction of the right to nationality was not considered to be manifestly arbitrary or to amount to a denial of justice, the Committee concluded, there was no violation of the Convention.[665] The applicant, an Albanian national with a physical disability who wanted to naturalize in Switzerland, complained that the refusal of naturalization application violated Article 5(d)(iii) CERD, as he was discriminated against on the grounds of national or ethnic origin. The Committee noted that the case was thoroughly reviewed at the national level and found that it is not its "role to review the interpretation of facts and national law made by national authorities, unless the decisions were manifestly

660 Human Rights Council, 'Report 25/28' (n 93) para 4.

661 *ibid 23 ff.*

662 *Borzov v Estonia* (n 159) para 7.4.

663 See also PACE, 'Withdrawing Nationality' (n 73) para 48.

664 Human Rights Council, 'Report 25/28' (n 93) para 4.

665 *Benon Pjetri v Switzerland* (n 122). In its General Recommendation No. XXX the Committee highlights that differential treatment based on citizenship amounts to discrimination if the criteria for such differentiation are not applied pursuant to a legitimate aim and not proportionate to the achievement of this aim, CtteeERD, 'General Recommendation No. XXX' (n 123) para 4.

arbitrary or otherwise amounted to a denial of justice".[666] It rejected the complaint without discussing proportionality considerations.[667] The case shows that, particularly in the context of acquiring nationality, considerations of proportionality are not sufficiently taken into account. The state's interest to control access to citizenship is accepted as a legitimate interest that outweighs the interest of the individual, so long as the refusal of naturalization is not outright arbitrary or discriminatory. Unreasonable or purely symbolic naturalization requirements — one might think of handshake requirements or overly formalistic or harassing questions in civil knowledge tests — are considered lawful and appropriate, even if they are in no way necessary or legitimate to the functions of nationality. Given the weighty interests of individuals in a naturalization procedure, a proportionality assessment would be all the more important. The question of proportionality also reinforces the importance of sufficient procedural safeguards when assessing a possible violation with the right to nationality.[668]

To sum up, the prohibition of arbitrary interferences with the right to nationality according to the relevant international legal standards would require that any limitations of the right are provided for in law, serve a legitimate purpose and are proportionate to the consequences an interference has for the individual concerned. In practice, however, states in nationality matters insist on a broad discretion in nationality matters and rarely apply proportionality considerations in decisions concerning acquisition, change, enjoyment or loss of nationality.

v Enforceability and Implementation of the Right to Nationality

The discussion in this chapter so far has shown that many aspects of the right to nationality are sufficiently precise to give rise to identifiable and predictable rights and obligations, even if states do not always comply with these obligations. Another question is whether the right to nationality is actually enforceable, ie, whether it can effectively be claimed before (state) authorities. The enforceability of a right, however, is not a requirement for the recognition of a legal human right. As Amartya Sen noted, "the current unrealizability of any

666 *ibid 7.5.*

667 *ibid 8.*

668 See for a similar argument with regard to immigration detention Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff 2010) 334.

accepted human right (…) does not, by itself, convert that claim into a non-right".[669] In fact, in practice human rights are rarely fully enforced and protected in practice.[670] Quite to the contrary — it is in herent to law and to legal norms that they are disregarded, breached and not enforced in practice.

Looking at the right to nationality one notes that the right is enshrined in international instruments that are accompanied by an enforcement machinery. Article 20 ACHR can be invoked directly before the IACtHR against a member states of the Convention. In Europe, individuals can rely on the right to private life to bring human rights violations relating to nationality before the ECtHR, and in Africa the ACmHPR and the ACtHPR assess complaints relating indirectly to the right to nationality. The UN instruments know the individual complaint mechanisms and remind states of their duty to respect, protect and fulfill the right to nationality through the reporting mechanisms. Thus, there is a number of enforcement mechanisms for the right to nationality at the international level. However, for individuals to actually enjoy the right in practice, effective implementation and enforcement in particular at the domestic level is indispensable.[671] Ultimately, states are primarily to be held accountable for their nationality regimes at the domestic level. It is precisely this full and effective implementation and enforcement of the right to nationality at the domestic level which remains fragile. Four main challenges can be identified: the lack of political recognition of international standards at the domestic level; the low numbers of ratification of international instruments guaranteeing the right to nationality; the lack of an international body mandated to protect the right to nationality; and the problem of indeterminacy, ie the vague formulation of international standards making it difficult to identify the duty bearing state.

Nationality law is essentially governed by *domestic law* in the sense that states can decide who their nationals are.[672] States determine the grounds for acquisition and loss of nationality in their domestic law. As the ACtHPR noted in the case of *Anudo v Tanzania*, "the conferring of nationality to any person is the sovereign act of States".[673] While — as argued before — this cannot be interpreted as meaning that nationality matters are a *domaine réservé* outside the realm and influence of international (human rights) law, it means

669 Amartya Sen, 'Elements of A Theory of Human Rights' (2004) 32 Philosophy & Public Affairs 315, 329.

670 Besson (n 76) 335.

671 See also Cornelisse (n 668) 105.

672 Article 1 1930 Convention; Article 3(1) ECN; *Nottebohm* (*Liechtenstein v Guatemala*) [1955] ICJ Reports 1955 20. See chapter 3, II.

673 *Anudo v Tanzania* (n 598) para 74. See also Weissbrodt (n 18) 108.

that each states establishes its own conditions for the acquisition and loss of its respective nationality.[674] Admittedly it is legitimate from an international human rights perspective that states set different requirements for acquiring nationality through naturalization, grant facilitated naturalization to certain groups and not to others or foresee the loss of nationality upon certain conditions. However, a balance has to be found between the relevant international standards governing the right to nationality described in the foregoing that have to be observed, and the limits within which each state can determine the conditions and procedures governing acquisition and loss of nationality.[675] Domestic law has to be interpreted and applied in conformity with international law.

This is not unusual *per se*. In fact, all human rights obligations have to be implemented *vis-à-vis* individuals in a particular state and most areas of law impacted by international human rights law are essentially governed by domestic law.[676] Family and marriage are determined by national civil law, rights of migrants are determined by national foreigners and asylum legislation, data protection is governed by national privacy regulations and so on. International human rights law sets the boundaries for the domestic regulatory framework and its implementation in practice. However, while these limits imposed by international human rights law are more or less recognized in other areas, it is widely questioned in the realm of nationality law. Here, states still try to dismiss any obligation derived from international law in nationality matters by referring to their sovereignty. As a consequence, the rights and obligations that can be derived from the relevant international standards on the right to nationality, and which are broader and more specific than often assumed, are not adequately reflected in domestic law and practice. Ultimately, states are not willing to accept limitations upon their discretion in nationality matters and disregard the obligations they have already undertaken. As Vlieks et al note:

> Authorities are necessarily involved in recognition, authorisation and revocation of citizenship. However, it makes a difference whether this role is viewed as an expression of the State's sovereignty over the people

674 European Court of Human Rights, 'Dissenting Opinion Ramadan v Malta' (n 101) para 25.

675 See also Carol A Batchelor, 'Developments in International Law: The Avoidance of Statelessness Through Positive Application of the Right to a Nationality' in Council of Europe (ed), *Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality* (Council of Europe 1999) 49.

676 See also Kälin and Künzli, *Menschenrechtsschutz* (n 17) 215 f.

> within its jurisdiction, or rather as a duty to administer an entitlement of the individuals concerned, ie a human right.[677]

Related to that is the problem of *low numbers of ratifications* — or the use of far-reaching reservations to specific provisions.[678] These low ratification numbers mirror the conviction of states that nationality matters are an essential element of their sovereign sphere and the corresponding reluctance to accept any limitation to that sphere. At the same time, it reinforces this exact conviction. This was apparent in the negotiations on Article 15 UDHR.[679] While the state representatives agreed that statelessness is an anomaly, the fear to forego any privileges in nationality matters prevented more effective rules.[680] Thus, the reluctance of states to accept international obligations in the area of nationality is both cause and result of the persistent appeal of the theory of nationality as a *domaine réservé*.

Third, despite different international tribunals and treaty bodies applying the right to nationality, there is *no specific international body* mandated with monitoring the implementation of the right to nationality at the domestic level.[681] While Article 11 1961 Convention foresaw the establishment of a body within the framework of the UN to which stateless persons may apply for assistance and protection, this provision, ultimately, was not directly implemented. The aim of creating a tribunal that is competent to decide upon claims of individuals who argue they have been denied nationality was abandoned.[682] A dispute between state parties on the interpretation of the 1954 or the 1961 Convention was never brought before the International Court of Justice, even though Article 34 1954 Convention and Article 14 1961 Convention would have provided that opportunity.[683] Later, it was decided that the UNHCR should

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677 Caia Vlieks, Ernst Hirsch Ballin and Maria Jose Recalde-Vela, 'Solving Statelessness: Interpreting the Right to Nationality' (2017) 35 Netherlands Quarterly of Human Rights 158, 163.

678 See with regard to statelessness Anna Dolidze, 'Lampedusa and Beyond: Recognition, Implementation, and Justiciability of Stateless Persons' Rights under International Law' (2011) 6 Interdisciplinary Journal of Human Rights Law 123, 130.

679 See chapter 4, I.1.

680 See UN Commission on Human Rights, Drafting Committee, 'Summary Record 123rd Meeting' (n 26).

681 See also Laura van Waas, 'Nationality and Rights' in Brad K Blitz and Maureen Lynch (eds), *Statelessness and the Benefits of Citizenship: A Comparative Study* (Geneva Academy of International Humanitarian Law 2009) 30.

682 Paul Weis, 'The United Nations Convention on the Reduction of Statelessness, 1961' (1962) 11 The International and Comparative Law Quarterly 1073, 1085.

683 van Waas, *Nationality Matters* (n 171) 46.

function as the body referred to in Article 11 1961 Convention to protect stateless persons.[684] However, the UNHCR's mandate is primarily aimed at identifying and protecting stateless persons and preventing and reducing instances of statelessness.[685] The mandate does not encompass the right to nationality in a broader sense beyond the core aspect of statelessness. Moreover, the UNHCR does not have the competence to act as a judicial organ.[686] Other UN bodies regularly address nationality matters, as we have seen, not all of them have effective means to ensure the implementation of the right to nationality in the domestic sphere either. As van Waas rightly points out, no "human rights instrument or body tackled the question of how to actually implement the right to a nationality in practice".[687] The same can be said for the regional level, where there are no organizations specifically mandated with monitoring the implementation of the right to nationality. Only the IACtHR has contributed significantly to the interpretation and protection of the right to nationality in the Americas, with its case law on Article 20 ACHR.[688] The ECtHR, in contrast, can only indirectly review cases concerning nationality through the social identity approach based on Article 8 ECHR; the right to nationality was neither included in the ECHR nor its protocol and the Court was not given the jurisdiction to monitor the implementation of the ECN.[689] As discussed, the ECtHR has so far been reluctant to fully protect the right to nationality against state interference.[690] Of interest in this context is the suggested Article 22 of

684 UN General Assembly, 'Resolution 3274 (XXIV)' (UN General Assembly 1974).

685 Executive Committee of the High Commissioner's Programme, 'Prevention and Reduction of Statelessness and the Protection of Stateless Persons No. 78 (XLVI) — 1995' (UNHCR ExCom 1995) UN Doc. A/AC.96/860 <https://www.unhcr.org/excom/exconc/3ae68c443f/prevention-reduction-statelessness-protection-stateless-persons.html>; UN General Assembly, 'Resolution 50/152' (n 181) paras 14 and 15.

686 van Waas, *Nationality Matters* (n 171) 209.

687 *ibid 206.*

688 *ibid 209.* See generally on the role of the IACtHR for migrant rights in the South American context Acosta (n 385).

689 Michael Autem, 'The European Convention on Nationality: Is a European Code of Nationality Possible?' in Council of Europe (ed), *Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality* (Council of Europe 1999) 33. See also Eva Ersbøll, 'The Right to a Nationality and the European Convention on Human Rights' in Stéphanie Lagoutte, Hans-Otto Sano and Scharff Smith (eds), *Human Rights in Turmoil: Facing Threats, Consolidating Achievements* (Martinus Nijhoff 2007). See for a comparison of the approach of the IACtHR and the ECtHR to nationality as a core human rights issue Dembour, *When Humans Become Migrants* (n 559) 130 ff.

690 See chapter 4, II.2.2.1.2. See also Dembour, 'Ramadan v Malta' (n 659); European Court of Human Rights, 'Dissenting Opinion Ramadan v Malta' (n 101).

the African Union Draft Protocol on Nationality that not only obliges states to regularly report on the measures taken to ensure respect for the right to a nationality, but wants to grant the African Commission and the African Court the competence to hear communications relating to the interpretation of the Protocol. If this provision should be adopted, it will increase the pressure on states to provide for the effective implementation of the right to nationality at the domestic level. Nevertheless, there are relatively few effective international enforcement mechanisms or procedures that would allow individuals to claim the right to nationality at an international level and that would have an effect even at the domestic level.[691] This *lacunae* diminishes the possible impact of the right to nationality. As already Weis noted,

> the question of the solution of conflicts of nationality and, in general, of the future development of international law relating to nationality is, however, in fact, closely linked to the question of the establishment of international judicial control of individual claims relating to nationality.[692]

In the absence of such an international judicial mechanism, the implementation and effective enforcement of the right to nationality at the national level is all the more important.[693] States, however, remain reluctant to transpose their international obligations under the right to nationality at the domestic level.[694] States like Moldova, that guarantee a right to a nationality at the level of the domestic legislation, are still the exception.[695]

A fourth difficulty remains in the *justiciability* of rights relating to nationality and the question of indeterminacy. The widespread perception of nationality as a sovereign privilege reinforced an understanding that nationality is an act of political grace and discretion that is not justiciable. It is argued that the duty bearer of the right to nationality cannot be identified and that this lack of an addressee explains why the right is not enforced.[696] This argument is not convincing. The wording of the different provisions guaranteeing the right to

691 van Waas, *Nationality Matters* (n 171) 207.

692 Weis, *Nationality in International Law* (n 276) 254.

693 See also Bianchini (n 249) 107.

694 See also Decaux (n 86) 250; Goonesekere (n 90) 251.

695 Law on the Citizenship of the Republic of Moldova, No. 1024-XIV, 2 June 2000 which declares in Article 7 that "everyone's right to a citizenship" is one of the principles on which the law is based.

696 Decaux (n 86) 250; Hailbronner, 'Nationality in Public International Law' (n 304) 37.

nationality — take for example Article 15(1) UDHR — is not that different from other civil rights that also guarantee a right to 'everyone', without specifying which state would be obliged to guarantee that right. Take for example, freedom of thought or the right to property. It is hardly argued that the right to freedom of thought or the right to property cannot be guaranteed in practice because the duty bearer cannot be identified.[697] Admittedly, the character of the right to nationality as a right to access to a specific nationality is different from the right to freedom of thought or the right to property in so far as the latter rights primarily entail a negative duty to respect and not interfere, whereas the right to a nationality regularly requires a positive action by the state — namely, the granting of nationality under certain circumstances. As Aaron X. Fellmeth argued:

> Because only the state itself can grant nationality, positing a human right to a nationality necessarily implies that every person's right to a nationality has to be granted by some state or other. Thus, the first paragraph [of Article 15] establishes a duty to fulfill the individual's interest in a nationality, which can be accomplished only by states providing procedures for the grant of nationality and ensuring that persons under their jurisdiction are not deprived of a nationality.[698]

As the previous discussion has shown, however, the duty bearing state can very often be identified — be that because a specific state denies the right to nationality by arbitrarily refusing naturalization, by arbitrarily depriving a person of their citizenship or by denying the right to change one's nationality. In fact, the problem of indeterminacy should only be an issue where a general right to the nationality of a specific state to which no particular genuine link exists is concerned. Hence, this argument of indeterminacy alone cannot explain why states refuse to enforce the right to nationality. Even in the context of deprivation of nationality, where the duty bearer can easily be identified, where this duty bearer has a negative duty to respect the right and where it is better accepted that the individual concerned should have a fair trial and the possibility of judicial review, procedural rights are weakened for the protection of national security or with the argument that the consequences the person concerned complains of "are to a large extent a result of his own choices and actions".[699] With the argument of indeterminacy, judicial

697 Yaffa Zilbershats, *The Human Right to Citizenship* (Transnational Publishers 2002) 15.

698 Fellmeth (n 77) 250.

699 *Ramadan v Malta* (n 153) para 89; *Said Abdul Salam Mubarak v Denmark* (n 453) para 67; *Ghoumid and others v France* (n 514) para 50; *Johansen v Denmark* (n 514) 54.

protection that could make an important contribution to the recognition of rights for individuals in nationality matters is, therefore, compromised from the outset.[700] In particular, naturalization procedures are still not always open to judicial or administrative review. Where domestic authorities and courts acknowledge certain individual rights in nationality matters, it is often done with reference to constitutional or fundamental rights at the national level and not to international law.[701] An example here is the case of *Unity Dow v Attorney General*, which concerns a discriminatory provision in the citizenship legislation of Botswana that did not grant women the same right to transmit their nationality to their children as men.[702] The Court of Appeal of Botswana ruled the provision to be in violation of the freedom of movement and not to be expelled, as well as the prohibition of discrimination as granted by the Botswanan Constitution — it did not, however, refer to the relevant standards of international law. Such an approach, ultimately, makes the protection of the right to nationality dependent on the specific constitutional framework of each state and shuts out international standards. While the effective implementation and enforcement of a right is not a precondition for the existence of a right, the difficulties described just now obviously and significantly weaken the right to nationality.[703] Individuals cannot effectively enjoy the right to nationality while domestic authorities and courts do not recognize the right to nationality as a human right.

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700 See eg for the important role of the Swiss Federal Court for the protection of the rights of migrants in nationality matters Barbara von Rütte and Stefan Schlegel, 'Auf dem falschen Fuss entlastet. Die Auswirkungen der geplanten BGG-Revision auf das Migrationsrecht' [2016] Jusletter vom 14. März 2016 <http://Jusletter.ch>. See also Dembour, *When Humans Become Migrants* (n 559) 506; Mantu, 'Terrorist Citizens' (n 73) 39.

701 See eg in the Swiss context the judgments of the Swiss Federal Court in *BGE 129 I 217* (n 100); *BGE 134 I 49*; *BGE 138 I 305*; *BGE 139 I 169* (n 104). In the Decision No. G 66/12-7, G 67/12-7 of 29 November 2012 the Austrian Constitutional Court did refer to the ECtHR case of *Genovese v Malta* and Article 14 in conjunction with Article 8 ECHR to find the Austrian rule on birthright acquisition of nationality for children born out of wedlock to Austrian fathers unconstitutional. By contrast, in Case 1242/2007 of 4 November 2007 the Greek State Council made reference to a range of international instruments and jurisprudence but found that these standards were not binding and thus argued that the rejection of a naturalization request does not need to be justified (summary based on Global Citizenship Observatory (GLOBALCIT), 'Citizenship Case Law Database' (GLOBALCIT 2018) <http://globalcit.eu/citizenship-case-law/>.).

702 *Unity Dow* (n 116). See also Manby, *Citizenship and Statelessness in Africa* (n 113) 102 f.

703 See the criteria set out in UN General Assembly, 'Resolution 41/120: Setting International Standards in the Field of Human Rights' (UN General Assembly 1987) para 4 <http://digitallibrary.un.org/record/126473>.

VI Conclusion: Identifiable and Predictable Rights and Obligations

The analysis of the rights and obligations that can be derived from the right to nationality shows that the still-often held conviction that the right to nationality lacks concrete obligations and cannot be translated into a specific, enforceable, and effective individual right, does not hold up.[704]

As the following table tries to depict in a schematized manner, the right to nationality is, in many respects, sufficiently precise to give rise to identifiable rights and obligations:

TABLE 4 Structure of the right to nationality

Obligation	Duty		Right to nationality
negative	to respect		Right to change one's nationality Right to renounce one's nationality Prohibition of forced naturalization Prohibition of mass naturalization Prohibition of arbitrary deprivation Prohibition of mass deprivation Prohibition of discrimination in nationality matters Prevention of statelessness
positive	to protect	preventive remedial	Protection against interferences Restoration of nationality Acquisition at birth if otherwise stateless
	to fulfil	legislative, institutional and procedural facilities	Acquisition in case of state succession Possibility of naturalization Facilitated naturalization for stateless persons and refugees Reduction of statelessness Procedural guarantees
		benefits in the narrow sense	Registration and documentation

704 See among many Decaux (n 86) 242; Goldston (n 112) 339; de Groot, 'Children's Right to Nationality' (n 188) 145; Peters, 'Extraterritorial Naturalizations' (n 63) 661.

Admittedly, not all these rights have an equally strong basis in different legal sources. The right to nationality for children who would otherwise be stateless, the prohibition of forced naturalization, the prohibition of arbitrary deprivation of nationality, the transversal obligations to respect the principle of non-discrimination, the prohibition of arbitrariness and the duty to prevent and reduce statelessness have a solid basis in international law and might even be recognized as customary international law. Other obligations are more controversial and have been developed primarily based on jurisprudence or soft law instruments. Namely, this includes the right to a naturalization procedure, the acceptance of dual or multiple nationality and procedural standards.

Nevertheless, the table shows that the right to nationality gives rise to identifiable and predictable rights and obligations. In that sense, the right to nationality is practicable, as states can be realistically expected to comply with their duties under the right to nationality and, to a large extent, already do. To come back to the criteria set out in Resolution 41/120 of the UN General Assembly, the previous chapters have shown that the right to nationality has the characteristics of a human right.[705] It is not only sufficiently precise to give rise to identifiable and predictable rights and obligations. As demonstrated in chapters 3 and 4, it is also consistent with the body of international human rights law, provides an implementation machinery, attracts international support and is of fundamental character.

The main protection gap, however, remains the right to a nationality, in the sense of a right to acquire a particular nationality or a right to the nationality of the place where one is living. As Goldstone writes, "the general right to a nationality has not yet been translated into a specific, actionable duty on the part of any particular state".[706] Why is that? It is often argued that the main reason is the problem of indeterminacy. The fact that the state bearing the duty to fulfil the positive right to a nationality cannot be identified. It is true that the duty bearing state can be determined more easily where it owes negative obligations to refrain from a certain interference with the right of a particular person.[707] Where positive obligations are concerned it is less straightforward. It can be difficult to identify which state would have had an obligation to protect or fulfill the right to nationality, especially when it comes to the acquisition of nationality where the individual and the state concerned are not already

705 See chapter 2, III.3.
706 Goldston (n 112) 339.
707 See also Chan (n 74) 11; Decaux (n 86) 250.

linked through the bond of nationality. However, I argue that it would also be possible to identify the duty bearing state in such situations. The following chapter will look at this aspect in more detail and discuss how the right to nationality could be strengthened by identifying the duty bearing state based on the different actual links of a person to a state.

CHAPTER 6

An Individual Right

Realizing the Right to Citizenship

> Whilst Article 8 of the Convention does not guarantee a right to acquire a particular nationality, the fact remains that nationality is an element of a person's social identity.[1]
>
> ECtHR, Mennesson v France, 2014

The previous chapters have described the right to nationality under international human rights law and discussed both the rights it attributes to individuals and the obligations it imposes on states. It has been shown that today, the right to nationality is well-established in international law. Its scope and content can be determined based on several international treaties, from Article 15 UDHR and the subsequent universal human rights treaties to instruments at the regional level. In fact, a surprising number of specific rights and obligations under the right to nationality can be identified. However, there is a mismatch between the increasingly solid protection of the right to nationality in international law and the practice, especially at the national level. The validity of the right to nationality as an individual human right right is regularly questioned. In particular, the right to nationality is interpreted as not protecting a right to the nationality of a specific state. Membership to the state where one has one's center of life is far from being recognized as an individual entitlement that can be invoked by individuals and protected by courts and state officials. It is often argued that this is due to the absence of an addressee. Since it is not clear which state would be under an obligation to protect that right, an individual cannot invoke the right to nationality against a particular state to be granted nationality. This alleged indeterminacy of the right to citizenship leaves noncitizens in a vulnerable situation. It leads to a situation where stateless persons cannot effectively claim a right to acquire a nationality that would offer them

1 *Mennesson v France* [2014] ECtHR Application No. 65192/11 para 97.

protection; where long-term resident non-citizens often remain dependent on discretionary naturalization procedures to acquire the nationality of the state in which they are at home;[2] and where an increasing number of persons are deprived of their nationality without a proper balancing of the interests involved.[3] In practice, despite the formal recognition of the right to nationality as a human right in the international legal sphere, nationality is often still thought to be a stronghold of state sovereignty where international law imposes few limitations upon states' discretion.

How can this tension between the right to nationality in international law and its realization in practice be released? How can the right to citizenship, as currently protected by international law, ensure the effective protection of citizenship as part of a person's social and legal identity in a world marked by global migration? Ultimately, the right to citizenship should establish that states, as Benhabib argued, "may stipulate certain criteria of membership, but they can never be of such a kind that others would be permanently barred from becoming a member of [their] polity".[4] Access to citizenship should not be a matter of discretion but of entitlement.

It is against this background that I would like to suggest a novel interpretation of the right to nationality, to strengthen the enforceability of the right for individuals and secure an actual claim to membership in a specific state. This is not a call for the introduction of a new human right, but a proposal for a more rights-based interpretation of the right to citizenship — as I shall refer to it in the following in order to illustrate its broader, rights-based focus.[5] I argue that the principle of *jus nexi* can serve as the theoretical foundation for such an interpretation. The principle of *jus nexi* proposes to base citizenship acquisition on a genuine connection between the person concerned and the society in question.[6] Linking citizenship to a person's ties to society allows

2 Liav Orgad, 'The Citizen-Makers: Ethical Dilemmas in Immigrant Integration' (2019) 25 European Law Journal 524. See on the practices of citizenship conferral Sara Kalm, 'Affective Naturalization: Practices of Citizenship Conferment' (2019) 44 Alternatives: Global, Local, Political 138.

3 See also Iseult Honohan, 'Just What's Wrong with Losing Citizenship? Examining Revocation of Citizenship from a Non-Domination Perspective' (2020) 24 Citizenship Studies 355; Laura van Waas and Sangita Jaghai, 'All Citizens Are Created Equal, but Some Are More Equal Than Others' (2018) 65 Netherlands International Law Review 419.

4 Seyla Benhabib, *The Rights of Others, Aliens, Residents, and Citizens* (5th printing, Cambridge University Press 2007) 135.

5 See for the terminology used in this book Chapter 2, 1.

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

nationality to be recognized as a mixed question of fact and law.[7] Moreover, as will be shown, it accommodates the fact that citizenship is not necessarily a stable, lifelong status that is passed on from generation to generation without any change of external factors.[8]

In the following, I shall first motivate my claim by discussing four arguments based on the limitations upon the current citizenship system, the exclusionary effect of citizenship laws, the risk of a democratic deficit and the implications of framing citizenship as an individual right. Each of these motivates why I believe the right to citizenship should be strengthened (I.). I then discuss the principle of *jus nexi*, its theoretical foundations and parallels to established concepts in human rights law, the elements it entails and its flexibility to account for individual biographies to illustrate how it could help in mitigating the indeterminacy of the right to citizenship (II.). A third section links the principle of *jus nexi* and the right to citizenship (III.). Section IV. then applies *jus nexi* to the right to citizenship — more precisely, the obligations identified in Chapter 5 — to explore what a *jus nexi* based right to citizenship would actually entail. Ultimately, the aim is to show that a *jus nexi*-based right to citizenship can account for a stronger protection of the right to citizenship than its current interpretation under international law.

I The Need to Strengthen the Right to Citizenship

Citizenship continues to be an important prerequisite for the enjoyment of fundamental rights, despite the universal validity of human rights.[9] Nevertheless, access to citizenship is not always guaranteed. As I will discuss in the following section, the two prevailing modes of birthright-based citizenship acquisition, the principles of *jus soli* and *jus sanguinis*, are not sufficient to safeguard that everyone has a citizenship or, even less so, an effective citizenship in the place where one is at home. Therefore, I argue that the individual rights dimension inherent to citizenship cannot be sufficiently secured by birthright-based modes citizenship acquisition alone — those based on birth in the territory, descent and the additional, largely discretionary, possibility of naturalization (I.1). Secondly, I address the need for the adequate representation and

7 Caia Vlieks, Ernst Hirsch Ballin and Maria Jose Recalde-Vela, 'Solving Statelessness: Interpreting the Right to Nationality' (2017) 35 Netherlands Quarterly of Human Rights 158, 160.

8 Rainer Bauböck and Vesco Paskalev, 'Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation' (2015) 30 Georgetown Immigration Law Journal 47, 60.

9 See Chapter 2.

participation of migrants to improve the legitimacy of decision making in democratic states (1.2). The third argument relates to the exclusionary character of citizenship and suggest that access to citizenship should be opened to secure the inclusion of all persons with genuine connections to the society (1.3). Finally, I argue that the individual rights-character of citizenship implies that the autonomy and individual choices of a person have to be respected and citizenship should be accessible for individuals who consider that state to be their center of life (1.4). All these arguments have been thoroughly discussed in political and democratic theory. It is not my ambition to reiterate this debate in its full complexity. Rather, I refer to the discussion where it is instructive to my argument that the current legal framework for the protection of the right to citizenship should be strengthened.

1 *The Limitations of Birthright-Based Modes of Citizenship Acquisition*

The principles of *jus soli* and *jus sanguinis* continue to shape citizenship laws worldwide. As discussed previously, both birthright principles are criticized for being under- and over-inclusive at the same time.[10] On the one hand, under-inclusive due to the exclusion of second (or more) generation migrants born in a state, forcing them to a status of non-citizen and thereby perpetuating their status as legal outsiders. On the other, over-inclusive by allocating citizenship on the basis of the mere accident of birth, in case of *jus soli* countries, and by allowing non-resident citizens to transmit citizenship over generations irrespective of any continuing actual ties to the state of citizenship, as in *jus sanguinis* countries.[11] Shachar points out that:

> Both criteria for attributing membership at birth are arbitrary: one is based on the accident of birth within particular geographical borders while the other is based on the sheer luck of descent. By focusing selectively on the event of birth as the sole criterion for allocating automatic membership,

10 See Chapter 2, II.3.2.

11 See eg Costica Dumbrava, 'Kick Off Contribution: Bloodlines and Belonging: Time to Abandon Ius Sanguinis?' in Costica Dumbrava and Rainer Bauböck (eds), *Bloodlines and Belonging: Time to Abandon Ius Sanguinis?* (2015) <http://cadmus.eui.eu/bitstream/handle/1814/37578/RSCAS_2015_80.pdf?sequence=1&isAllowed=y>. See also Rainer Bauböck, 'Democratic Inclusion. A Pluralistic Theory of Citizenship' in Rainer Bauböck (ed), *Democratic Inclusion* (Manchester University Press 2018) 68 ff; Iseult Honohan and Nathalie Rougier, 'Global Birthright Citizenship Laws: How Inclusive?' (2018) 65 Netherlands International Law Review 337, 339.

> existing citizenship laws contribute to the conceit that this assignment is no more than an apolitical act of membership demarcation.[12]

Moreover, the two birthright-based modes of citizenship acquisition cannot prevent statelessness. Rather to the contrary — conflicts between *jus soli* and *jus sanguinis* systems are a major cause of statelessness.[13] Statelessness caused by conflicts of *jus soli* and *jus sanguinis* systems primarily affects children who can neither acquire nationality from their parents — who are nationals of a *jus soli* country — nor from the state in which they are born — which attributes nationality *jure sanguinis*. They are left stateless in violation of the right to nationality.[14]

Calls for an abandonment of birthright-based modes of citizenship acquisition, have, nevertheless, been rejected — particularly with regard to *jus sanguinis* systems.[15] Transferring citizenship from parent to child, so the argument goes, is one of the clearest and thus most secure ways of attributing citizenship.[16] Birthright-based modes of citizenship acquisition offer protection against statelessness at birth. Moreover, being based on descent, the principle of *jus sanguinis* secures that children have the same citizenship as their parents and thus contributes to safeguarding the right to family life. In a migration context having the possibility and right to remain as a family in one place can be especially important.[17] Linking citizenship to the place where one was born, by contrast, can reduce membership to a consequence of mere coincidence without any substantive connection between the person concerned and the state in question.[18]

In conclusion, the way the birthright-based modes of citizenship attribution are currently applied by states lead to both under- and over-inclusion, still cause statelessness and fail to provide migrants with a reliable and meaningful

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12 Shachar, *The Birthright Lottery* (n 6) 7.

13 Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008) 49 ff.

14 See also Chapter 5, III.3.1.

15 See for an overview on the debate the contributions to Costica Dumbrava and Rainer Bauböck (eds), *Bloodlines and Belonging: Time to Abandon Ius Sanguinis?* (2015) <http://cadmus.eui.eu/bitstream/handle/1814/37578/RSCAS_2015_80.pdf?sequence=1&isAllowed=y>.

16 Eva Ersbøll, 'Retain Ius Sanguinis, but Don't Take It Literally!' in Costica Dumbrava and Rainer Bauböck (eds), *Bloodlines and Belonging: Time to Abandon Ius Sanguinis?* (2015) 35 <http://cadmus.eui.eu/bitstream/handle/1814/37578/RSCAS_2015_80.pdf?sequence=1&isAllowed=y>.

17 *ibid 38.*

18 See Shachar, *The Birthright Lottery* (n 6) 116.

way of acquiring the citizenship of their host state. The need for a reform of the current system becomes apparent. Yet, the solution for a more inclusive approach is neither found in relying either on *jus sanguinis* or *jus soli* alone, nor in rejecting both principles altogether.[19] Both principles fulfill certain legitimate functions. They allow for a relatively reliable, coherent and consistent attribution of citizenship at the moment of birth without requiring any further connection.[20] What they fail to provide, however, is reliable access to membership for non-citizens who establish a close connection to the host state after birth. Even though all states allow the acquisition of citizenship through naturalization, in addition to acquiring citizenship at birth, the current system of naturalization is not really an effective mechanism to mitigate the exclusionary effects of birthright-based citizenship either. Naturalization continues to be a highly discretionary procedure and based on strict and exclusionary, sometimes even discriminatory, criteria. In practice, the material barriers imposed exclude many migrants with close ties to the host society from membership. This includes barriers such as naturalization requirements assessed in tests, formal hindrances such as complicated procedures or excessive fees, and the discretion of the authorities involved.[21] In order to actually alleviate the limitations of birthright-based modes of citizenship acquisition, non-citizens should have access to citizenship on the basis of a rights-based non-discretionary procedure.

2 *The Claim for Political Participation and Representation*

Political participation and representation are central to the discussion on citizenship and the inclusion of migrants in the citizenry. There is a vast body of literature on political membership and democratic participation.[22] The legitimacy of democratic systems is premised on the fair and equal participation of

19 van Waas, *Nationality Matters* (n 13) 53.

20 Rainer Bauböck, 'Genuine Links and Useful Passports: Evaluating Strategic Uses of Citizenship' (2019) 45 Journal of Ethnic and Migration Studies 1015, 1020.

21 See on exclusionary effects of naturalization tests eg Ricky van Oers, *Deserving Citizenship. Citizenship Tests in Germany, the Netherlands and the United Kingdom* (Brill Nijhoff 2013).

22 See among many Arash Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders' (2008) 36 Political Theory 37; Rainer Bauböck, 'Political Membership and Democratic Boundaries' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017); Robert E Goodin, 'Enfranchising All Affected Interests, and Its Alternatives' (2007) 35 Philosophy & Public Affairs 40; David Owen, 'Resident Aliens, Non-Resident Citizens and Voting Rights: Toward a Pluralist Theory of Transnational Political Equality and Modes of Political Belonging' in Gideon Calder, Phillip Cole and Jonathan Seglow (eds), *Citizenship Acquisition and National Belonging* (Palgrave Macmillan 2009); Ruth Rubio-Marín, *Immigration as*

those who are subjected to legislative decisions in adopting those decisions.[23] There are different approaches how to determine those who should have a say in democratic processes. In an ideal scenario, the legislator would be largely congruent to the legal subjects of that political entity. The larger the mismatch between the legislator and those being governed by the legislator, the weaker the legitimacy of democratic decisions becomes.[24]

In reality, this ideal scenario of an overlap between the people in a state and the body politic is disrupted in several respects. In practice, democratic systems usually exclude certain groups for different reasons. Children below the voting age, for example, but also persons with disabilities and persons lacking legal capacity or, in some jurisdictions, persons serving criminal sentences.[25] Moreover, non-citizens do not generally have political rights in their host state irrespective of their legal status.[26] There are certain exceptions where non-citizen residents are granted political rights at a local or sub-state level[27] or in the particular case of the EU on supra-state level.[28] Nevertheless, political decision-making is usually restricted to citizens, especially at the national level. In a world where international migration is on the rise and an increasing number of states are confronted with a considerable number of residents that have no say in political discussions, this mismatch becomes a challenge for the legitimacy of democratic systems. Non-citizens who remain involuntarily excluded from political participation risk being dominated.[29] As the literature

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a Democratic Challenge: Citizenship and Inclusion in Germany and the United States (Cambridge University Press 2000).

23 Bauböck, 'Political Membership' (n 22).

24 *ibid 60 f.* See also Peter J Spiro, 'A New International Law of Citizenship' (2011) 105 The American Journal of International Law 694, 722.

25 The UK, for example, does not allow prisoners to vote. This has been found to be a violation of Article 3 of Protocol 1 to the ECHR by the *Hirst v The United Kingdom (No 2)* (GC) [2005] ECtHR Application No. 74025/01.

26 Article 25 ICCPR explicitly restricts the personal scope of the right to vote to citizens. See also Linda Bosniak, 'Status Non-Citizens' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 328; Luicy Pedroza, *Citizenship Beyond Nationality: Immigrant's Right to Vote Across the World* (University of Pennsylvania Press 2019).

27 In Switzerland, for example, eight Cantons grant non-citizens the active right to vote on cantonal or municipal level. The right to stand as a candidate in elections is granted in four Cantons. See the database on indicators of Swiss citizenship law, Jean-Thomas Arrighi and Lorenzo Piccoli, 'SWISSCIT: Index on Citizenship Law in Swiss Cantons' (nccr — on the move 2018) <https://indicators.nccr-onthemove.ch/how-inclusive-are-citizenship-laws-in-the-26-swiss-cantons/>.

28 Article 22 Treaty on the Functioning of the European Union, 26 October 2012, OJ C 326/47, 'TFEU'.

29 Bauböck and Paskalev (n 8) 67.

shows, means of including non-citizens in democratic political decision making processes are necessary to prevent democratic legitimacy problems. It would go beyond the scope of the present study to trace this debate. What is interesting for the question under discussion here, however, is that it illustrates that the current citizenship framework with birthright attribution of membership without a right to citizenship is not a sufficient to safeguard for a representative democratic political system in immigration states with a certain proportion of non-citizen residents.

Reframing the right to citizenship to being based in the principle of *jus nexi* could help reduce the increasing democratic deficit in migration societies. *Jus nexi*, as Shachar asserts, "reflects the idea of democratic inclusion, according to which those who are habitually subject to the coercive powers of the state must gain a hand in shaping its laws, if they so choose".[30] It aims to offer access to citizenship to those non-citizens who have genuine connections to that place. A *jus nexi* based right to citizenship would allow non-citizens with substantive connections to a state to participate fully in the society as citizens. This would allow the inclusion of those non-citizens that are most affected by political decisions taken in democratic processes.

3 *The Exclusionary Effects of Citizenship*

Distinguishing between those who belong to a citizenry and those who remain outside is a characteristic of citizenship.[31] As discussed in Chapter 2, citizenship therefore produces both inclusion and exclusion.[32] This boundary-creating consequence of membership to the state has been described as the 'janus face' of citizenship.[33]

In the context of this study, the primary divide lies between citizens and foreign nationals; between those with (legal) citizenship status and those without. Migrants — non-citizens present in a state make this exclusionary function of citizenship visible.[34] Citizens bear the full bundle of rights (and duties) attached to citizenship.[35] They have, at least in principle, full political

30 Shachar, *The Birthright Lottery* (n 6) 178 f.

31 See generally Benhabib (n 4); Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2006).

32 See Chapter 2, II.2.

33 Leti Volpp, 'Feminist, Sexual, and Queer Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (2017) 153. See also Bosniak, *Citizen and Alien* (n 31) 99.

34 See Linda Bosniak, 'Citizenship Denationalized' (2000) 7 Indiana Journal of Global Legal Studies 447, 473 f.

35 See Chapter 2, II.3.3.

rights, access to social and economic rights and, importantly, an unconditional right to enter, remain in and leave their state of citizenship.[36] Non-citizens, in contrast, lack at least some of these rights, remain subject to deportation and have no unconditional right to re-enter their state of residence once they have left it.[37] Even though universal human rights apply irrespective of one's citizenship, states may therefore restrict crucial rights of non-citizens on the basis of citizenship, particularly when it comes to political rights and mobility rights, but also social rights.[38]

The right to enter and remain in a state has even been described as a "*sine qua non* of legal citizenship".[39] It serves as a territorial marker between citizens and non-citizens and contributes to the formation of a sense of identity and belonging within the state.[40] As Jacqueline Bhabha noted:

> A key, perhaps the most important, attribute of nationality is non-deportability, or the *lifelong guarantee of a right to entry and to indefinite residence* in the country of one's nationality irrespective of criminal conviction, prolonged foreign absence or any other personal behavior. It is through this entitlement that the enduring bonds of national identification are protected. (emphasis added)[41]

In *Serrano Sáenz v Ecuador*, the Inter-American Court of Human Rights found a violation of the right to nationality in a case concerning an Ecuadorian citizen who was deported to the US. The Court ruled that the deportation deprived Mr. Serrano Sáenz of an elemental right inherent to nationality — the right to remain in the state and not be deported.[42] This judgment highlights the

36 See for a discussion of degrees of rights among those who formally have legal nationality Lindsey N Kingston, *Fully Human: Personhood, Citizenship, and Rights* (Oxford University Press 2019).

37 See also Vanessa Barker, 'Democracy and Deportation: Why Membership Matters Most' in Katia Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press 2013).

38 Article 25 ICCPR, for example, explicitly limits political rights to citizens.

39 Audrey Macklin, 'Who Is the Citizen's Other? Considering the Heft of Citizenship' (2007) 8 Theoretical Inquiries in Law 333, 343. See also Barker (n 37); Bosniak, 'Status Non-Citizens' (n 26). See further Chapter 2, II.3.3.

40 Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004) 17; Dora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge University Press 2008) 138.

41 Jacqueline Bhabha, 'The Importance of Nationality for Children' in Institute on Statelessness and Inclusion (ed), *The World's Stateless: Children* (Wolf Legal Publishers 2017) 116.

42 *Nelson Iván Serrano Sáenz v Ecuador* [2009] IACtHR Report N. 84/09, Case 12.525 para 67.

importance of the right to remain as part of the exclusionary functions of citizenship. While long-term residents might be granted a permanent residence permit that grants them an unlimited right to remain, this right is not unconditional.[43] Residence permits, including long-term residence permits, can be withdrawn under the current international legal framework for different reasons — be that for reasons of national security, for economic reasons if a person is dependent on social welfare, for political reasons if a person is deemed to constitute a threat to political interests, or merely because a person has left the country for too long. Thus, non-citizens thus remain vulnerable to deportation or expulsion from the place where they are at home.[44] In cases where non-citizens have significant, permanent connections to their state of residence, this exclusion becomes particularly worrying.[45]

In recent years, a number of states have tightened the requirements for migrants to acquire citizenship by naturalization or on the basis of birth in the territory.[46] At the same time, the increasing securitization of citizenship has led to a renewed interest in the use of denationalization as the primary means of undercutting the right to remain in the country.[47] These

43 See Bosniak, 'Status Non-Citizens' (n 26) 326 ff.

44 See also Mirna Adjami and Julia Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27 Refugee Survey Quarterly 94; Barker (n 37) 246.

45 See Bosniak, 'Citizenship Denationalized' (n 34).

46 See eg the 2014 Swiss Swiss Citizenship Act, which reduces the residence period at national level from twelve to ten years while at the same time increasing the other requirements for naturalization, see Barbara von Rütte, 'Das neue Bürgerrechtsgesetz' [2017] Anwaltsrevue 202. Austria announced to increase the residence period for naturalization for refugees, Gerd Valchars, 'Verschärfung für Ungewollte' *Der Standard* (Wien, 9 July 2018) <https://www.derstandard.at/story/2000083140556/verschaerfung-fuer-ungewollte>. During the Trump administration, the US has announced to change the country's *jus soli* system, see Patrick J Lyons, 'Trump Wants to Abolish Birthright Citizenship. Can He Do That?' *The New York Times* (New York, 22 August 2019) <https://www.nytimes.com/2019/08/22/us/birthright-citizenship-14th-amendment-trump.html>. In other states, such as Portugal, the acquisition of citizenship has been facilitated, see Lorenzo Piccoli, '2018: A Year in Citizenship' (*GLOBALCIT*, 8 March 2019) <http://globalcit.eu/2018-a-year-in-citizenship/>. See on the evolution of citizenship policies moreover Orgad (n 2); Ayelet Shachar, 'Beyond Open and Closed Borders: The Grand Transformation of Citizenship' (2020) 11 Jurisprudence 1, 13 ff.

47 An extension of deprivation powers has been discussed in countries such as Canada, the UK, Belgium, France, Germany, or Denmark. See eg Matthew J Gibney, 'Denationalisation and Discrimination' (2020) 46 Journal of Ethnic and Migration Studies 2551; Honohan (n 3); Arnfinn H Midtbøen, 'Dual Citizenship in an Era of Securitisation: The Case of Denmark' (2019) 9 Nordic Journal of Migration Research 293; Patrick Sykes, 'Denaturalisation and Conceptions of Citizenship in the "War on Terror"' (2016) 20 Citizenship Studies 749;

developments reinforce the exclusionary effects of citizenship. The boundary created between citizens and non-citizens based on the rights tied to citizenship remains very much alive. Citizenship is "a privilege for some that works to the exclusion of others".[48] One approach to mitigate the exclusionary effects of this privilege would be to detach the rights, particularly political rights and the right to remain, from citizenship and grant them to non-citizens on an equal basis. The other approach, which is the approach I propose here, is not to replace citizenship with another status, but to make access to citizenship (and its retention) a right. Applying the principle of *jus nexi* to the right to citizenship would allow for inclusion into the citizenry of those who are most affected by the exclusionary effects of citizenship in their daily life; those who have their center of life in a state without having that state's citizenship. Based on the principle of *jus nexi*, those persons could be granted an enforceable legal entitlement to acquire citizenship. This would allow for the inclusion of, at least, some of those who belong to the society and hence alleviate some of the exclusionary effects of citizenship.[49]

4 *The Individual Rights' Dimension*

The two previous sections have discussed the implications of citizenship as an individual's membership in a social and political group. I have argued before why citizenship has the quality of a human right.[50] Now I would like to make the point that recognizing citizenship as an individual human right has implications for the state's competence to decide who qualifies as a citizen and, in

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Deirdre Troy, 'Governing Imperial Citizenship: A Historical Account of Citizenship Revocation' (2019) 23 Citizenship Studies 304; Elke Winter and Ivana Previsic, 'The Politics of Un-Belonging: Lessons from Canada's Experiment with Citizenship Revocation' (2019) 23 Citizenship Studies 338. See also Chapter 5, III.6.

48 Marie-Bénédicte Dembour, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg' (2003) 21 Netherlands Quarterly of Human Rights 63, 87. See also Shachar, 'Beyond Open and Closed Borders' (n 46); Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press 2020).

49 I am aware that this approach shifts the pressure quite literally to the border. If access to citizenship is recognized as an enforceable right for those in a country the question who gets access to the territory in the first place becomes predominant. Those in favor of a restrictive migration policy will aim to limit access to the territory to preclude claims to access to citizenship. This discussion, however, goes beyond the scope of this study. From an international human rights law perspective, the right to enter a state (and possibly the right to asylum) and the right to citizenship are two different questions. My concern in this study is for the latter without in any way questioning the legitimacy or importance of the former. See also Chapter 1, II.

50 See Chapter 2, III.

turn, the way the law regulates access to citizenship. As the IACtHR noted in its opinion on the *Amendments to the Naturalization Provision of the Constitution of Costa Rica*:

> The classic doctrinal position, which viewed nationality as an attribute granted by the State to its subjects, has gradually evolved to a conception of nationality which, in addition to being the competence of the State, is a human right.[51]

Recognizing the right to citizenship as a human right entails granting an enforceable legal entitlement to membership that can be claimed against a specific state. This, as the opinion of the IACtHR illustrates, means that the individual is no longer merely a subject, but a rights holder. This shift of perspective from the state to the individual has considerable legal and practical consequences. The state is "dethroned as the author and owner of citizenship".[52] Instead, the claim to acquire citizenship is transferred to the individual. Hence, the position of the individual is strengthened at the cost of states' discretion. It is no longer exclusively within the *domaine réservé*, the sovereign and sole competence of states, to decide on access to and loss of citizenship without any restriction derived from international standards.

As a human right, citizenship is subject to the choices and autonomy of the individual. The individual and her interests must be taken into consideration, even where they are not parallel to the interests of the state.[53] Citizenship should not be imposed against the will of the individual and should only be revoked under exceptional circumstances.[54] Individuals should have a meaningful way to acquire nationality.[55] This shift from state privilege to individual right becomes apparent in the social identity approach of the ECtHR, where it qualifies citizenship as a part of the social identity of an individual, falling within her private life.[56] If citizenship is part of a person's social identity,

51 *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* [1984] IACtHR OC-4/84, Series A No. 4 (1984) para 33.

52 Vlieks, Hirsch Ballin and Recalde-Vela (n 7) 162.

53 Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 119.

54 Bauböck and Paskalev (n 8) 64.

55 See also Chapter 5, III.3.6. Similarly also Honohan (n 3) 11.

56 *Genovese v Malta* [2011] ECtHR Application No. 53124/09 para 33.

that person has the right and the autonomy to shape that identity.[57] As social beings, humans have to be able to establish social relationships and be members of the society where those social relationships exist; where one's center of life is. As Bauböck and Paskalev point out, the view that citizenship is an individual right implies that individuals have a right to choose their own identities.[58] The state, by contrast, has an obligation to accommodate and administer the choices and entitlements of the individuals concerned.[59]

Recognizing the right to citizenship, in other words, entails recognizing non-citizens' claim to equal membership and limiting states' sovereignty.[60] Rather than making access to citizenship dependent on the decision of a state or attributing it automatically, a right to citizenship on the basis of the principle of *jus nexi* would give necessary weight to the individual's intentions, her subjective circumstances, connections and her sense of belonging.[61] It would give sufficient weight to the individual's will and accommodate the need for dual or even multiple citizenship.[62]

This section has discussed several reasons why the current international citizenship law framework does not sufficiently protect the rights of individuals, nor accommodate the realities of modern migration societies. The system of attributing membership on the basis of *jus soli* and *jus sanguinis*, or alternatively through naturalization, threatens to exclude individuals who effectively are members of the society; it risks weakening democratic processes, as non-citizens remain excluded from political participation and representation, and fails to give sufficient weight to individuals' choices on where their center of life is. I have suggested the principle of *jus nexi* as a possibility to close these gaps in the current framework. In the following section, I will discuss in more detail what the principle of *jus nexi* entails and illustrate why I believe it could be a helpful approach.

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57 By the notion of 'identity' I refer to an individual's personal identity which is formed by her personal characteristics and social ties, see also *Mennesson v France* (n 1) para 97. Hence, it is to be distinguished from notions of collective, cultural, ethnic or national identity which refer to ideas of group identity. See also Ernst Hirsch Ballin, *Citizens' Rights and the Right to Be a Citizen* (Brill Nijhoff 2014) 17 ff.

58 Bauböck and Paskalev (n 8) 64.

59 Vlieks, Hirsch Ballin and Recalde-Vela (n 7) 163.

60 See *ibid 162 f.*

61 See also Ayelet Shachar, 'Earned Citizenship: Property Lessons for Immigration Reform' (2011) 23 Yale Journal of Law and the Humanities 140. See in a similar vein also Bauböck and Paskalev (n 8) 68.

62 See also Macklin, 'The Citizen's Other' (n 39) 354.

II *Jus Nexi* — a Genuine-Connection Principle for Citizenship Acquisition

In the previous section I have presented arguments why the right to citizenship, as it is currently interpreted, does not offer the necessary corrective to the shortcomings of the current international citizenship regime. I would like to propose an interpretation of the right to citizenship based on the principle of *jus nexi* in order to address these shortcomings. In order to show how the principle of *jus nexi* could be applied to the right to citizenship, I first want to elaborate on the concept of *jus nexi* itself. After establishing its historical evolution and theoretical foundations (II.1), I will draw upon the jurisprudence of international human rights bodies and soft law instruments to illustrate that the idea of a genuine-connection principle for membership in itself is not foreign to human rights law (II.2). I then identify different elements that build a genuine-connection that then serve as points of reference for citizenship acquisition based on the principle of *jus nexi* (II.3). I end this section by concluding that the concept allows for a non-exclusive and dynamic mode of membership attribution that takes a person's individual circumstances into account and thus paves the way for a rights-based approach to citizenship acquisition (II.4).

1 *Theoretical Foundations of the Concept of* Jus Nexi

The principle of *jus nexi*, most prominently developed by Shachar, is an alternative mode of citizenship attribution that refers to membership acquisition based on a genuine connection to the society in question.[63] Shachar defines *jus nexi* as a "genuine connection principle of membership acquisition"[64] that "reflects a social relational conception of citizenship".[65] The term '*jus nexi*', as she notes, is a short version of the term '*jus connexion*'.[66] Shachar refers to the judgment of the ICJ in the case of *Nottebohm* and the evolving case law of the CJEU on EU citizenship, as well as practices of urban citizenship and the creation of city IDs — as a form of local membership based on social

63 Shachar, *The Birthright Lottery* (n 6). See also Shachar, 'Earned Citizenship' (n 61), where she elaborates on the principle of *jus nexi* and describes it as a theoretical framework that takes rootedness in a society as the basis for membership. See in more detail Chapter 2, III.2.5.

64 Shachar, *The Birthright Lottery* (n 6) 164.

65 Shachar, 'Earned Citizenship' (n 61) 128.

66 Or '*jus connectionis*' for that matter. See Shachar, *The Birthright Lottery* (n 6) xii. See on the terminology also Hirsch Ballin (n 57) 83.

attachment — to illustrate that it is not new to tie membership status to the existence of effective connections to a society.[67]

Shachar proposes to complement the principles of *jus soli* and *jus sanguinis* with the principle of *jus nexi* in order to overcome the negative consequences of automatic transmission of entitlement based on citizenship obtained through birthright-based modes of transmission, particularly over- and under-inclusion.[68] Unlike the accident of birth, a person's effective connection to or rootedness in a society would be decisive for membership attribution based on the principle of *jus nexi*. Shachar argues that

> *jus nexi* provides substance to the idea that real and genuine ties fostered on the ground deserve some form of legal recognition: here, by granting secure membership status based on the social connectedness that has already been established. Such an approach enables us to welcome into the political community those who have already become social members based on their actual participation in the everyday life and economy of the jurisdiction, and through their interdependence with its legal and governance structures.[69]

Accordingly, actual, functional connections a person has to the political community should be decisive for legal citizenship and not purely formalist considerations.[70] As the basis for a *jus nexi* model for accessing citizenship, Shachar proposes a 'center of interests test'.[71] Such a test, she finds, would offer a pragmatic and functional way to evidence the existence of a genuine connection between a person and the political community she lives in. *Jus nexi* could thereby trace "attachment between the individual and the political community on the basis of factual membership and affected interests".[72] Hence, the principle of *jus nexi* would provide an opportunity to adjust political and legal membership and base citizenship on existing social facts of membership rather than only on an entitlement on the basis of birthright.[73]

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67 Shachar, *The Birthright Lottery* (n 6) 167 and 175 ff.
68 ibid 164 f. Shachar, 'Earned Citizenship' (n 61) 115.
69 Shachar, *The Birthright Lottery* (n 6) 169.
70 Shachar, 'Earned Citizenship' (n 61) 122.
71 Shachar, *The Birthright Lottery* (n 6) 168.
72 *ibid.*
73 *ibid 165.*

Others have raised similar arguments.[74] Hirsch Ballin, for example, argues for "a human right to be a citizen of the state where one is effectively at home" and "a citizenship that is appropriate to everyone's life situation, where he or she is at home — which can change during the course of a person's life".[75] Goldston proposes to turn to the notion of genuine and effective links in order to "give further content to the limits on state discretion in regulation citizenship access".[76] In her work, Anuscheh Farahat develops a 'principle of progressive inclusion' (*Prinzip der progressiven Inklusion*). Based on this principle, the legal status of migrants should progressively be approximated to the status of citizens based on the connections between them and the state of residence — even if they still have ties to the state of origin or other states.[77] The 'stakeholder principle' developed by Bauböck also bears strong similarities to the principle of *jus nexi*. He argues that the "Westphalian conception of citizenship" must be based on a genuine link, a political and legal relation between individuals and states.[78] He claims that a genuine link is necessary to sort individuals into states, which is a crucial function of citizenship.[79] He proposed a 'stakeholder principle' for determining who has a claim to membership in the political community.[80] This claim should be based on an individual's stake in the political community that depends on that person's circumstances of life, rather than a subjective preference. Based on the stakeholder principle, "self-governing political communities should include as citizens those individuals whose circumstances of life link their autonomy or well-being to the common good of the political community".[81] Against the background of statelessness and deprivation of citizenship, Owen refers directly the *jus nexi* principle and

74 Criticism, on the other hand, has been voiced eg by Spiro or Weil, see Peter J Spiro, 'Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion' (2019) Investment Migration Working Paper No 2019/1 <https://investmentmigration.org/download/nottebohm-genuine-link-anatomy-jurisprudential-illusion-imc-rp-2019-1/> 22 f; Patrick Weil, 'From Conditional to Secured and Sovereign: The New Strategic Link Between the Citizen and the Nation-State in a Globalized World' (2011) 9 International Journal of Constitutional Law 615, 628.

75 Hirsch Ballin (n 57) 125 and 145.

76 James A Goldston, 'Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens' (2006) 20 Ethics & International Affairs 340.

77 Anuscheh Farahat, *Progressive Inklusion: Zugehörigkeit und Teilhabe im Migrationsrecht* (Springer 2014) 76 f.

78 Bauböck, 'Genuine Links and Useful Passports' (n 20).

79 *ibid 4.*

80 Rainer Bauböck, 'The Rights and Duties of External Citizenship' (2009) 13 Citizenship Studies 475.

81 *ibid 479.*

Bauböck's stakeholder principle when he discusses the 'right to have nationality rights' and argues that it is necessary to attribute membership on the basis of a "reciprocal relationship between individuals and states".[82] The legitimacy of the international political order "requires that it acknowledges ius nexi as a basic constitutional principle and, hence, a human right to naturalize under conditions where a person has a genuine link to a state".[83]

In international legal instruments, the principle of *jus nexi* has, so far, not gained much traction as a mode of citizenship acquisition. Nevertheless, tying membership and legal status rights to the existence of functional connections to a society is not unknown to international law.[84] Even in international law, the concept of nationality is, in fact, built on the idea that nationality should reflect a meaningful and genuine connection between the individual and the state in question. Vlieks et al argue that the "concept of nationality acknowledges that nationality has effective and social features, and that in the absence of a factual basis and genuine connection between the individual and the state, the claim of nationality becomes increasingly meaningless".[85] Especially in cases concerning diplomatic protection of dual nationals, the principle of effective nationality has long played an important role in determining whether one state of nationality can exercise protection *vis-à-vis* the other state of nationality.[86]

One of the early sources in international law that touches upon the relevance of actual connections for citizenship is the report by Manley Hudson, the ILC Special Rapporteur on Nationality, Including Statelessness, of 1952. In that report, Hudson argues that the situation of stateless persons can only be improved if the individual concerned has "the nationality of that state with which he is, in fact, most closely connected, his 'effective nationality'".[87] Such an effective nationality based on the closest connection is the only way, he

82 David Owen, 'On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights' (2018) 65 Netherlands International Law Review 310. See also David Owen, 'The Prior Question: What Do We Need State Citizenship For?' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer International Publishing 2018). See in more detail the discussion in Chapter 2, III.2.6.

83 Owen, 'The Right to Have Nationality Rights' (n 82) 314.

84 See also Anne Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction' (2010) 53 German Yearbook of International Law 680 ff.

85 Vlieks, Hirsch Ballin and Recalde-Vela (n 7) 164.

86 See eg *Mergé Case* (*United States v Italy*) [1955].

87 International Law Commission, 'Report on Nationality, Including Statelessness' (International Law Commission 1952) UN Doc. A/CN.4/50 7 <http://untreaty.un.org/ilc/documentation/english/a_cn4_50.pdf> ('Hudson Report').

argues, to eliminate both *de jure* and *de facto* statelessness.[88] He then refers back to a Conference of the International Law Association in 1936, where it was suggested that neither *jus soli* nor *jus sanguinis* should be decisive, but a right of attachment, a *'jus connectionis'*.[89] Such *jus connectionis* would allow for the attribution of the "nationality of the state to which a person has proved to be most closely attached in his conditions of life as may be concluded from spiritual and material circumstances".[90] The relevant factors for a *jus connectionis*, or in other words a *jus nexi*, would thus be both the actual and emotional facts of attachment. The Hudson Report was the most comprehensive study on nationality, statelessness and their relationship with international law of the time. This reference to the principle of *jus connectionis* shows that the idea to link citizenship to the actual connections of a person was already known in the first half of the 20th century.

In 1955, the idea of citizenship as a legal status based on an actual, close connection was at the heart of the seminal *Nottebohm* judgment.[91] In its ruling the ICJ famously defined nationality as

> 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. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. (emphasis added)[92]

In order to be externally valid *vis-à-vis* other states, the Court argued, nationality must correspond to the factual situation of a person.[93] The ICJ found that, in conflicts concerning diplomatic protection of dual nationals, preference was usually given to the 'real and effective nationality'; the nationality that

88 See also Carol A Batchelor, 'UNHCR and Issues Related to Nationality: International Assistance to Stateless Persons' (1995) 14 Refugee Survey Quarterly 91, 112.

89 For the terminological similarity between '*jus nexi*' and '*jus connectionis*' see Shachar, *The Birthright Lottery* (n 6) xii.

90 International Law Commission, 'Hudson Report' (n 87) 20 referring to the Report of the 39th Conference of the International Law Association, p. 13–51.

91 *Nottebohm* (*Liechtenstein v Guatemala*) [1955] ICJ Reports 1955 4. But see the reference to the effective link of attachment already in *Question Concerning the Acquisition of Polish Nationality* (*Advisory Opinion*) [1923] PCIJ (1923) PCIJ Series B No. 7 15.

92 *Nottebohm* (n 91) 23.

93 *ibid* 22.

came with stronger factual ties to the person concerned.[94] The Court defined the notion of genuine connection in a negative way. It found the connections between Nottebohm and Liechtenstein to be extremely tenuous. There was "no settled abode, no prolonged residence", no intention of doing so and no economic interests or activities exercised there.[95] Hence, there was no bond of attachment between Nottebohm and Liechtenstein. At the same time, there was a long-standing and close connection between Nottebohm and his state of permanent residence, Guatemala. The Court concluded that Nottebohm's naturalization in Liechtenstein for these reasons was "lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a state in the position of Guatemala".[96] Liechtenstein consequently had no right to exercise diplomatic protection on his behalf.

Obviously, the *Nottebohm* ruling has to be seen in its particular context.[97] The case — an interstate dispute — concerned the effectiveness of citizenship for the purpose of diplomatic protection exercised at the international level against another state.[98] Whether Nottebohm actually acquired the citizenship of Liechtenstein from the perspective of Liechtenstein's domestic law did not factor into the case. This purely external dimension clearly distinguishes the genuine connection doctrine developed in the *Nottebohm* case from the principle of *jus nexi*. The former does not determine the basis upon which nationality should be attributed or acquired.[99] The ICJ simply applied the genuine connection doctrine to the question whether a state has the right to exercise diplomatic protection on behalf of one of its citizens *vis-à-vis* another state. The Court, *ergo*, imposed a limitation upon the external effectiveness of nationality. A positive implication of the genuine connection doctrine, which would suggest that an individual with a genuine connection has a right to the citizenship of a specific state, cannot be derived from the judgment.[100]

94 *ibid.*

95 *ibid 25.*

96 *ibid 26.*

97 See critically Spiro, 'Nottebohm and "Genuine Link"' (n 74). See further Chapter 3, III.4.

98 See also Shachar, *The Birthright Lottery* (n 6) 167.

99 See also the International Court of Justice, 'Dissenting Opinion of Judge "Ad Hoc" Guggenheim in Liechtenstein v Guatemala (Nottebohm)' (1955) ICJ Reports 1955, p. 4 54.

100 See also Jeffrey Blackman, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law' (1998) 19 Michigan Journal of International Law 1141, 1158. If anything, Mr. Nottebohm would have had an actual, close connection to Guatemala and not to Germany or Liechtenstein, see also Shachar, *The Birthright Lottery* (n 6) 167; Robert D Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 Harvard International Law Journal 18 and 32.

Nevertheless, the doctrine of genuine connection or genuine link is interesting for the discussion of the principle of *jus nexi*.[101] Both the doctrine of genuine connection and *jus nexi* build on a close, factual connection between a state and a citizen — or a prospective citizen. The ICJ mentions different factors that can create a social attachment or genuine connection: habitual residence is an important element, as are one's center of interest, possible family ties in a country, the participation in public life or, generally, attachment shown for a state.[102] The sum of these links between individual and state — or as the Court interestingly said, the "population of a state" — establishes the genuine connection.[103] Social relationships, based on different factors, are therefore directly linked to the legal bond of citizenship.[104] This is the lesson to be drawn from the *Nottebohm* case for the theory of *jus nexi.* It supports Shachar's argument that "instead of relying on mere formal status of affiliation, the more important criterion is to examine the social fact of attachment, the genuine connection of the person to the polity as a valid and relevant basis for membership allocation".[105]

The idea of an effective link as the basis for citizenship has also found its way into some of the more recent instruments on citizenship in international law. The European Convention on Nationality touches upon the principle of *jus nexi* without recognizing it explicitly. Articles 6, 7 and 18 ECN all recognize attachment, integration and belonging as part of the underlying concept of citizenship of the ECN and thus mirror a *jus nexi* principle.[106] According to Article 6 ECN persons with a certain connection to a state — based on residence, birth, family ties or protection status — shall be granted access to citizenship.[107] In parallel, the loss of a genuine link can be a legitimate reason for

101 Shachar refers to it as the principle of real and effective citizenship, a citizenship which accords with the facts. See Shachar, *The Birthright Lottery* (n 6) 167.

102 *Nottebohm* (n 91) 22.

103 *ibid 23.*

104 William E Conklin, *Statelessness: The Enigma of the International Community* (Hart Publishing 2014) 190.

105 Shachar, *The Birthright Lottery* (n 6) 167. Similarly, the CJEU ruled that it is legitimate for an EU member state 'to take the view that nationality is the expression of a genuine link between it and its nationals', see *Tjebbes and Others v Minister van Buitenlandse Zaken* [2019] CJEU C-221/17 para 35.

106 See also Ineta Ziemele, 'State Succession and Issues of Nationality and Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 225.

107 See Chapter 4, II.2.2.1.1.

the loss of citizenship in cases of habitual residence abroad.[108] This reflects the negative side of *jus nexi*, limiting transmission of citizenship from generation to generation to those who have a genuine connection to their country of citizenship in order to prevent over-inclusion.[109] In cases of state succession the importance of a genuine and effective link is explicit: an individual affected by state succession should have the nationality of the successor state to which a substantial connection exists.[110] The ECN thereby mirrors the principle that in case of state succession the legal bond of nationality should correspond to an individual's genuine connection to that state.[111]

A similar understanding of a genuine connection, as a precondition for acquiring citizenship in the context of state succession, can be found in the ILC Draft Articles on Nationality.[112] As we have seen, Article 1 ILC Draft Articles guarantees a right to a nationality in the context of state succession.[113] Everyone who, on the date of the succession, had the nationality of the predecessor state has the right to the nationality of at least one of the states involved in the succession. The state that bears the obligation to grant nationality shall be determined based on the existing links between said individual and the states involved in the succession:

> The identification of the State which is under the obligation to attribute its nationality depends mainly on the type of succession of States and the nature of the *links* that persons referred to in article 1 may have with one or more States involved in the succession (emphasis added).[114]

Such links can consist of residence or birth on the territory, as well as family or professional ties. These factors normally connect a person to one state, but

108 Article 7(1)(e) ECN. See also Council of Europe, 'Explanatory Report to the European Convention on Nationality' (Council of Europe 1997) para 70.

109 See for the aspect of over-inclusion Shachar, *The Birthright Lottery* (n 6) 183 f.

110 Article 18(2) ECN.

111 Council of Europe, 'Explanatory Report ECN' (n 108) para 113.

112 See generally on the emergence of positive obligations from the principle of effective nationality in the case of state succession Blackman (n 100) 1160 ff.

113 See Chapter 4, II.1.3.2.

114 International Law Commission, 'Commentary on the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States' (ILC 1999) Yearbook of the International Law Commission, 1999, Vol. II, Part Two 23 <http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/3_4_1999.pdf&lang=EF> 25, para 4.

they can also create links to two or more states involved in the succession.[115] Hence, the ILC Draft Articles on Nationality also link the right to a nationality to the existence of a genuine link between the individual concerned and the states involved in the succession and imply a positive obligation for the state to which such genuine connection exists to its grant nationality to the individual concerned.[116]

Several other provisions of the ILC Draft Articles on Nationality also refer to the requirement of a connection between the individual in question and the state involved in the succession. Article 5 creates a presumption of nationality for habitual residents. Persons having their habitual residence in the territory affected by a succession shall acquire the nationality of the successor state over said territory. This shows that habitual residence provides a strong indication for the existence of an effective connection and can function as an important criteria for determining which state is bound to grant the right to citizenship.[117] Another example is Article 11(2), which holds that each state concerned shall grant a right to opt for its nationality to persons who have an appropriate connection with that state if they would otherwise become stateless. According to the Commentary, this right to opt has the aim of resolving problems of attribution of nationality to persons that fall within an area of overlapping jurisdictions.[118] The notion of 'appropriate connection' used in Article 11(2) shall be interpreted broader than the notion of 'genuine link', in order to highlight the importance of the prevention of statelessness, which in some cases can supersede the requirement of effective nationality.[119] Besides habitual residence, an appropriate legal connection with the predecessor state can be established by birth on the territory.[120] By referring to an 'appropriate connection' as the basis for the attribution of citizenship, the ILC Draft Articles effectively apply the principle of *jus nexi* in the context of state succession. They use a mix of criteria determine the effective nationality, with domicile as the predominant criterion but also including others, such as prior nationality or family ties. The right

115 Article 1 International Law Commission, Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, 3 April 1999, Supplement No. 10, UN Doc. A/54/10 ('ILC Draft Articles on Nationality'); see *ibid.*

116 Vaclav Mikulka, 'Third Report on Nationality in the Relation to the Succession of States' (International Law Commission 1997) UN Doc. A/CN.4/480 37 para 4<http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_480.pdf&lang=EFSX>. See also Blackman (n 100) 1164 ff.

117 International Law Commission, 'Commentary Draft Articles on Nationality' (n 114) 29, para 4.

118 *ibid 34, para 6.*

119 *ibid 34, para 9.*

120 *ibid 34, para 10.*

of option moreover gives individuals a claim to the nationality of the state with which they have the closest connection.[121]

The Draft Protocol on Nationality of the African Union takes the idea of a genuine connection as the basis for the right to nationality even further.[122] It proposes to oblige states to facilitate the acquisition of nationality for persons who were habitual residents in their territory as children and remain residents as adults (Article 6(2)(d)). The Draft Protocol, moreover, addresses, specifically, the situation of persons "whose habitual residence is in doubt, including persons who follow a pastoralist or nomadic lifestyle and whose migratory routes cross borders, or who live in border regions" (Article 8). In such situation states shall be obliged to take all appropriate measures to ensure that these persons have the right to the nationality of at least one of the states to which they have an appropriate connection (let. a). Such an appropriate connection shall be recognized in cases of:

i. repeated residence in the same location over many years;
ii. the presence of family members in that location throughout the year;
iii. the cultivation of crops on an annual basis at that location;
iv. the use of water points and seasonal grazing sites;
v. the burial sites of ancestors;
vi. the testimony of other members of the community;
vii. the expressed will of the person.[123]

This provision would introduce a novel approach to the acquisition of nationality entirely based on a diverse range of possible individual connections to a place. The criteria are not based on a perceived image of integration or successful participation of a person in society, but on actual ties to the country and the society. It mirrors a specific conception of *jus nexi* for the context of nomadic and cross-border populations that is informed by the African context, but at the same time, illustrates how access to citizenship generally could be tied to the individual's actual and multifaceted links.

These examples show that linking nationality and a genuine connection to a state, its territory and population is not new to international law. In fact, the notions of 'genuine connection' and 'effective nationality' have been central to discussions around nationality and citizenship in international legal theory for

121 Blackman (n 100) 1170.
122 See Chapter 4, II.2.3.2.
123 Article 8(c) AU Draft Protocol.

most of the 20th and the 21st century. It was at the heart of the ICJ's decision in the case of *Nottebohm*, and is mirrored in most recent international instruments on nationality. Younger instruments, such as the ECN and also the AU Draft Protocol, reflect this turn towards genuine and effective links as relevant criteria for granting citizenship.[124] In addition, the idea of an effective link as the basis for citizenship — which is at the heart of the principle of *jus nexi* — is also found in domestic nationality legislation that stipulates requirements such as residence, family ties or participation in public life in order to acquire citizenship.[125] Applying the principle of *jus nexi* to the right to citizenship would build on this existing framework. In addition, it would strengthen the role of the individual in the attribution of citizenship. *Jus nexi* allows to recognize the individual as an international legal person and thus promises to grant her an active entitlement to claim access to citizenship in a specific state. The next section introduces this change of perspective by discussing how international human rights law already incorporates elements of the principle of *jus nexi*.

2 *From 'Private Life' and 'One's Own Country' to* Jus Nexi

In international human rights law, the notion of a person's social and familial ties is at the heart of the right to private and family life. Where a person's center of life is and what relationships a persons has to the persons around her and to the state of residence are central to assess the legitimacy of restrictions to the right to private and family life. This is particularly important with regard to the rights of migrants to enter and stay in a country. Against that background, the similarity of the principle of *jus nexi* to the notions of private life and 'one's own country' becomes apparent. In the following the relevant case law in this regard shall be discussed. This discussion shall help illustrating the individual rights character inherent to the principle of *jus nexi*.

2.1 The Right to Private Life and the Concept of Social Identity

The right to private life is guaranteed in all major international human rights instruments. While some of these instruments refer to the notion of 'private life' and others to 'privacy', all these provisions entail some form of protection for the right of everyone to personal autonomy.[126] Particularly interesting for

124 Adjami and Harrington (n 44) 106.

125 See also Bauböck and Paskalev (n 8) 67.

126 Walter Kälin and Jörg Künzli, *Universeller Menschenrechtsschutz: der Schutz des Individuums auf globaler und regionaler Ebene* (4. Aufl., Helbing Lichtenhahn Verlag 2019) 456. See also *Pretty v The United Kingdom* [2002] ECtHR Application No. 2346/02 para 61.

the discussion at hand is the social identity doctrine developed by the ECtHR under it's right to private life as protected by Article 8 ECHR. According to the well-established case law of the ECtHR "the concept of 'private life' is a broad term not susceptible to exhaustive definition. […] It can sometimes embrace aspects of an individual's physical and *social identity* […] (emphasis added)".[127] Thus, besides protecting aspects such as one's physical and psychological integrity, health, home, environment, correspondence, one's personal development and legal capacity, the right to private life also protects one's social identity.[128] This social identity covers the "personal, social and economic relations that make up the private life of every human being"[129] and the free pursuit of "the development and fulfilment of his personality".[130] In short, the social identity covers a person's social contacts, networks and roots — irrespective of whether the person concerned is a citizen or not.[131] It is this aspect of the right to private life that — in addition to the protection under the right to family life — has become increasingly important in the migration context. Hence, the right to private and family life under Article 8 ECHR can guarantee non-citizens a right to remain in a state and sometimes even a right to be granted access to a state, provided they have sufficient ties. In the case of *Üner v The Netherlands* the Strasbourg Court has held that:

> [A]s Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of "private life" within the meaning of Article 8.[132]

127 *Pretty v UK* (n 126) para 61.

128 See eg also *Dadouch v Malta* [2010] ECtHR Application No. 38816/07 para 47.

129 *Slivenko v Latvia* [2003] ECtHR Application No. 48321/99 para 96.

130 *AN v Lithuania* [2016] ECtHR Application No. 17280/08 para 111.

131 Social identity as developed by the ECtHR under Article 8 ECHR is to be distinguished from concepts of national or collective identity which are put forward by liberal nationalists as arguments for restricting access to citizenship. Social identity, understood in this sense, hence is not to be equated with national identity. It is a network of individual relationships and ties and not a collective identity or identification with a national idea. See on citizenship as identity in a collective sense Bosniak, 'Citizenship Denationalized' (n 34) 479 ff.

132 *Üner v The Netherlands* [2006] ECtHR Application No. 46410/99 para 59.

The concept of social identity — as an individual's personal, social and economic relations being a fundamental aspect of the life of every human — is similar to the principle of *jus nexi*, which also aims at weighing in the social, familial, economic and cultural ties of non-citizens, only with greater regard for access to citizenship.

When are the ties protected by the right to private life sufficiently strong to override the competing state interest to migration control? In the cases of *Boultif v Switzerland* and *Üner v the Netherlands*, the ECtHR developed a list of criteria to be taken into consideration when balancing the right to family and private life of the individual against the state's interests to control the entry and stay of non-citizens in the territory. These criteria include the degree of integration in the state of residence, the length a person's stay in the country, the family ties, the best interests of children involved and the solidity of social and cultural ties.[133] In the case of *Maslov v Austria*, a case concerning a young Bulgarian national that came to Austria with his parents as a child and was to be deported as a young adult after committing a criminal offense, the Court developed that argument further and found that the right to private life as such, without additional family ties, also protects the social ties of settled migrants who have not yet founded a family of their own as part of their social identity. Even if a person is not protected by the right to family life, the expulsion of a settled migrant might interfere with his or her right to respect for private life.[134]

The judgment in *Sisojeva v Latvia* dealt with the regularization of the legal status of a Russian-origin family living in Latvia for most of their life.[135] The applicants belonged to the stateless minority of so-called 'erased' or 'non-citizens' in Latvia who were neither granted Latvian nationality after the independence in 1991, nor received a residence permit. The judgment of the Chamber found that Latvia violated the right to private life under Article 8 ECHR by not regularizing the legal status of the applicants. It argued that the family was determined to have spent all or almost all of their lives in Latvia and, despite not being of Latvian origin, had developed personal, social and

133 *Boultif v Switzerland* [2001] ECtHR Application No. 54273/00 para 48; *Üner v The Netherlands* (n 132) paras 57 and 58.

134 *Maslov v Austria* [2008] ECtHR Application No. 1638/03 para 63.

135 *Sisojeva and others v Latvia* (*Chamber*) [2005] ECtHR Application No. 60654/00. See also the cases *Slivenko v Latvia* (n 129); *Kolosovskiy v Latvia* [2004] ECtHR Application No. 50183/99.

economic ties strong enough for them to be regarded as sufficiently well integrated.[136]

The case of *Hoti v Croatia* also concerned the regularization of a stateless person.[137] Mr. Hoti, born to Albanian refugees in Kosovo, entered Croatia as a teenager and continued to reside there.[138] After the collapse of the Socialist Federal Republic of Yugoslavia (SFRY) he did not acquire any nationality. During the nearly forty years he lived in Croatia he repeatedly applied for a legal status, but was never granted a stable residence permit. He ultimately took the refusal of an application for a residence permit to the ECtHR and argued that the insecurity of his residence status, due to the fact that he had no effective possibility to regularize his status, violated his right to private life.[139] In its judgment the ECtHR confirmed that

> Article 8 protects, inter alia, the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity. Thus, the totality of social ties between a migrant and the community in which he or she lives constitutes part of the concept of private life under Article 8.[140]

The Court considered that the applicant had no formal or *de facto* ties to any other country than Croatia, where he had lived for several decades, worked and accumulated social ties in the local community.[141] Being stateless, he had no other country that he could turn to. Croatia's refusal to provide for any meaningful procedure to regularize his legal status and stay in the country lawfully and permanently violated Article 8 ECHR. The case of *Hoti v Croatia* shows the weight the Court attributes to a person's social ties in the country of residence. The case did not concern acquisition of citizenship and the Court explicitly

136 *Sisojeva v Latvia* (n 135) para 107. In the Grand Chamber judgment of 15 January 2007 the complaint under Article 8 ECHR was struck out as it had been resolved by the state party.

137 *Hoti v Croatia* [2018] ECtHR Application No. 63311/14 para 122. In the case of *Sudita Keita v Hungary* the ECtHR has since reaffirmed the *Hoti* judgment and stressed the importance of a regularization mechanism for stateless persons without referring to the concept of social identity, *Sudita Keita v Hungary* [2020] ECtHR Application No. 42321/15. See further Barbara von Rütte, 'Social Identity and the Right to Belong — The ECtHR's Judgment in Hoti v Croatia' (2019) 24 Tilburg Law Review 147; Katja Swider, 'Hoti v Croatia' (2019) 1 The Statelessness and Citizenship Review 184.

138 *Hoti v Croatia* (n 137) para 7.

139 *ibid 75.*

140 *ibid 119.*

141 *ibid 125.*

noted that it was "not called upon to examine whether the applicant should be granted Croatian citizenship but rather whether, if he had chosen not to become Croatian citizen or had failed to do so, he would have an effective possibility to regularise his residence status".[142] Nevertheless, it shows that the ties based on a person's social identity can be so strong as to give rise to a positive right to acquire a particular legal status in a specific state.

When balancing the competing interests, the Court not only takes into consideration the ties of the individual concerned to the country of residence but also to the country of origin.[143] In this regard, the case of *Beldjoudi v France* is particularly interesting.[144] The applicant was born in France to parents of Algerian origin, who at that time, under the French colonial system, had French nationality. After the independence of Algeria, the parents failed to lodge a declaration for the family recognizing their French nationality and consequently lost it. Though born in France to then French parents, Mr. Beldjoudi suddenly found himself being an Algerian national. When France sought to deport him to Algeria after a criminal conviction, he claimed that the deportation would violate his private life since his family ties, social links, cultural connections and linguistic ties were in France.[145] The Court not only examined the applicant's rootedness in France, but also his ties to Algeria. Noting that he had no links to Algeria other than his nationality, the Court found a violation of Article 8 ECHR.[146] In other words, the ECtHR in *Beldjoudi v France* decided in favor of the effective nationality of the applicant, which was French.[147] The Court confirmed this approach in subsequent cases.[148] Nevertheless, in such cases

142 *ibid 131.*

143 *Boultif v Switzerland* (n 133) para 48; *Üner v The Netherlands* (n 132) paras 57 and 58. See eg also *Samsonnikov v Estonia* [2012] ECtHR Application No. 52178/10 para 88.

144 *Beldjoudi v France* [1992] ECtHR Application No. 12083/86.

145 *ibid 71.*

146 *ibid 77.*

147 Kim Rubenstein and Daniel Adler, 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7 Indiana Journal of Global Legal Studies 540; Sloane (n 100) 56 f. See also the concurring opinion of Judge Martens in the *Beldjoudi* case who refers to the concept of 'one's own country' when describing the applicant's ties to France, European Court of Human Rights, 'Dissenting Opinion Judge Martens in Beldjoudi v France' (European Court of Human Rights 1992) Application No. 12083/86.

148 See eg *Ezzouhdi v France* [2001] ECtHR Application No. 47160/99 para 34; *Benhebba v France* [2003] ECtHR Application No. 53441/99 para 36; *Mokrani v France* [2003] ECtHR Application No. 52206/99 para 31. The Supreme Court of the United Kingdom applied the reasoning of the ECtHR to a deportation case in the case *R* (*on the application of Johnson*) (*Appellant*) *v Secretary of State for the Home Department* (*Respondent*) [2016] UK Supreme Court [2016] UKSC 56.

concerning second generation migrants, the Court not always decides in favor of the applicant but sometimes finds the state's interest to migration control to outweigh the individual's right to private life.[149] A striking example here is the case of *Pormes v The Netherlands* where the court rejected a violation of Article 8 ECHR.[150] The case concerned a young man born to an Indonesian mother and a Dutch father, though the paternity was never formally established. Growing up with the family of his paternal uncle in the Netherlands, the applicant was unaware that he had not formally acquired Dutch citizenship and had no legal status in the Netherlands.[151] After finding out, he applied unsuccessfully for a residence permit. During this procedure, he was convicted of assault and, subsequently, ordered to leave the Netherlands. The Court acknowleged that the applicant had very close ties to the Netherlands and cannot be reproached for the unlawful character of his stay.[152] Nevertheless, it concluded that given the seriousness of the offences the removal to Indonesia — despite the absence of any social or family ties — was proportionate.[153] The fact that the applicant only by accident was not a Dutch citizen, however, was not discussed in the judgment.[154]

The ECtHR's social identity doctrine under Article 8 ECHR is interesting for the principle of *jus nexi*. It allows for the consideration of social, economic and cultural ties, as well as the development of one's identity of non-citizens in their state of residence. In fact, the elements taken into consideration under the notion of social identity are similar to factors examined in the 'center of interests' test to determine the *jus nexi* based right to citizenship. As Robert Sloane has noted, what the Court effectively does in these cases is apply a variant of the genuine link theory to protect long-term residents — ie persons who have the center of their lives in a Convention state — against a merely formal nationality.[155]

The ECtHR has mainly developed its case law through cases concerning the withdrawal of a residence permit and the deportation from the country of

149 *Baghli v France* [1999] ECtHR Application No. 34374/97; *Benhebba v France* (n 148); *Kaya v Germany* [2007] ECtHR Application No. 31753/02. See also the criticism voiced by Dembour, *When Humans Become Migrants* (n 53).

150 *Pormes v The Netherlands* [1999] ECtHR Application No. 25402/14.

151 *ibid para 8*.

152 *ibid para 64*.

153 *ibid para 67 ff*.

154 See European Court of Human Rights, 'Dissenting Opinion Judge Ranzoni, joined by Judge Ravarani in Pormes v The Netherlands' (European Court of Human Rights 2020) Application No. 25403/14 para 17 ff.

155 Sloane (n 100) 56 f.

residence or the legalization of undocumented migrants. Some commentators have even argued that the protection offered to long-term residents amounts to *de facto* citizenship or to a protection of rights that are otherwise only secured by citizenship itself.[156] But is it also relevant for questions directly relating to access to or loss of citizenship? In the case of *Hoti v Croatia* the Court has been careful to stress that the cases did not concern acquisition of citizenship.[157] Nevertheless, the Court has also established a clear line of case law according to which access to and loss of citizenship raise an issue under the right to private life according to Article 8 ECHR. This is despite a right to citizenship not being covered by the Convention.[158] As the judgment in the case of *Genovese v Malta* makes clear

> [...] the denial of citizenship may raise an issue under Article 8 [ECHR] because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person's social identity.[159]

Thus, the Court's concept of social identity includes citizenship. Acquisition and loss of citizenship are covered by the right to private life. One can argue that the social identity approach, which considers whether a person has such close ties to a state that the connection to that state becomes part of their social identity, corresponds to the center of interests concept, which is at the heart of the *jus nexi* principle. In such an interpretation, having or not having

156 See eg Ryszard Cholewinski, 'Strasbourg's "Hidden Agenda"?: The Protection of Second-Generation Migrants from Expulsion under Article 8 of the European Convention on Human Rights' (1994) 12 Netherlands Quarterly of Human Rights 287, 298 ff. Rubenstein and Adler (n 147) 539; Daniel Thym, 'Residence as De Facto Citizenship? Protection of Long-Term Residence Under Article 8 ECHR' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014). More critical Dembour, 'Collusion' (n 48); Dembour, *When Humans Become Migrants* (n 53).

157 *Hoti v Croatia* (n 137) para 131.

158 *Karassev v Finland* (*Decision*) [1999] ECtHR Application No. 31414/96. See also *Slivenko v Latvia* (n 129) para 77; *Kuduzovic v Slovenia* [2005] ECtHR Application No. 60723/00; *Riener v Bulgaria* [2006] ECtHR Application No. 46343/99; *Makuc and others v Slovenia* [2007] ECtHR Application No. 26828/06; *Kurić and Others v Slovenia* (*Chamber*) [2010] ECtHR Application No. 26828/06 para 353. See Chapter 4, II.2.2.1.2.

159 *Genovese v Malta* (n 56) para 33. Subsequently confirmed in *Ramadan v Malta* [2016] ECtHR Application No. 76136/12. The idea of a link between a person's social identity and her citizenship was in fact first brought up in a partly dissenting opinion by Judge Maruste in *Riener v Bulgaria*, European Court of Human Rights, 'Dissenting Opinion Judge Maruste in *Riener v Bulgaria*' (2006) Application No. 46343/99.

citizenship becomes a matter of private life where there are such close ties and genuine connections to a place.

The Human Rights Committee has adopted a similar approach in their interpretation of Article 17 ICCPR.[160] According to the jurisprudence of the Committee, the deportation of non-citizens with substantial ties to the host state can amount to a violation of the right to private and family life.[161] Under the framework of the ICCPR, however, there is a second line of case law developed by the Human Rights Committee that is interesting in the context of the principle of *jus nexi* — the case law on the right to enter one's own country under Article 12(4) ICCPR, which shall be discussed in the following section.

2.2 The Right to Enter One's Own Country

Article 12(4) ICCPR stipulates that no one shall be arbitrarily deprived of the right to enter his or her own country. In the case of *Stewart v Canada*, a British national who lived in Canada from an early age was later to be deported due to a criminal conviction. The HRCttee examined whether the complainant could claim that Canada was 'his own country', even though he did not have Canadian citizenship.[162] The Committee famously noted that the notion of 'his own country' under Article 12(4) ICCPR is broader than the concept of 'country of his nationality'.[163] It "applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not 'aliens'".[164] As the Committee later noted in General Comment No. 27, the concept of one's own country "is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered a mere alien".[165] Thus, the right to

160 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 ('ICCPR').

161 See amongst many *Winata and Li v Australia, Communication No 930/2000* [2001] HRCttee Communication No. 930/2000 para 7.3; *Madafferi and Family v Australia* [2004] HRCttee Communication No. 1011/2001 para 9.8.

162 *Stewart v Canada, Communication No 538/1993* [1996] HRCttee UN Doc. CCPR/C/58/D/538/1993.

163 *ibid 12.3*. See on the concept of one's own country under Article 12(4) ICCPR generally Babak Fargahi, *Das Konzept des eigenen Landes gemäss Art. 12 Abs. 4 UNO-Pakt II im Lichte der Strassburger sowie der Schweizer Wegweisungspraxis gegenüber Ausländern der zweiten Generation* (Dike 2016).

164 *Stewart v Canada* (n 162) para 12.3.

165 Human Rights Committee, 'General Comment No. 27: Article 12 (Freedom of Movement)' (HRCttee 1999) UN Doc. CCPR/C/21/Rev.1/Add.9 para 20. See also *Stewart v Canada* (n 162) para 12.4.

enter one's own country applies to everyone whose ties to the country of residence are so strong that it becomes their center of life. In the case of *Stewart v Canada*, the HRCttee ultimately found that such ties were only given if a person was stripped of his or her nationality in violation of international law, if the nationality was denied in the context of a state succession or if a stateless person was arbitrarily deprived of his or her right to acquire the nationality of the country of residence.[166] Considering that Canada was not Stewart's 'own country' because he had never attempted to acquire Canadian citizenship and thus lacked the necessary special ties, the Committee found no violation of the ICCPR.[167] This limitation of the concept of one's own country was criticized as too formalistic.[168] A dissenting opinion pointed out that the aim of the right to enter one's own country was to protect individuals against the deprivation of close contact with their families, friends and "web of relationships that form his or her social environment".[169] The Committee subsequently confirmed this approach in a number of cases but continued to interpret it very restrictively and denied a violation of Article 12(4) ICCPR. Both in the case of *Canepa v Canada* as well as in *Madafferi v Australia* the Committee was not convinced by the complainants' claim that Canada and Australia were their own countries.[170] In the case of *Toala et al. v New Zealand*, the complainants argued they had a right to enter New Zealand based on Article 12(4) ICCPR after New Zealand revoked a law granting New Zealand citizenship to all citizens of Western Samoa.[171] The Committee rejected the claim that the applicants had been arbitrarily deprived of their right to enter their own country as they had no connection with New Zealand by birth, descent or residence and had never been to New Zealand.[172]

166 *Stewart v Canada* (n 162) para 12.4. See also *Canepa v Canada, Communication No 558/1993* [1997] HRCttee UN Doc. CCPR/C/59/D/558/1993 para 11.3.

167 *Stewart v Canada* (n 162) para 12.6 ff.

168 Fargahi (n 163) 47.

169 Human Rights Committee, 'Individual Opinion by Evatt and Medina Quiroga, Co-Signed by Aguilar Urbina (Dissenting) in Stewart v Canada' (HRCttee 1996) UN Doc. CCPR/C/58/D/538/1993 para 5. Similarly also Human Rights Committee, 'Individual Opinion by Bhagwati (Dissenting) in Stewart v Canada' (HRCttee 1996) UN Doc. CCPR/C/58/D/538/1993.

170 *Canepa v Canada* (n 166); *Madafferi v Australia* (n 161).

171 *Toala et al v New Zealand, Communication No 675/1995* [2000] HRCttee UN Doc. CCPR/C/63/D/675/1995.

172 *ibid n.5.*

The Committee continued to develop the concept.[173] In the case of *Nystrom v Australia*, it opened the scope and confirmed that the concept of one's own country is not limited to nationality in the formal sense:

> [T]here are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words "his own country" invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.[174]

The approach taken in *Nystrom v Australia* — and subsequently in *Warsame v Canada*[175] and *Budlakoti v Canada*[176] — is broader than that in *Stewart v Canada*. The HRCttee not only accepts formal ties, but also offers protection for informal links based on long standing residence, social and family ties, the absence of ties to any other country and the individual's intention to remain.[177] In the case of *Warsame v Canada* the Committee acknowledged that these "factors other than nationality which may establish close and enduring connections between a person and a country may be stronger than those of nationality".[178]

Building on the ties of a person to her country of residence, the concept of one's own country developed by the Human Rights Committee is similar to the principle of *jus nexi*. The approach embraces categories of long-term residents, such as "stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence", as well as other individuals with close and enduring connections to the country.[179] Interestingly, the HRCttee also takes into consideration the individual's intention when assessing the concept of one's own country.[180] Even though the right to one's own country does not as such entail access to the citizenship of that country, it directly establishes a

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173 See also Human Rights Committee, 'General Comment No. 27' (n 165) para 19 ff.

174 *Nystrom v Australia, Communication No 1557/2007* [2011] HRCttee UN Doc. CCPR/C/102/D/1557/2007 para 7.4.

175 *Jama Warsame v Canada, Communication No 1959/2010* [2011] HRCttee UN Doc. CCPR/C/102/D/1959/2010.

176 *Deepan Budlakoti v Canada, Communication No 2264/2013* [2018] HRCttee UN Doc. CCPR/C/122/D/2264/2013.

177 Fargahi (n 163) 49. See eg also *Budlakoti v Canada* (n 176) para 9.3.

178 *Warsame v Canada* (n 175) para 8.4.

179 Human Rights Committee, 'General Comment No. 27' (n 165) para 20.

180 *Nystrom v Australia* (n 174) para 7.4; *Warsame v Canada* (n 175) para 8.4; *Budlakoti v Canada* (n 176) para 9.2.

right of persons with a '*jus nexi*' to enter and remain in that state. This implies that states may be obliged to enable long-term residents to ultimately acquire nationality. Ultimately, the right to be and remain in a country and to establish links there should give rise to a claim to become a full member, a citizen. As Vlieks et al note:

> the concept of "own country" represents an approach which asserts the relevance of particular forms of connection with regard to the exercise of particular rights, helping to bridge the gap between the freedom of States to determine what connection between individual and State is sufficient for the acquisition of nationality, and the right of every person to a nationality.[181]

Thereby, the concept of 'one's own country' indirectly contributes to shaping the contours of a *jus nexi*-based right to citizenship.

The evaluation of the case law of the ECtHR and the HRCttee shows that the principle of *jus nexi* is not foreign to human rights law.[182] Elements of *jus nexi* underpin the case law of both international tribunals.[183] If the principle of *jus nexi* is rooted in internationally recognized and protected human rights such as the right to private life under the ECHR and the right to one's own county under the ICCPR, what about applying it to the right to citizenship? I would argue that applying the principle of *jus nexi* to the right to citizenship would assist in better substantiating its scope and content. Based on *jus nexi*, the personal scope of the right to citizenship can be broadened to include everyone with a sufficiently close connection; with a *jus nexi*. Looking at the right to citizenship from the perspective of the principle of *jus nexi* would assist in determining the state responsible for protecting, respecting and fulfilling the right to citizenship, which is claimed to be underdetermined. Once the state responsible is identified — based on an individual's ties under the principle of *jus nexi* — the enforceability of the right to access the citizenship of that state would be strengthened.[184] Before turning to the discussion on what implications arise from reframing the right to citizenship on the basis of *jus nexi* (see

181 Vlieks, Hirsch Ballin and Recalde-Vela (n 7) 169.

182 At the domestic level, *jus nexi* is rarely used, as Shaw demonstrates, Shaw, *The People in Question* (n 48) 101 ff.

183 See similarly Vlieks, Hirsch Ballin and Recalde-Vela (n 7) 169.

184 See also Indira Goris, Julia Harrington and Sebastian Köhn, 'Statelessness: What It Is and Why It Matters' (2009) 32 Forced Migration Review 4, 6.

below III. and IV.), I first want to address when a person can be said to have an entitlement based on *jus nexi*. What are the factors that give rise to a genuine connection?

3 *Connecting Factors for a* Jus Nexi

I have referred to the principle of *jus nexi* as a genuine connection principle of membership acquisition.[185] It provides for access to citizenship based on the social and factual connections of a person. But what kind of connections give rise to a *jus nexi*? According to the ICJ in the *Nottebohm* case

> Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.[186]

As this passage of the judgment shows, there is a broad range of different possible links between an individual and society that can form the basis for a genuine connection — residence, family ties, social connections and cultural, political or economic links. Attributing nationality based on particular links, as is suggested with *jus nexi*, is not new. The principles of *jus soli* and *jus sanguinis* are also based on a particular connection — place of birth in *jus soli* and descent in *jus sanguinis*. Thus, state practice recognizes birth in the territory and descent as the most important ties to justify the acquisition of nationality.[187] Other connecting factors such as residence, marriage, language skills, social ties or participation in public life are, moreover, well-established criteria for acquiring of nationality through naturalization.[188]

In the following section I propose to distinguish three broader groups of connections — territorial connections (II.3.1), familial or social ties (II.3.2) and

185 Shachar, *The Birthright Lottery* (n 6) 164. See above Chapter 6, II.1.

186 *Nottebohm* (n 91) 22.

187 Human Rights Council, 'Report 13/34 of the Secretary General on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2009) UN Doc. A/HRC/13/34 para 37. See also Vlieks, Hirsch Ballin and Recalde-Vela (n 7) 165.

188 See also Council of Europe, 'Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality' (Council of Europe 1999) 49 f.

emotional, cultural, professional or economic links (II.3.3).[189] While I believe that these are the most relevant connecting factors, there are certainly other possible links not explicitly mentioned here that can create a connection to a state. The following discussion therefore does not aim to be conclusive.

3.1 Territorial Ties

The first group of possible *nexi* with a state are those factors that relate to the territory; to the territorial presence of a person within a state. Territorial connections are formal links relating to physical presence. They have the advantage of being relatively objective and easy to verify.[190] Among possible territorial connections, the primarily link is residence but other connections arise, such as, for example, birth in the territory. The possession of a residence right on the basis of international obligations may also be a connecting factor based on territory, as the individual concerned is granted a right to remain on the territory based on this obligation.

3.1.1 *Residence*

Residence, namely long-term or permanent residence, is one of the most important connecting factors. Permanent residence in a state creates a strong indication of a genuine connection to that state.[191] Residence is widely recognized as a prerequisite for acquiring citizenship. The vast majority of nationality laws worldwide foresee a minimum period of residence as one of the requirements for naturalization.[192] The criteria of residence features prominently in those international instruments that discuss the acquisition of nationality. Article 6(3) ECN and the proposed Article 6 AU Draft Protocol on Nationality call upon states to provide for the possibility of naturalization for lawful and habitual residents. In the *Nottebohm* case, the ICJ found that habitual residence is an important factor to be taken into consideration to identify

189 For these three categories of possible meaningful kinds of connections see Ayelet Shachar, 'The Marketization of Citizenship in an Age of Restrictionism' (2018) 32 Ethics & International Affairs 3, 9.

190 Council of Europe, '1st European Conference on Nationality' (n 188) 49.

191 van Waas, *Nationality Matters* (n 13) 32.

192 See already Paul Weis, *Nationality and Statelessness in International Law* (2nd ed, Sijthoff & Noordhoff 1979) 99. See also Article 6(3) ECN that urges states to limit the required period of residence to a maximum of ten years. Some states however know provisions that waive the residence requirements in special cases, eg in the case of investment citizenship programs. See also Global Citizenship Observatory (GLOBALCIT), 'Global Database on Modes of Acquisition of Citizenship, Version 1.0' (GLOBALCIT 2017) <https://globalcit.eu/modes-acquisition-citizenship/>.

a person's center of life.[193] Similarly, the ECtHR has repeatedly confirmed that the duration of a person's stay in a country is a weighty element to be taken into consideration in an assessment of a violation of Article 8 ECHR, as there is the assumption "that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be".[194]

Residence as a connecting factor is not necessarily limited to legal residence, ie residence in accordance with the immigration laws of a state. Current state practice does not normally recognize the presence of undocumented migrants as residence when it comes to the attribution of citizenship.[195] This is reflected in Articles 6 ECN and AU Draft Protocol, which allow states to require lawful residence as a precondition for naturalization. However, it is not decisive for the establishment of a genuine link whether a person has a legal status or not.[196] A person can also establish substantial ties — in particular, social and cultural ties, but often also economic ties — without having a residence permit. In the case of *Sisojeva v Latvia*, the ECtHR found that the applicants, despite living irregularly in Latvia, had built strong enough ties to the state to fall under the notion of private life within the meaning of Article 8(1) ECHR.[197] The Court concluded that the refusal of Latvian authorities to grant the applicants a permanent right to reside in the state violated their right to private life.[198] In the case of *Hoti v Croatia*, the ECtHR found that Croatia was under a similar obligation to regularize the applicant who had lived in Croatia for almost forty years, though not always regularly.[199] The two cases illustrate that irregular residence does not hinder the establishment of a genuine connection to the state that can give rise to a legal entitlement to membership.

193 *Nottebohm* (n 91) 22.

194 *Üner v The Netherlands* (n 132) para 58.

195 See for example also Article 6 (2) and (3) ECN that refers to 'lawful and habitual residence'.

196 Shachar draws the analogy to the institute of adverse possession in property law to argue why residence of undocumented migrants nevertheless builds up to a genuine connection giving rise to a *jus nexi* over time, see Shachar, *The Birthright Lottery* (n 6) 184; Shachar, 'Earned Citizenship' (n 61) 147 ff. See also Catherine Dauvergne, 'Challenges to Sovereignty: Migration Laws for the 21st Century' (2003) UNHCR Working Paper No. 92 <http://www.unhcr.org/research/working/3f2f69e74/challenges-sovereignty-migration-laws-21st-century-catherine-dauvergne.html> 9; Owen, 'The Right to Have Nationality Rights' (n 82) 314.

197 *Sisojeva v Latvia* (n 135) para 102.

198 *ibid 105 f.*

199 *Hoti v Croatia* (n 137). See also *Sudita v Hungary* (n 137); *Pormes v The Netherlands* (n 150) para 58.

Thus, permanent residence is an objective and reasonable basis to grant nationality.[200] Some authors even argue that residence should be a necessary condition for acquiring citizenship. Yaffa Zilbershats claims that "[if] residence is the basic moral justification for obtaining citizenship, then the process of naturalization which is not preceded by residence in the place is defective in nature".[201] If the criterion of residence is met, she argues, the state is under a duty to grant citizenship.[202] Similarly, Rubio-Marín argues that permanent residents should be recognized as citizens without having to fulfill additional criteria.[203] Based on a *jus domicilii*, individuals who permanently live in a state should be recognized automatically and unconditionally as citizens.[204]

I agree that residence is a central condition for acquiring citizenship and that it allows for an objective criterion that can be applied in a non-discriminatory manner. In that sense, it can be a sufficient basis for acquiring nationality, especially in the absence of other links.[205] However, I would argue that residence is neither the sole relevant connecting factor nor is it a necessary connecting factor for *jus nexi*. There can be situations where a person has substantial ties to a place without necessarily being a habitual resident.[206] Imagine a cross-border commuter that has worked in a state for years, has close social ties to their colleagues and friends, is integrated into the labor market, speaks the language and maybe even participates in public and political life — for example by being active in a professional association. However, they do not legally reside in the state. Does that mean she cannot claim a genuine connection to that state? Such a person could, depending on the depths of other connecting factors, build a connection to the state that can be strong enough to be considered a center of life and hence give rise to a *jus nexi* claim. Another example could be a binational couple where each partner resides in a different country but regularly spends time in the other. If in such a situation an additional connecting factors exist, it is not impossible for a genuine connection to be built despite the lack of residence in a country.

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200 Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 International Journal of Refugee Law 163.

201 Yaffa Zilbershats, 'Reconsidering the Concept of Citizenship' (2001) 36 Texas International Law Journal 689, 713.

202 *ibid 714.*

203 Ruth Rubio-Marín, 'National Limits to Democratic Citizenship' (1998) 11 Ratio Juris 51; Rubio-Marín, *Immigration as a Democratic Challenge* (n 22). See also Kostakopoulou who proposes to make citizenship anational and base it on domicile, Kostakopoulou (n 40).

204 See in more detail Chapter 2, III.2.3.

205 Batchelor, 'Resolving Nationality Status' (n 200) 163.

206 Farahat (n 77) 59 f.

I would argue that reducing the question where one's center of life is — and ultimately where one should have citizenship — to the question where one resides bears two risks. First, it risks excluding modern forms of mobility where people do not move mono-directionally between two countries but move in circular and repeated patterns of transnational mobility.[207] Focusing solely on residence might disproportionately affect highly mobile persons that do not necessarily have long periods of residence in a particular state and migrants who retain ties to their country of origin or the country of origin of their parents.[208] In particular, children of migrants might have substantial ties to more than one country.[209] Secondly, it shifts the discussion about the societal inclusion and exclusion of non-citizens ever more so to the border and to the question of who gets physical access to a state's territory in the first place.[210] The question of when someone is granted citizenship becomes purely based on their (legal) physical presence over a certain period of time, increasing pressure to physically exclude non-citizens from access to the territory. While I fully agree that residence is an important element of one's center of life, and physical presence on a territory brings with it several other connecting factors and see the advantages of having a formal criterion, I concur with Shachar that making "territorial presence the all-or-nothing criterion" is not satisfactory.[211] I would, for these reasons, argue that residence can neither be the only nor can it be a necessary connecting factor.

Considering these different arguments, it becomes clear that residence is particularly important among several possible connecting factors and creates such ties between an individual and a state that it might give rise to a *jus nexi* based right to citizenship. The required duration of residence will vary from case to case, depending on the existence of possible other connecting factors. However, whether the person concerned is staying in the host state regularly or not does not affect the establishment of a genuine connection *per se*.

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207 See also Anuscheh Farahat, 'The Exclusiveness of Inclusion: On the Boundaries of Human Rights in Protecting Transnational and Second Generation Migrants' (2009) 11 European Journal of Migration and Law 253.

208 See Human Rights Council, 'Report 13/34' (n 187) para 39. See also Conklin (n 104) 223.

209 Human Rights Council, 'Report 13/34' (n 187) paras 37 and 65.

210 See also Linda Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 International Journal of Constitutional Law 9, 21 as well as the criticism raised by Shachar on Kostakopoulou's model of anational citizenship; Ayelet Shachar, 'The Future of National Citizenship: Going, Going, Gone?' (2009) 59 University of Toronto Law Journal 579, 586.

211 Shachar, *The Birthright Lottery* (n 6) 179.

3.1.2 *Birth in the Territory*

A second connecting factor on the basis of territory is birth in a state.[212] Birth as a connecting factor is mirrored in the principle of *jus soli*.[213] While birth in the territory generally is a relatively weak link, in certain situations it can provide for an important connecting factor.[214]

In particular, birth in the territory provides a sufficient enough link to claim access to citizenship, where a child is otherwise stateless. In this situation, the state of birth is the state to which the child has the closest connection. In fact, it is probably the only state to which the child has an objective connection at all, except maybe for the state of nationality of the parents. Hence, birth in the territory should be recognized as a link significant enough to substantiate a claim to citizenship.

As previously discussed, birth in the territory is an important connecting factor in many provisions that cover the right of the child to a nationality. Article 20(2) ACHR explicitly states that every person has the right to the nationality of the state in whose territory they were born if they do not have the right to any other nationality. Based on this provision, the IACtHR has argued in the case of the *Girls Yean and Bosico v the Dominican Republic* that:

> The fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born.[215]

Similarly, both Article 1 of the 1961 Convention and Article 13 of the ILC Draft Articles on Nationality build on birth in the territory as the connecting factor for attribution of nationality to persons who would otherwise be stateless. Likewise, the provisions relating to the right of the child to acquire a nationality in Article 7 CRC and Article 24(3) ICCPR have been interpreted as entailing an entitlement for otherwise stateless children born in the territory.

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212 See also van Waas, *Nationality Matters* (n 13) 32.

213 See eg Vlieks, Hirsch Ballin and Recalde-Vela (n 7) 165; Carol A Batchelor, 'Developments in International Law: The Avoidance of Statelessness Through Positive Application of the Right to a Nationality' in Council of Europe (ed), *Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality* (Council of Europe 1999) 49.

214 Bauböck and Paskalev (n 8) 67.

215 *Case of the Girls Yean and Bosico v Dominican Republic* [2005] IACtHR Series C No. 130 (2005) para 156.

It follows that birth in the territory can be one of the elements that contribute to the genuine connection an individual has with a state, in the sense of the principle of *jus nexi*. In cases of newborn children who would otherwise be stateless, birth in the territory might even be the only connecting factor and should be enough to give rise to a sufficient enough connection for a right to citizenship.[216] This right to citizenship for otherwise stateless children is compatible with an interpretation of the right to citizenship based on the principle of *jus nexi*.

3.1.3 *Protection*

A third element that creates a particular connection to the territory of the host state, is the granting of international protection. This concerns two groups in particular, refugees and stateless persons. In the absence of a state of nationality or origin that can offer and exercise protection, the relationship between refugees and stateless persons and their state of residence becomes particularly important. The question is whether the protection status does not *per se* create a connecting factor that should facilitate access to citizenship.

Refugees in the sense of Article 1 of the Refugee Convention are unable or unwilling to avail themselves to the protection of their state of nationality and thus are granted international protection.[217] With refugee status, the state of asylum offers the individual concerned a protection status that includes a number of social, economic and civil rights.[218] By granting asylum, the host state assumes responsibility, both internally by offering refugees at least the same rights as other non-citizens,[219] and, presumably, externally by exercising diplomatic protection on behalf of recognized refugees staying in the country lawfully and habitually.[220] This exercise of protection creates a particular bond

216 See also Chapter 5, III.3.1 where I have argued that states have an obligation under the current international legal framework to grant children born on their territory citizenship if they would otherwise be stateless.

217 Article 1 (A) (2) Refugee Convention.

218 James C Hathaway, *The Rights of Refugees Under International Law* (2nd ed, Cambridge University Press 2021) 1207.

219 Article 7 Refugee Convention.

220 Article 8(2) International Law Commission Draft Articles on Diplomatic Protection, 2006, Supplement No. 10, UN Doc. A/61/10 ('ILC Draft Articles on Diplomatic Protection'). However, states have been very reluctant to exercise diplomatic protection on behalf of refugees and courts have rejected claims by refugees *vis-à-vis* their host state to do so, see International Law Commission, 'Commentary on the Draft Articles on Diplomatic Protection' (ILC 2006) Yearbook of the International Law Commission, 2006, Vol. II, Part Two 48, para 2; Andreas Kind, *Der diplomatische Schutz: Zwischenstaatlicher Rechtsdurchsetzungsmechanismus im Spannungsfeld von Individualrechten,*

between the refugee and the host state.[221] The Refugee Convention recognizes this link to a certain extent by suggesting in Article 34 that states should facilitate, as far as possible, the naturalization of refugees.[222] Being granted protection therefore establishes a relevant connection in the sense of the principle of *jus nexi*.

The same is true for stateless persons.[223] Just as Article 34 CSR, Article 32 of the 1954 Convention suggests that state parties "shall as far as possible facilitate the [...] naturalization of stateless persons". What is more, in the case of *Stewart v Canada*, the Human Rights Committee noted that long-term resident stateless persons have a special connection to their host state, to the extent that this state might become their 'own country' in the sense of Article 12(4) ICCPR.[224] The recognition of statelessness creates a special connection between the person concerned and the host state, giving rise to a *jus nexi*. Considering that stateless persons have no nationality at all, the claim of stateless persons based on territorial presence and the granting of a protection should be even stronger. Also, in the absence of other links, these factors alone should be sufficient to justify access to citizenship for stateless persons.[225] The principle of *jus nexi* might therefore be helpful to strengthen stateless persons' right to nationality.[226]

3.2 Familial Ties

3.2.1 *Family Ties*

A second important group covers connections that are built on familial ties to a state. Within this group fall different kinds of family ties that bring with

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Ausseninteressen, Staatsangehörigkeit und Schutzpflichten: Eine schweizerische Perspektive (Dike Verlag Zürich 2014) 118 ff.

221 Annemarieke Vermeer-Künzli, 'Nationality and Diplomatic Protection, A Reappraisal' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 90. The commentary to the ILC Draft Articles on Diplomatic Protection, however, explicitly states that "the exercise of diplomatic protection in respect of a stateless person or refugee cannot and should not be seen as giving rise to a legitimate expectation of the conferment of nationality", see ILC, 'Commentary Draft Articles on Diplomatic Protection' (n 114) 51, para 12.

222 See also Chapter 4, II.1.2.3.

223 See by contrast the German Bundesverwaltungsgericht *Urteil 1 C 2088* [1988] BVerwG 1 C 20.88 para 35.

224 See *Stewart v Canada* (n 162) para 12.4.

225 See by contrast Bauböck and Paskalev who argue that a genuine link conception cannot account for the situation of stateless persons, Bauböck and Paskalev (n 8) 68.

226 International Law Commission, 'Hudson Report' (n 87) 20. See also Batchelor, 'UNHCR and Nationality' (n 88) 112.

them a qualitative connection to the state.[227] Family ties are recognized as a ground for the facilitated acquisition of nationality (by naturalization or registration) in many jurisdictions. Article 6(4)(a) ECN recognizes this principle and suggests that states facilitate the acquisition of nationality for spouses of nationals. In some states marriage still leads to automatically acquiring nationality.[228] Article 12 of the ILC Draft Articles on Nationality also mirrors the importance of family ties as a connecting factor. The provision holds that the states involved in a situation of state succession shall take all appropriate measures to allow a family to remain together or to be reunited on the basis of citizenship. Moreover, the importance of family ties for a person's connection to the host state is mirrored in the extensive case law of the ECtHR on the right to family life in immigration cases.[229]

As discussed in Chapter 5, the rules on acquiring nationality based on family ties should not discriminate on the basis of sex.[230] Nevertheless, nationality laws should protect family ties and relationships of care.[231] Thus, it is legitimate to recognize familial ties as important connecting factors under the principle of *jus nexi*. The notion of family should thereby be understood broadly, so as to include not only the core family of a married (heterosexual) couple and their children, but include non-traditional families such as unmarried couples, single parents, same-sex partnerships and non-Western concepts of family that are recognized in domestic law and practice.[232] Moreover, it should accommodate new family structures made possible through assisted reproduction technologies — namely, surrogacy — to recognize different forms of parenthood.[233] Having family ties in a country can constitute an important

227 *Nottebohm* (n 91) 22.

228 According to the GLOBALCIT database this is the case in several African states, among them Benin, Mali or Somalia, but also in Turkey or Iran, see Global Citizenship Observatory (GLOBALCIT), 'Database Acquisition of Citizenship' (n 192). Such automatic acquisition rules are problematic from a gender equality perspective. The ECN rejects the automatic change of nationality on the basis of marriage or dissolution of marriage in Article 4(d).

229 See above Chapter 6, II.2.1.

230 See Chapter 5, III.2.1.1.

231 Karen Knop, 'Relational Nationality: On Gender and Nationality in International Law' in T Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001) 110.

232 *ibid.* See also Human Rights Committee, 'General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (HRCttee 1990) para 2.

233 See Ana Tanasoca, 'Distributing Some, but Not All, Rights of Citizenship According to Ius Sanguinis' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer International Publishing 2018) 144.

element of a person's connectedness to a state. A *jus nexi*-based right to citizenship could take these ties into consideration.

3.2.2 *Descent*

The element of descent is also among the connecting factors that build on an emotional attachment to the state.[234] Like birth on the territory, descent is one of the main connecting factors linking a person to a particular state. It is the connecting factor underpinning the principle of *jus sanguinis*.[235] However, descent does not relate to the territory one is born in, but to the attachment to the state of citizenship through descent and the familial relationship. Descent in that sense relates to a particular form of family ties to one's parents. The principle of *jus sanguinis* attributes citizenship based on a person's social attachment to a state *via* her family ties and the link to her parents. This allows for the creation of intergenerational connections and protection of family unity. These kinds of connections could also be taken into consideration under the principle of *jus nexi*.

3.2.3 *Childhood and Adolescence*

Another example of an emotional attachment that creates a strong social and emotional attachment between a person and the society of her state of residence is the period of childhood and adolescence. Childhood and adolescence are particularly formative years for a person's social identity.[236] The situation of children born and raised in a state, who have spent their childhood and adolescence there, is often given particular weight in migration law.[237] Article 6(4)

234 Like family, descent not only covers a person's biological descent but also the establishment of family ties based on assisted reproduction technologies such as surrogacy as well as adoption.

235 Batchelor, 'Developments in International Law' (n 213) 49.

236 *Maslov v Austria* (n 134) para 42.

237 William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 397; Daniel Thym, 'Menschenrecht auf Regularisierung des Aufenthalts? Rechtsprechung des EGMR zum Schutz des Privat- und Familienlebens nach Art. 8 EMRK und deren Verhältnis zum nationalen Ausländerrecht' (2006) 33 Europäische Grundrechte-Zeitschrift 541, 545. See also other cases concerning second generation migrants that were born in the host state or immigrated at a very young age, such as *Moustaquim v Belgium* [1991] ECtHR Application No. 12313/86; *Mehemi v France* [1997] ECtHR Application No. 25017/94; *Boujlifa v France* [1997] ECtHR Application No. 25404/94; *Ezzouhdi v France* (n 148); *Benhebba v France* (n 148); *Samsonnikov v Estonia* (n 143). A similar approach is also taken by Council of Europe bodies arguing that persons born or raised in a state should not be expelled under any circumstances, see Council of Europe, Committee of Ministers, 'Recommendation Rec(2000)15 of the Committee of Ministers to Member States Concerning the Security of Residence of Long-Term Migrants'

ECN, for example, calls upon state parties to facilitate the acquisition of nationality for persons who were born on their territory and continue to live there (let. e) and for persons who lawfully and habitually reside on the territory from a period beginning before the age of 18 and continuing into adulthood (let. f).[238] There is also a rich case law recognizing the special weight of ties established at a young age. The ECtHR has stated in the case of *Maslov v Austria* that:

> In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile.[239]

In the case of *Mokrani v France*, the Court found with regard to the elements to be assessed in expulsion cases under Article 8 that:

> Les mêmes critères doivent à plus forte raison être utilisés pour les immigrés de la seconde génération ou des étrangers arrivés dans leur prime jeunesse, pour autant que ceux-ci aient fondé une famille dans leur pays d'accueil. Si tel n'est pas le cas, la Cour n'aura égard qu'aux trois premiers d'entre eux. S'ajoutent toutefois à ces différents critères, les liens particuliers que ces immigrés ont tissés avec le pays d'accueil où ils ont passé l'essentiel de leur existence. Ils y ont reçu leur éducation, y ont noué la plupart de leurs attaches sociales et y ont donc développé leur identité propre. Nés ou arrivés dans le pays d'accueil du fait de l'émigration de leurs parents, ils y ont le plus souvent leurs principales attaches familiales. Certains de ces immigrés n'ont même conservé avec leurs pays natal que le seul lien de la nationalité.[240]

The ECtHR argued that, in case of second generation migrants (or children who immigrated at a very young age), stronger arguments have to be put forward to justify an expulsion. The Court confirmed that being born in a country makes

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(Committee of Ministers 2000) para 4.c; Parliamentary Assembly of the Council of Europe, 'Recommendation 1504 (2001) on Non-Expulsion of Long-Term Immigrants' (PACE 2001) para 11.2.h.

238 See similarly the proposed Article 6(2)(d) AU Draft Protocol on Nationality.

239 *Maslov v Austria* (n 134) para 75.

240 *Mokrani v France* (n 148) para 31.

a difference to that person's social, cultural and family ties in that country.[241] The Human Rights Committee gives considerable weight to the ties developed at a young age, as the case law on Article 12(4) illustrates.[242]

These examples illustrate the special weight attributed to the process of socialization during childhood and adolescence. A person who has spent her childhood and adolescence in a state usually has a particularly close connection to the state.[243] Thus, members of the 1.5 generation of migrants, and even more so members of the second generation who have spent their childhood and adolescence in a state, have a very strong claim to citizenship on the basis of *jus nexi*.[244] Hence, childhood and adolescence are connecting factors based on a particular emotional attachment that can create the foundation for a *jus nexi*-based right to citizenship.

3.3 Social, Professional, Cultural or Political Ties

Within the third group are those kinds of links that arise based on personal ties to the host state. These social, emotional, cultural, political, professional or economic factors are often described with the notion of *integration*. These factors reflect the connections that have developed between a migrant and the host state over time.[245] They relate to the endeavors of the person concerned to establish a life, participate in public and social life and build social, cultural and economic ties in a host society. For example, migration law knows the assessment of such criteria in the form of hardship procedures, eg to regularize undocumented migrants or to grant persons with a removal order a right to remain.[246] Weighing these personal ties and the integration of persons, however, runs the risk of excluding people who do not have the same opportunities to participate in public life. Hence, an assessment of personal

241 *Maslov v Austria* (n 134) para 73.

242 Eg *Warsame v Canada* (n 175) para 9.3.

243 See also Thomas Soehl, Roger Waldinger and Renee Luthra, 'Social Politics: The Importance of the Family for Naturalisation Decisions of the 1.5 Generation' (2020) 46 Journal of Ethnic and Migration Studies 1240.

244 Shachar, 'Earned Citizenship' (n 61) 144. See also Shachar, *The Birthright Lottery* (n 6) 183.

245 Shachar, 'Earned Citizenship' (n 61) 133.

246 Many states know some kind of hardship or regularization mechanism which allows to regularize irregular migrants. In the US, for example, 'equities', personal characteristics, are weighed in favor of the person concerned, see Shachar, 'Earned Citizenship' (n 61) 133 f. In Switzerland, 'Operation Papyrus', a regularization program for sans papiers in the Canton of Geneva granted irregular migrants a residence permit if they *inter alia* were financially independent, more information <https://www.sem.admin.ch/sem/de/home/themen/aufenthalt/sans-papiers/papyrus.html>.

ties must in any case take the specific circumstances of the particular case into consideration.

Social ties are a central form of connection within this category. Social ties go beyond family ties in a narrow sense, as discussed above. They cover all forms of personal relationships, including friendships, professional relationships or contacts at the local level in one's place of residence. All these social contacts should be recognized as connecting factors that can give rise to a relevant link under the principle of *jus nexi*. As the ECtHR does with regard to the right to private life where "the totality of social ties between settled migrants and the community in which they are living" are taken into consideration, these ties should also be recognized as elements of a *jus nexi* and thus support a claim to citizenship.[247]

Other connections can be establish on the basis of a particular effort or commitment of the person concerned in the host state. An example would be *education* in the host state. This is particularly true for children and young adults, where completing their education after birth in the territory, or entry into the country at a young age, as alongside a particular residence period creates strong social and cultural ties. It implies that a person has the necessary language skills and will generally be able to participate in the society. The ECtHR has repeatedly stressed the importance education for establishing ties to the country of residence in the context of the right to private life.[248] In the *Üner* case, Strasbourg held that "it is self-evident that the Court will have to regard the special situation of aliens who have [...] received their education [in the host country]".[249] In *Trabelsi v Germany*, a case concerning a second generation migrant from Tunisia, the Court noted that the applicant had his main social ties — his center of life — in Germany, where he was not only born but also received his education.[250] In the case of *A.A. v the United Kingdom*, that the applicant had obtained a number of high school qualifications, was enrolled in college and obtained a university degree was considered favorably by the Court.[251] The CJEU has also confirmed that students who stay in a member state for a certain period of time in order to acquire an education establish

247 *Üner v The Netherlands* (n 132) para 59.

248 *Boujlifa v France* (n 237) para 44; *Benhebba v France* (n 148) para 33; *Slivenko v Latvia* (n 129) para 96; *Samsonnikov v Estonia* (n 143) para 88.

249 *Üner v The Netherlands* (n 132) para 58. See also *Kaya v Germany* (n 149) para 53; *Maslov v Austria* (n 134) para 74.

250 *Trabelsi v Germany* [2011] ECtHR Application No. 41548/06 para 62. See also *Mutlag v Germany* [2010] ECtHR Application No. 40601/05 para 58.

251 *AA v The United Kingdom* [2011] ECtHR Application No. 8000/08 para 62.

a certain connection to that state, and are to be considered integrated, which grants them certain rights *vis-à-vis* that state.[252]

Participation in the labor market is similar to education. It also serves as a connecting factor with the host state due to its impact on the social identity of a person. Like education, work or employment implies that the person concerned has certain social ties and, usually, language skills. Participation in the labor market has long been recognized as an important element of a person's private life and social identity in immigration case law. In the case of *Bajsultanov v Austria*, for example, the ECtHR notes that the applicant had never worked in the host state despite living there for almost nine years and concludes, based on that and other factors, that he did not have significant ties to Austria.[253] Moreover, participation in the labor market and, related to that, financial independence is a wide-spread requirement to acquire citizenship by way of naturalization.[254]

A third element I would like to mention that can represent a certain social fact of attachment is *language*.[255] Like education and participation in the labor market, language is an element that has also been an important aspect of integration and private life in the case law of the ECtHR.[256] Again, the case of *Bajsultanov v Austria* provides an interesting example. *In casu*, the Court found that the applicant did not have particularly strong ties to the host country despite a relatively long period of residence and explained, among other things, that its decision was based on his poor language skills.[257]

There are other possible connecting factors based on personal connections in the host state. For example, in the *Nottebohm* judgement, the ICJ lists *participation in public life* as one of possible additional factors that can constitute a genuine link.[258] While the ICJ does not further specify what kind of participation it has in mind, it seems clear that political activities — maybe even the exercise of political rights, as far as such are granted to non-citizens — but also activities such as membership in civil society organizations, associations or clubs can be an important element in making a state the center of a person's

252 *The Queen ex parte Dany Bidar v London Borough of Ealing, Secretary of State for Education and Skills* [2005] CJEU C-209/03 para 60; *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] CJEU C-158/07 para 49 f.

253 *Bajsultanov v Austria* [2012] ECtHR Application No. 54131/10 para 85.

254 Shachar, 'Beyond Open and Closed Borders' (n 46) 21.

255 van Waas, *Nationality Matters* (n 13) 32.

256 Thym, 'De Facto Citizenship' (n 156) 125 n. 107.

257 *Bajsultanov v Austria* (n 253) para 85.

258 *Nottebohm* (n 91) 22.

life.[259] Other examples could be voluntary work for a social institution or the provision of care work for family members or others.[260] Some states, for example the US, facilitate the acquisition of citizenship for persons who have served in the military.[261] Finally, there can be connections established on the basis of cultural, linguistic or even ethnic ties.[262] In practice, such ties are sometimes seen as an indicator for a particular connection.[263] Often, however, such connecting factors are purely instrumentalized for political purposes.[264] In particular, cultural and ethnic ties bear a strong risk of discriminating on the basis of ethnicity, national origin, religion or race.[265] Therefore, they should not be seen as independent ties but at best as supporting connecting factors.[266]

These different connecting factors based on territorial connections such as residence, family and social ties create an emotional attachment, while links on the basis of work, education, participation in public life, language or cultural ties overall form a person's social identity. They constitute the "network of personal, social and economic relations that make up the private life of every human being".[267] They determine where a person feels at home and where

259 In Switzerland, for example, membership in a club is found to be an indicator for a person's integration in the local society and her connectedness to Switzerland but it cannot be a decisive element, see eg the judgment of the Swiss Federal Court *BGE 138 I 305*. See further *1D_5/2017, Urteil vom 12 Februar 2018* [2018] para 3.4; *1D_6/2017, Urteil vom 12 Februar 2018* [2018] para 3.4.

260 See also Shachar, 'Earned Citizenship' (n 61) 134.

261 US Immigration and Nationality Act, Section 328, 8 U.S.C. 1439.

262 See eg *Üner v The Netherlands* (n 132) para 58; van Waas, *Nationality Matters* (n 13) 32.

263 See on 'ethnically' selective citizenship policies Szabolcs Pogonyi, 'The Right of Blood: 'Ethnically' Selective Citizenship Policies in Europe' (2022) National Identities 1 ff. See also Honohan and Rougier (n 11) 354. One could, for example, also think of colonial ties as links that give rise to a right to citizenship, similar to Achiume's argument for a right to immigration, see E Tendayi Achiume, 'Migration as Decolonization' (2019) 71 Stanford Law Review 1509, 1530 f.

264 See eg the proposal by the Austrian conservative People's Party and the far-right Freedom Party to allow for dual citizenship for German native speakers in South Tyrol (Italy) while there is a strict prohibition of dual citizenship for other countries, Fritz Neumann and András Szigetvari, 'Die politische Taktik hinter dem Doppelpass für Südtiroler' *Der Standard* (23 December 2017) <https://www.derstandard.at/story/2000070925036/die-politische-taktik-hinter-dem-dopelpass-fuer-suedtiroler>.

265 See implicitly also UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, 'Report on Racial Discrimination in the Context of in the Context of Laws, Policies and Practices Concerning Citizenship, Nationality and Immigration' (Special Rapporteur on Racism 2018) UN Doc. A/HRC/38/52 para 42.

266 Honohan and Rougier (n 11) 354.

267 *Slivenko v Latvia* (n 129) para 96.

that person would most likely like to live. Thus, it determines where a person should be granted a right to citizenship in order to have an unconditional right to remain and participate in the political process to shape that place.[268] As Hudson has already noted, "a person should have the nationality of the State to which he has proved to be most closely attached in his conditions of life as may be concluded from spiritual and material circumstances".[269] A *jus nexi*-based right to citizenship allows the different ties forming a person's social identity to be taken into consideration and links them with a claim to citizenship. It allows for the acknowledgment of forms of social citizenship, in the context of legal citizenship, that have been neglected or blurred by state discretion.[270] Based on the principle of *jus nexi* a person should thus have an entitlement to citizenship if the connection between an individual and state as determined by these factors is close enough.[271] By giving weight to these different ties the principle of *jus nexi* would permit granting migrants full membership in a society, despite them not necessarily having a connection based on descent or place of birth and where they would consequently be excluded by the principles of *jus soli* and *sanguinis*.

4 *A Dynamic and Non-exclusive Concept*

The previous section identified different possible factors that can constitute a genuine connection. These connections have to be assessed individually and their weight can vary depending on the circumstances of a case.[272] They may be subject to transformations across time and space depending on a person's individual situation and biography.[273] They are also not necessarily exclusive. An individual can have genuine and substantive connections to more than one state. As Karen Knop noted, "loyalties are potentially multiple, variable and interactive. Individuals may have loyalty to more than one state, and each loyalty may wax or wane over time".[274] Thus, citizenship is

268 See also Benhabib (n 4) 139; Goris, Harrington and Köhn (n 184) 6.

269 International Law Commission, 'Hudson Report' (n 87) 20.

270 See also Macklin, 'The Citizen's Other' (n 39) 354.

271 See also David Weissbrodt and Clay Collins, 'The Human Rights of Stateless Persons' (2006) 28 Human Rights Quarterly 245, 263.

272 See also the ruling of the ECtHR regarding the balancing exercise under Article 8, *AA v UK* (n 251) para 57.

273 Human Rights Council, 'Report 13/34' (n 187) para 39.

274 Knop (n 231) 113. See also already T Alexander Aleinikoff, 'Theories of Loss of Citizenship' (1986) 84 Michigan Law Review 1471, 1474.

not necessarily in every case a "stable lifelong membership for individuals".[275] *Jus nexi* as a dynamic and non-exclusive concept can accommodate these transformations.[276]

This dynamic and non-exclusive nature is one of the main differences between the birthright-based principles of *jus soli* and *jus sanguinis* on the one hand and the principle of *jus nexi* on the other. Whereas an individual can develop changing connections that shift the center of their life over a lifetime, birthright acquisition of citizenship is static. The place of birth and the descent of one's parents are fixed at the moment of birth. But what do I mean when I describe the principle of *jus nexi* as dynamic and non-exclusive?

Firstly, the principle of *jus nexi* is dynamic. In the foregoing, I defined the principle of *jus nexi* as a genuine connection principle of membership acquisition reflecting a social relation conception of citizenship.[277] A genuine connection is built over time through different connecting factors. Most of these factors require a certain time period to reflect an actual genuine connection. Namely, criteria such as residence, education, work, the establishment of family and other social ties all include a certain temporal dimension. The longer a person stays in a country, the more ties she establishes and the stronger the entitlement to membership becomes.[278]

The idea of solidifying rights is not new.[279] In fact, it is well-established in domestic immigration legislation and nationality laws that the legal status of migrants may vary over time and become more stable the longer a person is in a state. This is well-illustrated, for example, by the notion of permanent residency or by requirements for a certain minimum period of residence as preconditions for naturalization, two conditions that are known in many jurisdictions.[280] The principle of *jus nexi* would fall in this tradition and provide for

275 Bauböck and Paskalev (n 8) 60.

276 See similarly also Katja Swider and Caia Vlieks, 'Learning from Naturalisation Debates: The Right to an Appropriate Citizenship at Birth' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer International Publishing 2018) 152.

277 See Chapter 6, II.1, building on the definition advanced by Shachar, *The Birthright Lottery* (n 6) 164 f.

278 *ibid 178.*

279 See generally Farahat (n 77).

280 Shachar, 'Earned Citizenship' (n 61) 131 ff. See for a comparison of the residence requirements for ordinary naturalization, Global Citizenship Observatory (GLOBALCIT), 'Database Acquisition of Citizenship' (n 192). The European Convention on Nationality tried to standardize the differing residence requirements by introducing a maximum period of residence for naturalization of ten years in Article 6(3) ECN.

membership rights based on a connection that has continuously developed over time.[281]

Secondly, the principle of *jus nexi* should be understood as non-exclusive. A genuine connection does not necessarily exist with only one state.[282] There is a vast literature on transnational migration that shows migration patterns are not necessarily one dimensional and that individuals have strong and effective ties to different communities and states.[283] Transnational migrants have ties to more than one state; the country of origin, the country of residence and possibly other states, as well as repeatedly crossed borders between different states. Genuine connections are relational, they depend on one's social identity and can exist with more than one state, just as the center of one's life can be in more than one place at a time.[284] For example, imagine the situation of a binational couple with strong ties to both countries.[285] The existence of ties to more than one state is also mirrored in the case law of the ECtHR, albeit from a different perspective. In deportation cases, the Court examines not only the ties to the host state but also the ties to the country of origin.[286] Even stronger is the case of children born to binational parents, who should have a right to acquire the nationality of both parents in order to physically secure a relationship with both parents.[287] An alternative mode of citizenship attribution must be able to account for these transnational identities. Linking the entitlement to citizenship to a person's effective ties instead of a static allegiance or descent provides a much more flexible and equitable approach.[288] By acknowledging the non-exclusive, layered nature of connections and the

281 Shachar, 'Earned Citizenship' (n 61).

282 See Organization for Security and Co-operation in Europe, 'The Ljubljana Guidelines on Integration of Diverse Societies' (OSCE 2012) <https://www.osce.org/hcnm/ljubljana-guidelines> para 32. See also Bauböck, 'Genuine Links and Useful Passports' (n 20) 1021.

283 See among many Linda Bosniak, 'Multiple Nationality and the Postnational Transformation of Citizenship' in David A Martin and Kay Hailbronner (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects* (Kluwer Law International 2003); Farahat (n 77).

284 See also Knop (n 231) 111; Hans Ulrich Jesserun d'Oliveira, 'Once Again: Plural Nationality' (2018) 25 Maastricht Journal of European and Comparative Law METRO 22, 31.

285 For example, the Second Protocol amending the Convention on the Reduction of Cases of Multiple Nationality foresees that in cases of binational marriages each spouse shall have the right to retain her nationality of origin even if she acquires the nationality of the other spouse.

286 Where those ties amount to nothing more than the nationality of that state a deportation is considered to be a particularly severe interference with the right to private and family life, see eg *Beldjoudi v France* (n 144) para 77; *Mokrani v France* (n 148) para 31.

287 Knop (n 231) 104 f.

288 See also Rubenstein and Adler (n 147) 546.

flexibility of the notion of 'one's center of life' the principle of *jus nexi*, in my opinion, can accommodate these realities of contemporary migration biographies.[289] To quote Shachar:

> precisely because of its anchoring in social fact, *jus nexi* permits *multiple* citizenship affiliations to remain and flourish; at the same time, it gives priority to the political relationships toward which the real and genuine ties are manifested.[290]

For now, we note that the principle of *jus nexi* as developed here is both dynamic and non-exclusive in nature. The dynamic and non-exclusive nature of a *jus nexi* based right to citizenship at the same time is what makes the principle attractive for contemporary migration societies. As Shachar has shown, it helps in mitigating the over- and under-inclusion caused by birthright citizenship and in finding the state(s) to which the closest connection(s) exist.[291] The element of time inherent in *jus nexi* can limit the membership entitlement for persons who have lost a genuine connection (over-inclusion) while, at the same time, offering a solution for *de facto* members of a society excluded from citizenship (under-inclusion) by offering them a claim to membership based on a growing connection.[292] As Shachar noted:

> What *jus nexi* demands, then, is a closer correlation between democratic voice, factual membership, and citizenship entitlement. It offers a path for stakeholder residents whose lives have already become deeply intertwined with the bounded community in which they have settled to enjoy legal rights and protections as permanent residents and a predictable path to becoming full members. It also requires the nominal heir whose entitlement diminishes as the age or distance of the inheritance increases to establish some meaningful connection with the polity before claiming the manifold benefits that attach to citizenship's property.[293]

289 Swider and Vlieks (n 276) 152.

290 Shachar, *The Birthright Lottery* (n 6) 179. Shachar, however, is more reluctant towards the idea that *jus nexi* should give a claim to dual or multiple citizenship. One's center of life may change over time, she argues, but at a given time it can be in place only.

291 *ibid 171.*

292 *ibid 180 f.*

293 *ibid 181.*

Even though the vast majority of humans live in the state they were born in or that of their parents' nationality, a dynamic model of citizenship attribution compensates for a growing international mobility, for transnational identities that span across two or more states and for an ever increasing number of binational relationships and marriages, as well as the growing acceptance of dual and multiple citizenship. Given that every person has links to at least one state — be that the state of birth or the state of the parents' nationality, the principle of *jus nexi* could also contribute to the reduction and prevention of statelessness.[294] In short, the principle of *jus nexi* offers the necessary flexibility to accommodate the biographies and identities of the 21st century where the rights of the individual, her individual circumstances and interests should be central considerations.[295]

III Linking *Jus Nexi* and the Right to Citizenship

In the previous two sections I have discussed why it is necessary to strengthen the right to citizenship and why the principle of *jus nexi* is suitable to achieve this aim. Applying the principle of *jus nexi* to the right to citizenship would, as argued above, help in alleviating the exclusionary effects of citizenship, secure better representation for all members of the society in the democratic process, strengthen the individual rights dimension of citizenship and address the problem of the right to citizenship's indeterminacy. The genuine connection an individual has to a state would be better protected.[296] But what does it mean to apply the principle of *jus nexi* to the right to citizenship?

The idea is not to replace the acquisition of citizenship based on *jus soli* or *jus sanguinis* with the acquisition of citizenship through *jus nexi*. Rather, the principle of *jus nexi* could be applied in addition to *jus soli* and *jus sanguinis* to determine the scope and content of the right to citizenship.[297] In other words, *jus nexi* should complement *jus soli* and *jus sanguinis*.[298] Acquiring citizenship at birth should occur on the basis of *jus soli* and *jus sanguinis* and reflect the

294 See also Vlieks, Hirsch Ballin and Recalde-Vela (n 7).

295 See also Shachar, *The Birthright Lottery* (n 6) 180.

296 Goldston (n 76) 340.

297 Shachar, *The Birthright Lottery* (n 6) 165.

298 Owen, by contrast, proposes to see *jus nexi* as the general principle for citizenship attribution and *jus soli*, *jus sanguinis* and *jus domicilii* as different routes through which a genuine connection can be established, Owen, 'The Right to Have Nationality Rights' (n 82) 311.

ties of place of birth and descent respectively. These provide for a relatively straightforward, formal and non-discretionary mode of citizenship acquisition which does not require the establishment of particular link.[299] *Jus nexi* comes into play as a subsidiary mechanism of citizenship attribution in cases where an individual cannot acquire a nationality at birth through *jus soli* or *jus sanguinis* and is at risk of statelessness or, thereafter, if there is a mismatch between the citizenship acquired at birth through *jus soli* or *jus sanguinis* and a person's actual connections and center of life. Thereby, *jus nexi* would not function as a mode for automatic acquisition of citizenship, but as a mechanism for the individual concerned to claim citizenship based on the social fact of membership.[300] The decision to exercise the right to citizenship, especially to claim access to citizenship in a particular state, is left with the individual. Hence, by linking the principle of *jus nexi* with the right to citizenship, access to citizenship could accommodate the actual life choices of a person and thereby be reflective of human agency.[301]

The principle of *jus nexi*, which is based on a person's center of life, helps to determine the scope and content of the right to citizenship more effectively. The principle of *jus nexi* allows for the identification of the state to which a person has the closest connection and, for that reason, bears the obligation to protect, respect and fulfill the right to citizenship. One has to assume that everyone has a link to at least one state.[302] A *jus nexi*-based right to citizenship would thus provide an effective mechanism to prevent and reduce statelessness.[303] This would remedy one of the main flaws of the current framework protecting the right to nationality.[304] It also offers a way to address the problem of the right to citizenship's indeterminacy, strengthen its enforcement and re-draw the limits of state discretion in nationality matters.[305] Based on a person's genuine connection, it would be possible to determine the state against which that person has a claim to nationality. Thus, a *jus nexi*-based right to citizenship would broaden the content of the right to citizenship to offer not only protection against statelessness and discriminatory or arbitrary interferences, but to include an actual right to acquire citizenship in a particular state

299 See also Honohan and Rougier (n 11) 353 f.

300 See also Shachar, 'Earned Citizenship' (n 61) 144. See similarly also Spiro, 'New Citizenship Law' (n 24) 723.

301 Shachar, 'Earned Citizenship' (n 61) 145.

302 David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press 2008) 107.

303 See also *ibid.*

304 See also Mikulka, 'Third Report' (n 116) 36 f.

305 See similarly also Batchelor, 'Developments in International Law' (n 213) 50; Goldston (n 76) 340.

where a person has a genuine connection; a *nexus*.[306] Moreover, it would identify legitimate criteria for acquiring citizenship.[307] In that sense, *jus nexi* could guide state practice in regulating acquisition and loss of citizenship.[308] Such an interpretation of a *jus nexi*-based right to citizenship would safeguard the effectiveness of citizenship and ensure that an individual can actually exercise her social, economic and political rights in the place where they are most significant to her.[309]

Applying the principle of *jus nexi* to the right to citizenship gives sufficient weight to the will of the person concerned and their 'legitimate interests'.[310] The life choices of an individual are weighed in through the different connecting factors that constitute that person's center of life. Thus, citizenship could more adequately reflect a person's interactions with others.[311] The effectiveness of citizenship could thereby be improved. Moreover, a *jus nexi*-based right to citizenship opens the possibility of making it an entitlement for the individual concerned, who can then exercise her right to citizenship rather than the state exercising a discretionary decision. The acquisition of citizenship would not be automatic or mandatory but subject to the individual's agency. The state's discretion to refuse naturalization where the conditions are fulfilled — if the person has a genuine connection — would, however, be reduced to zero.

In short, a *jus nexi*-based right to citizenship could contribute to making citizenship "more in line with a rights-based, individualized focus for international law, rather than a sovereignty-based one".[312] It could address statelessness by granting stateless persons a right to the citizenship of the state to which they have substantial ties.[313] It would also offer a solution to the problem of under-inclusion by granting a right to citizenship on the basis of *jus nexi* where nationality is no longer effective or does not correspond to one's center

306 See also Owen, 'The Right to Have Nationality Rights' (n 82) 314; Peter J Spiro, 'Citizenship, Nationality, and Statelessness' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 286.

307 See however *Urteil 1 C 20.88* (n 223) para 35.

308 See also Adjami and Harrington (n 44) 106.

309 Goris, Harrington and Köhn (n 184) 6. See also Kim Rubenstein, 'Globalization and Citizenship and Nationality' in Catherine Dauvergne (ed), *Jurisprudence for an Interconnected Globe* (Ashgate 2003) 184; Vlieks, Hirsch Ballin and Recalde-Vela (n 7) 169 ff.

310 See also Recital 4, Preamble to the ECN.

311 See Irene Bloemraad and Alicia Sheares, 'Understanding Membership in a World of Global Migration: (How) Does Citizenship Matter?' (2017) 51 International Migration Review 855.

312 Rubenstein and Adler (n 147) 547.

313 See also Weissbrodt (n 302) 107.

of life. Therefore, linking the principle of *jus nexi* with the right to citizenship addresses the main exclusionary effects of citizenship and helps strengthen the right to citizenship.

IV The Implications of a *Jus Nexi*-Based Right to Citizenship

In Chapter 5 I discussed the scope and content of the right to nationality under current international law. On that basis, I would now like to assess the implications of a *jus nexi*-based right to citizenship for the scope (IV.1) and the content (IV.2) of the right to citizenship. There is a particular focus on the aspects where the application of the principle of *jus nexi* would change the scope and content of the right, before looking at the possibilities for restricting a *jus nexi* based right to citizenship (IV.3).

1 *Scope of a* Jus Nexi*-Based Right to Citizenship*

As discussed above, the right to nationality in principle has a universal personal scope of application.[314] Equally, a *jus nexi*-based right to citizenship should have a universal personal scope of application. It should apply to everyone, irrespective of whether they have a nationality or not, their nationality if they have one or whether they have more than one nationality. Thus, a *jus nexi*-based right to citizenship applies to everyone with a sufficient connection to the state against which the right is invoked.[315] However, in cases of particularly vulnerable persons, such as children, stateless persons or refugees, the requirements regarding the strength and breadth of possible connecting factors should be reduced in order to take into account the particular situation of the person.[316] Moreover, the requirements to lawfully restrict the right to citizenship could be stricter when it comes to such vulnerable groups.

Generally, a *jus nexi*-based right to citizenship should also apply irrespective of the specific connecting factors a person has, provided the ties are strong enough to form a genuine connection. As elaborated above, depending on the specific circumstances, neither residence nor lawful residence are always necessary requirements.[317]

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314 See Chapter 5, II.1.

315 See for the domestic level similarly Andrea Marcel Töndury, 'Existiert ein ungeschriebenes Grundrecht auf Einbürgerung?' in Patricia M Schiess Rütimann (ed), *Schweizerisches Ausländerrecht in Bewegung?* (Schulthess 2003) 189, 209 f.

316 See eg Batchelor, 'Resolving Nationality Status' (n 200) 181. See by contrast Zilbershats, 'Reconsidering' (n 201) 719.

317 See Chapter 6, I.3.1.1.

2 *Content of a* Jus Nexi*-Based Right to Citizenship*

Regarding the possible scope of a *jus nexi*-based right to citizenship, I will focus on those aspects of the right that are most affected by the application of the principle *of jus nexi*. Namely, the right to acquire citizenship at birth (IV.2.1), the right to a given nationality (IV.2.2), the right to dual or multiple citizenship (IV.2.3) and involuntary loss of citizenship (IV.2.4). The focus on these specific aspects should in no way be interpreted as putting into question the other obligations under the right to nationality as defined in Chapter 5.[318]

2.1 The Right to Acquire Citizenship at Birth

In principle, as I have argued in Chapter 5, states have an obligation under the current international framework on the right to nationality to grant citizenship to children born stateless on their territory.[319] This obligation is derived, most importantly, from Article 7 CRC, Article 24(3) ICCPR and regional human rights instruments. However, the implementation of this right is insufficient in many states.[320] The acquisition of citizenship for stateless children is often made conditional on additional requirements, such as a certain period of legal residence,[321] on the immigration status of the parents[322] or on procedural requirements such as lodging an application or undergoing a formal statelessness determination procedure.[323] Switzerland, for example, only grants stateless children the possibility of a facilitated naturalization, ie a discretionary procedure with slightly reduced requirements, conditional upon a period of legal residence of at least five years.[324] The practice shows that the

318 See Chapter 5, III.

319 See Chapter 5, III.3.1.

320 See for an overview of the practices in selected European states European Network on Statelessness, 'Statelessness Index' (European Network on Statelessness (ENS) 2019) <https://index.statelessness.eu/>.

321 The United Kingdom foresees that children born stateless in the territory can register as citizens after a residence period of five years. See the country profile on the UK on European Network on Statelessness, 'Statelessness Index UK' <https://index.statelessness.eu/country/united-kingdom>.

322 In Slovenia, for example, stateless children can only acquire citizenship if their parents are unknown or also stateless (Article 9 of the Citizenship Act of the Republic of Slovenia), see the country profile on Slovenia, European Network on Statelessness, 'Statelessness Index Slovenia' <https://index.statelessness.eu/country/slovenia>.

323 In France children born stateless in the territory in principle acquire French citizenship *ex lege* (Article 19 of the French Civil Code). In practice, however, they must lodge a formal request with the authorities and prove their statelessness in a statelessness determination procedure. See the country profile on France, European Network on Statelessness, 'Statelessness Index France' <https://index.statelessness.eu/country/france>.

324 Article 23(1) and (2) Federal Act on Swiss Citizenship, 20 June 2014, SR 141.0 ('SCA').

protection offered to stateless children under the current international framework remains fragmentary.

A *jus nexi*-based right to citizenship for children born stateless in the territory of a state would offer an additional layer of protection in those states whose current legal frameworks impose additional requirements for acquiring citizenship in case of statelessness at birth. Here, *jus nexi* could grant an entitlement based on the connecting factor of birth on the territory. Given the overarching aim of the right to citizenship to prevent and avoid statelessness, a *jus nexi*-based right to citizenship should thus guarantee access to citizenship for newborn children. In the absence of any other substantial link, the strongest link is to the state where the child is born. Given the particular vulnerability of stateless children, the state would consequently be obliged to grant a child its nationality if they would otherwise be stateless. Here, the principle of *jus nexi* would be combined with a default *jus soli* to promote the overriding aim of preventing statelessness. Thereby, attribution of nationality could occur automatically or *ex lege* at birth to prevent statelessness and guarantee every child a secure legal status at birth. If, subsequently, the center of the child's life shifts to another state, for example the state of the parents, a *jus nexi*-based right to citizenship would give rise to a right to acquire the nationality of that latter state.

2.2 The Right to the Citizenship of a Specific State

I have argued in the previous chapter that the current international legal framework obliges states to provide for the possibility of naturalization, at least for some groups of non-citizens.[325] However, this right to naturalization only relates to the availability of a procedure to apply for the acquisition of nationality by administrative decision. It does not include a right to be granted nationality through naturalization.[326] The current international legal framework fails to safeguard a general right to the citizenship of a particular state.[327]

As the discussion above shows, the principle of *jus nexi* implies a right to acquire the citizenship of the state to which one has the closest connection, or — to quote Hirsch Ballin — to the citizenship "with its associated rights, that is appropriate to everyone's life situation, where he or she is at home — which can change during the course of a person's life".[328] Based on the principle of *jus*

325 See Chapter 5, III.3.6.

326 Lassa Francis Lawrence Oppenheim, Robert Yewdall Jennings and Arthur Desmond Watts, *Oppenheim's International Law* (9th ed, Longman 1993) 876.

327 See eg Serena Forlati, 'Nationality as a Human Right' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 23.

328 Hirsch Ballin (n 57) 141.

nexi, the acquisition of citizenship by administrative decision should thus no longer be discretionary but an entitlement based on a person's circumstances of life.

Other than the acquisition of citizenship at birth for otherwise stateless children, the right to a given citizenship based on *jus nexi* should not be automatic. Instead, it should be voluntary and based on a request or declaration of the individual concerned.[329] As Shachar writes:

> like the *ex lege* idea, the *jus nexi* principle is normatively designed to shrink the gap between partaking in actual membership and gaining political voice; it views every long-term resident as a citizen-in-the-making. Unlike it, however, *jus nexi* does not force membership upon them. Instead, it creates an eligibility or presumption of inclusion on behalf of those whose life center has already shifted.[330]

Any forced or automatic attribution of citizenship against the person's explicit will would be incompatible with the character of *jus nexi*-based citizenship as a person's center of life.[331] This consent requirement reflects the negative aspect of the right to citizenship, the right not have a citizenship imposed against one's will.[332] Without the consent of the person concerned, the attribution of citizenship, moreover, becomes over-inclusive through the inclusion of individuals in the citizenry that do not have the necessary subjective links.[333]

The right to a given citizenship based on *jus nexi* should thus grant access to citizenship upon application of the person concerned.[334] The discretion of the state would be reduced to a mere examination of connecting factors. Citizenship must be granted if the links are strong enough. This approach still

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329 See also Bauböck, 'Democratic Inclusion' (n 11) 66; José Francisco Rezek, 'Le droit international de la nationalité' (1986) 198 Collected Courses of the Hague Academy of International Law 333, 361; Zilbershats, 'Reconsidering' (n 201) 720.

330 Shachar, *The Birthright Lottery* (n 6) 179.

331 See also International Law Commission, 'Commentary Draft Articles on Nationality' (n 114) 34. See by contrast Helder De Schutter and Lea Ypi, 'Mandatory Citizenship for Immigrants' (2015) 45 British Journal of Political Science 235.

332 See Chapter 5, III.3.5.

333 See Rainer Bauböck, 'Global Justice, Freedom of Movement and Democratic Citizenship' (2009) 50 European Journal of Sociology 1; Anja Lansbergen and Jo Shaw, 'National Membership Models in a Multilevel Europe' (2010) 8 International Journal of Constitutional Law 50, 67 ff; Rubio-Marín, *Immigration as a Democratic Challenge* (n 22); Weil (n 74) 618 f.

334 A number of states provide for naturalization based on declaration, see Global Citizenship Observatory (GLOBALCIT), 'Database Acquisition of Citizenship' (n 192).

leaves states a certain amount of discretionary power.[335] On the one hand, the connecting factors that give rise to a *jus nexi* are not necessarily fixed at universal level but may vary depending on the specific local situation. As Shachar notes, the criteria that form one's center of life "itself can be interpreted in more generous or more stringent ways".[336] Nevertheless, the connecting factors required must relate to the assessment of a sufficient link and must never be so restrictive as to hinder persons with a genuine connection from accessing citizenship.[337] Any such criteria must be justifiable and may never be discriminatory or arbitrary.[338] They must be objective and relevant for the question of whether a person has a nexus to the state in question.[339] Any criteria relating to a person's political or religious beliefs, race, ethnic or national origin, to her health, wealth or financial resources are problematic against that background as they are likely to be discriminatory. Moreover, to do justice to the principle of *jus nexi*, any such criteria must be applied in a flexible manner considering the particular circumstances of the person concerned. On the other hand, state authorities have a certain leeway in the assessment of those factors. But again, the assessment must take the concrete circumstances of the person concerned into consideration and may not be such as to exclude persons with a sufficient *nexus* from citizenship. Procedures should respect due process standards.[340] In order to give sufficient weight to the will of the persons concerned and the establishment of their relevant connection, such assessment should give them adequate opportunity to participate. As Hirsch Ballin explains, "[s]tates have the right to apply procedures and criteria here, but these must not result in people not being able to acquire citizenship in the society/societies that they may regard as their home(s)."[341]

How does such an interpretation of the right to a given citizenship based on *jus nexi* reinforce the individual's right to citizenship? The decisive shift would be the recognition of the right to acquire the citizenship of the state where one's center of life is as an individual right instead of a political privilege or discretionary favor.[342] Acquiring citizenship is conceived of as a legal procedure

335 See also the criticism of Shachar's approach by Gonçalo Matias, *Citizenship as a Human Right, The Fundamental Right to a Specific Citizenship* (Palgrave Macmillan 2016) 212.

336 Shachar, *The Birthright Lottery* (n 6) 179.

337 Hirsch Ballin (n 57) 123.

338 See Chapter 5, I V See also Council of Europe, 'Explanatory Report ECN' (n 108) para 51.

339 See also Peter J Spiro, 'Questioning Barriers to Naturalization' (1999) 13 Georgetown Immigration Law Journal 479, 517.

340 See Chapter 5, III.7. See also Benhabib (n 4) 140.

341 Hirsch Ballin (n 57) 123.

342 *ibid 131.*

that is initiated at the initiative of the individual and where the state's role is reduced to an assessment of objective and legitimate criteria. This would amount to a paradigm change in international (human rights) law.[343] Thus, granting citizenship "is not a favour that can be arbitrarily bestowed or denied; it must be seen in the contest of 'an implicit two-way contract' that complies with the idea underlying citizenship".[344]

Practical examples of how the right to citizenship could be implemented can be found at the domestic level. Several states have a right to citizenship or a right to naturalization for certain groups or depending on certain circumstances. Portugal, for example, is one of the few states that has an actual right to naturalization.[345] Under certain circumstances non-citizens in Portugal have a right to naturalization if they meet the necessary requirements.[346] If these requirements are met, the state has no discretion to refuse the acquisition of citizenship.[347]

The right to a given citizenship would thus protect the right to membership in a migration context. Non-citizens who effectively have their center of life in a state would be able to acquire that state's citizenship. Stateless persons, on the other hand, would not just be granted any nationality, but an effective citizenship that reflects their actual connections.[348] The right to a given citizenship would thereby complement the regular naturalization mechanisms in place for non-citizens without a genuine connection.

2.3 The Right to Dual and Multiple Citizenship

The principle of *jus nexi* could also have an impact on the question of whether there is a right to dual or even multiple citizenship.[349] As argued above, the principle of *jus nexi* accommodates ties to more than one country.[350] Not all individuals have their center of life exclusively in one state. In cases where a

343 *ibid 125.*

344 *ibid 133.*

345 See also Cristina J Gortázar Rotaeche, 'Identity, Member States Nationality and EU Citizenship. Restitution of Former European Nationals v Naturalisation of New European Residents?' in Elspeth Guild (ed), *The Reconceptualization of European Union Citizenship* (Martinus Nijhoff 2014) 28.

346 Nuno Piçarra and Ana Rita Gil, 'EUDO Citizenship Observatory: Country Report Portugal' (Global Citizenship Observatory (GLOBALCIT) 2012) RSCAS/EUDO-CIT-CR 2012/08 19 <https://cadmus.eui.eu/bitstream/handle/1814/19632/RSCAS_EUDO_CIT_2012_8.pdf?sequence=3&isAllowed=y>.

347 *ibid 20.*

348 See also Vlieks, Hirsch Ballin and Recalde-Vela (n 7).

349 See on the current international legal framework Chapter 5, III.5.3.

350 See above Chapter 6, I.4.

person has equally strong (though not necessarily the same) ties to more than one county, a *jus nexi*-based right to citizenship should thus imply a right to dual or multiple citizenship.[351]

Any interpretation of the right to citizenship that would require the person concerned to decide between two citizenships of equally strong connection would run counter to the aim of securing membership status in the place where one has her center of interests and respecting her will. Without a right to dual or also multiple citizenship, the right to citizenship would become ineffective. As Spiro explains, "requiring individuals to choose one over the other will deprive them of rights and equality in the state not chosen".[352] Denying the right to dual or multiple citizenship would "infringe autonomy values to the extent that it constrains identity composites".[353]

2.4 Limitations upon Involuntary Loss of Citizenship

Finally, the principle of *jus nexi* provides an interesting take on the determination of the negative right not to be deprived of one's citizenship. *Jus nexi* can help in drawing the limits of involuntary loss of citizenship.[354] Since the core obligation under the right to citizenship is to avoid and reduce statelessness, loss of citizenship should never occur where it would render a person stateless. Given that every person has, at least, one genuine connection to a state — however tenuous it may be — deprivation of nationality resulting in statelessness would inevitably violate a *jus nexi*-based right to citizenship. Deprivation of citizenship resulting in statelessness should therefore fall within this core content of a *jus nexi*-based right to citizenship and be prohibited absolutely. Measures that lead to the erasure of (former) citizens from official registers and so render them stateless, such as those imposed in the Indian state of Assam in 2019, would not be compatible with a *jus nexi*-based right to citizenship.[355]

But the principle of *jus nexi* also restricts limitations upon involuntary loss of citizenship where it does not result in statelessness. A *jus nexi*-based right to citizenship would always be restricted where citizenship is withdrawn despite an existing link to that state. In such cases, the question becomes a matter

351 See similarly also Honohan (n 3) 11.

352 Peter J Spiro, 'The Equality Paradox of Dual Citizenship' (2019) 45 Journal of Ethnic and Migration Studies 879, 880.

353 *ibid.*

354 See similarly also Matthew J Gibney, 'Should Citizenship Be Conditional? The Ethics of Denationalization' (2013) 75 The Journal of Politics 646, 655.

355 Jeffrey Gettleman and Hari Kumar, 'Four Million Indians in One State Risk Being Denied Citizenship. Most Are Muslims.' *The New York Times* (17 August 2019) <https://www.nytimes.com/2019/08/17/world/asia/india-muslims-narendra-modi.html>.

of how strong the links are. If a person has her center of life in the state in question, and her closest connection is to that state, a deprivation measure would hardly ever seem proportionate given the extremely far reaching consequences that stem from a loss of citizenship in the state of one's center of life.[356] As Gibney argues:

> [T]he state has no moral right to deprive an individual of citizenship in a country where the individual has made his or her life. [...] Denationalization would violate the principle that citizenship should correspond to an individual's connections and residence.[357]

Against that background, policies aimed at depriving foreign terrorist citizens with dual citizenship fighting in a third country of citizenship seem highly problematic.[358] the decision of the case of Jack Letts, a British–Canadian dual citizen who grew up in the UK and joined the IS in Syria, would not be compatible with a *jus nexi*-based understanding of the right to citizenship as he has no ties to Canada, the country of nationality of his father.[359] Similarly, the attempted deprivation measure ordered by Switzerland against a Swiss–Italian citizen fighting in Syria would violate a *jus nexi*-based right to citizenship, even if the person concerned would not be rendered stateless.[360] The measure seems hardly compatible with a *jus nexi*-based right to citizenship, even in cases where persons committed a terrorist or criminal act in their country

356 See similarly also Hirsch Ballin (n 57) 126; Honohan (n 3) 12. See on the proportionality of deprivation of nationality Chapter 5, III.6.

357 Matthew J Gibney, 'Denationalization' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 358, 371.

358 See on these policies most recently Institute on Statelessness and Inclusion and Global Citizenship Observatory GLOBALCIT, 'Instrumentalising Citizenship in the Fight against Terrorism. A Global Comparative Analysis of Legislation on Deprivation of Nationality as a Security Measure' (2022) <https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf>.

359 Dan Sabbagh, 'Jack Letts Stripped of British Citizenship' *The Guardian* (18 August 2019) <https://www.theguardian.com/world/2019/aug/18/jack-letts-stripped-british-citizenship-isis-canada>. See also Audrey Macklin, '"Jihadi Jack" and the Folly of Revoking Citizenship' (*The Conversation*, 20 August 2019) <http://theconversation.com/jihadi-jack-and-the-folly-of-revoking-citizenship-122155>.

360 Carlos Hanimann, 'Dschihadismus und Rechtsstaatlichkeit: Ein Urteil über die denkbare Zukunft' *WOZ Die Wochenzeitung* (4 August 2016) <https://www.woz.ch/-6fd7>; Stefanie Kurt and Barbara von Rütte, 'Ist die Schweiz zum Entzug der Staatsangehörigkeit berechtigt?' (*NCCR — on the move*, 31 May 2016) <http://blog.nccr-onthemove.ch/ist-die-schweiz-zum-entzug-der-staatsangehoerigkeit-berechtigt/?lang=de>.

of citizenship and were subsequently deprived of their citizenship.[361] Finally, cases like *Ramadan v Malta*, where the applicant had lived in Malta for over twenty years before his citizenship was nullified, also seem problematic under the principle of *jus nexi* — the applicant had his center of life in Malta.[362] In fact, the ECtHR even argued that the applicant had not been threatened with removal despite the nullification of citizenship and, consequently, could stay in Malta to justify why Article 8 ECHR was not violated.[363] Here, a *jus nexi* approach could limit the state's competence to nullify citizenship after a certain period of time or in cases where there are certain particularly strong links.[364] This would prevent a 'race to the bottom' in the context of deprivation measures that shift responsibility to the other state of nationality.[365]

In contrast, if a person is residing abroad and has closer links to the other state of nationality, loss of citizenship would not necessarily amount to a violation of the right to citizenship. The state's interest in the withdrawal measure would not override the individual's interest.[366] The case of *Tjebbes* before the CJEU provides an interesting example.[367] In that case, the Court considered a Dutch rule that provided for lapses in the genuine links of persons who had resided abroad for a certain period of time. The CJEU found this rule compatible with EU law so long as the measure remained proportionate and has the necessary procedural safeguards in place. Such a rule could also be compatible with a *jus nexi*-based right to citizenship, so long as the link has effectively expired and the person is not left stateless.[368]

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361 See however *Ghoumid and others v France* [2020] ECtHR Application Nos. 52273/16, 52285/16, 52290/16, 52294/16 and 52303/16; *Adam Johansen v Denmark* [2022] ECtHR Application No. 27801/19; K2 v The United Kingdom (n 137); *Said Abdul Salam Mubarak v Denmark* (*Decision*) [2019] ECtHR Application No. 74411/16.

362 *Ramadan v Malta* (n 159).

363 *ibid 90.*

364 See also Marie-Bénédicte Dembour, 'Ramadan v Malta: When Will the Strasbourg Court Understand That Nationality Is a Core Human Rights Issue?' (*Strasbourg Observers*, 22 July 2016) <http://blogs.brighton.ac.uk/humanrights/2016/07/22/ramadan-v-malta-when-will-the-strasbourg-court-understand-that-nationality-is-a-core-human-rights-issue/>; European Court of Human Rights, 'Dissenting Opinion of Judge Pinto de Albuquerque in Ramadan v Malta' (European Court of Human Rights 2016) Application No. 76136/12 para 22.

365 See also Bauböck and Paskalev (n 8) 68.

366 See also Gibney, 'Denationalization' (n 357) 372.

367 *Tjebbes* (n 105). Similarly also *JY v Wiener Landesregierung* [2021] CJEU C-118/20.

368 See also Shachar, *The Birthright Lottery* (n 6) 173 ff; Human Rights Council, 'Report 25/28 of the Secretary General on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2013) UN Doc. A/HRC/25/28 para 18. Critically however, Bauböck, 'Democratic Inclusion' (n 11) 69.

Overall, it can be argued that involuntary loss of citizenship despite a persisting genuine link is problematic from a *jus nexi* perspective. Owen even argues that any deprivation that fails to acknowledge a genuine link is arbitrary.[369] Involuntary loss of citizenship despite a persisting genuine link should only be compatible with a right to citizenship if the person concerned is not rendered stateless, if there are stronger links to the other state of nationality and if the state has a legitimate, overweighing interest in the withdrawal of citizenship.

3 *Legitimate Interferences — Balancing a* Jus Nexi*-Based Right to Citizenship*

Applying the principle of *jus nexi* to the right to citizenship does not make the right absolute. Limitations would also be possible for a *jus nexi*-based right to citizenship. In fact, I argue that the principle of *jus nexi* would facilitate the assessment of the lawfulness of limitations of the right to citizenship. The principle of *jus nexi* allows for a better determination of the interests involved. Clearly, the core content of a *jus nexi*-based right to citizenship should be the prevention and reduction of statelessness. Any violation of the right to citizenship resulting in statelessness should be absolutely prohibited. Regarding other aspects of the right, limitations are possible as long as there is a legitimate aim for the restriction, the restriction is necessary to achieve that aim, and the restriction is proportionate to the aim pursued. The individual's interests relating to her genuine connections have to be weighed against the states' interest not to grant access to citizenship or to withdraw citizenship.[370] The competing interests could be balanced in a proportionality assessment similar to the examination of a violation of the right to private and family life under Article 8 ECHR. Of course, a criminal record or a possible threat to nationality can be a legitimate ground not to grant citizenship. However, if the person concerned has her center of life in the state in question and has no comparable ties to any other state, then the state's interest to refuse access to citizenship must outweigh the individual's interest to justify a restriction of the right to citizenship.

Now, one might object that such a *jus nexi*-based right to citizenship which is not absolute might just bestow states even more discretion. As elaborated above, the *jus nexi* approach cannot avoid a certain degree of state discretion.

369 Owen, 'The Right to Have Nationality Rights' (n 82) 312.

370 See with regard to deprivation of citizenship also UNHCR, 'Expert Meeting — Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")' (UNHCR 2013) para 21 <https://www.refworld.org/docid/533a754b4.html>.

Be that regarding the relevant connecting factors and their assessment or the balancing of the individual interests against state interests. Yet, with the exception of absolute rights, the protection of all human rights usually entails a certain degree of flexibility, balancing and discretion on the part of the state.[371] Absolute rights, as already noted, are the exception.[372] Most human rights allow for limitations. Hence, in principle, the possibility of limitation does not reduce the validity of a right as a human right. More importantly the recognition of citizenship as a human right grants individuals a substantive entitlement to citizenship based on their actual connections and provides them, at least theoretically, with a legal pathway to claim full and effective legal membership in the state. The state, by contrast, has the burden to explain and justify any restriction or limitation of the right — even if it retains a certain discretion in the practical assessment of the circumstances of a case. If the state fails to provide a justification, the right is violated.[373] Ultimately, this shifts the decision on access to citizenship from the state to the individual and reduces the element of state discretion in nationality matters. As Peters describes it, "the right confers a legal position which changes the equation" [between the individual and the state].[374] The right to citizenship is transformed from a mere aspiration to an enforceable human right.

V Conclusion: Strengthening the Right to Citizenship

This chapter has looked beyond the current international legal framework and asked how the right to citizenship could be strengthened to improve the protection of rights of individuals in practice. Arguing that one of the main protection gaps left open by the current interpretation of the right to nationality in international law is the lack of a right to citizenship of a specific state, I have proposed to apply the principle of *jus nexi* to in order to strengthen the right to citizenship. Tying membership to one's connection to the society — one's social, familial, emotional, cultural or economic ties — would solve the problem of indeterminacy and identifying the state bearing the obligation to fulfil the right to citizenship. Thus, applying the principle of *jus nexi* to the right to

371 Smith (n 68) 183. See also Hurst Hannum, 'Reinvigorating Human Rights for the Twenty-First Century' (2016) 16 Human Rights Law Review 409, 442 f.

372 See Chapter 5, I V

373 See also Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 538.

374 *ibid 539.*

citizenship fills the protection gaps left open by the current interpretation of the right to citizenship. Namely, access to a given citizenship and disproportionate interferences with the right to citizenship.

I have discussed several reasons why the right to nationality in its current interpretation has considerable weaknesses. In states with restrictive citizenship regimes, democratic processes are undermined by a lack of adequate representation and participation. At the same time, the exclusionary function of citizenship fails to include those with genuine and substantive ties to society and leaves them at the fringes of society, permanently at risk of exclusion and deportation. The failure to provide for access to the citizenship of the state where one is at home as an individual human right disregards the fact that citizenship is part of a person's social identity and central to her private life. In a second section, I have discussed the principle of *jus nexi* and its theoretical foundations and shown that the idea of genuine connections and of linking rights to one's connection to society is not new — neither to international citizenship law, where the genuine link doctrine has long been important, nor to human rights law, where concepts of social identity and one's own country have long been at the core of identifying migrants' rights. Hence, I have argued, it would be consistent to apply the principle of *jus nexi* to solve the right to citizenship's problem of indeterminacy. A final section has then outlined how the principle of *jus nexi* would affect the obligations under the right to citizenship and argued that the most significant impact would occur upon the right to acquire a given nationality. A *jus nexi*-based right to citizenship would give rise to a right to the nationality of the state to which one has such a *nexus*. Moreover, the principle of *jus nexi* could also clarify obligations relating to the child's right to a nationality, allow for a possible right to dual or multiple nationality and draw limitations upon the state's right to withdraw nationality against the will of the person concerned. Generally, the idea of a *jus nexi*-based right to citizenship assists in assessing interferences with the right to citizenship against the consequences for the individual concerned.

Overall, applying the principle of *jus nexi* would provide an alternative, more rights-oriented approach to the right to citizenship. This would not itself omit any discretion on the part of the state, be it in naturalization or deprivation procedures. But it would shift citizenship from a privilege granted on a discretionary basis to an effective and enforceable human right that can be claimed by individuals based on their ties to the state in question. In short, it would make citizenship a matter of entitlement. Applying the principle of *jus nexi* in addition to the existing modes of birthright-based forms of citizenship acquisition would therefore provide for a system that is better apt to accommodate biographies and identities of the 21st century, which are shaped by international connections, migration and globalization.

CHAPTER 7

Conclusion

> Nationality is a fundamental human right.[1]
>
> IACtHR, Case of the Girls Yean and Bosico, 2005

This book has explored the status of the right to citizenship in international human rights law. On the basis of the observation that acquisition, enjoyment or loss of citizenship is hardly every framed as a human rights issue, it has traced the evolution of the right to citizenship from a sovereign privilege to an enforceable individual human right and highlighted the ongoing tension between these two poles — between state sovereignty and the right to citizenship as an individual human right. It has juxtaposed the normative claim for a right to citizenship against international human rights law and argued that the right to citizenship can and, in fact, must be recognized as a legal human right. The book thereby looked not only at statelessness, deprivation of citizenship or multiple citizenship, but more generally at acquisition, enjoyment and loss of citizenship in a migration context.

Based on a comprehensive and an in-depth review of the international legal framework protecting the right to nationality, this book had the aim of challenging the widespread skepticism towards the recognition of the right to citizenship as an effective and judiciable legal entitlement. Despite predictions to the contrary, citizenship has not lost any of its relevance. It remains a powerful marker for access to rights, territories, privileges and political voice and continues to be used as such by states all over the world.[2] Nevertheless, the book has showed that the right to citizenship is more firmly anchored in the current international human rights regime than one might think and that many domestic authorities are willing to acknowledge. A number of international

1 *Case of the Girls Yean and Bosico v Dominican Republic* [2005] IACtHR Series C No. 130 (2005) para 136.

2 See on the different strategies states employ to transform and use boundaries to membership and citizenship Ayelet Shachar, 'Beyond Open and Closed Borders: The Grand Transformation of Citizenship' (2020) 11 Jurisprudence 1, 13 ff.

human rights instruments grant individuals concrete rights and entitlements in nationality matters. The right to citizenship is therefore clearly a legal human right, protected at the international as well as at the regional level. The close-reading of the relevant provisions in international law as well as the corresponding practive of international and regional human rights courts, treaty bodies and international organizations in this book has showed that the scope and content of the right to citizenship can be clearly demarcated. The popular objection that the right to citizenship remains void and ineffective due to the lack of an addressee therefore must be rejected. Depending on the instrument in question, more or less far-reaching but clear rights for individuals and corresponding duties for states can be identified.

This being said, from an individual rights perspective protection gaps clearly remain. Especially when it comes to the acquisition of citizenship of a particular state for persons who are not stateless or at risk of becoming stateless, international human rights law is relatively week. According to the vast majority of international legal instruments, a state may decide freely on the granting of its citizenship and on the criteria for acquisition of citizenship by naturalization — as long as the criteria or the decision at hand are not discriminatory or arbitrary. From the perspective of the individual and assuming that citizenship is so central to a person's life, perspectives and well-being that it forms part of their social identity and hence their private life, this omission is troubling. The book has developed a normative argument to address this issue: the protection gaps left open under current international law should be closed by recognizing a right to the citizenship of a specific state on the basis of one's effective connection to that state on the basis of the principle of *jus nexi*. Such a *jus nexi*-based right to citizenship would give rise to a right to the citizenship of the state to which one has a substantive connection. Beyond that, the principle of *jus nexi* would allow to clarify the content of the right to citizenship also with regard to children, dual or multiple citizenship and with regard to the possibility to withdraw citizenship against the will of the person concerned and, generally, to effectively balance interferences with the right to citizenship for the individual concerned against legitimate interests of the state.

The book developed these arguments over the course of seven chapters. Chapter 2 has layed out the theoretical groundwork for the book and discussed the different approaches to conceptualizing citizenship. It has shown that from a legal perspective, citizenship is seen as a legal status, a relationship between an individual and a state, determining membership in the state and giving rise to rights and duties on both parts. At the same time, citizenship is often conceptualized as a right fundamentally affecting core aspects of human dignity. Statelessness — the lack of a nationality — is widely understood as a grave

violation of a person's rights. Hence, citizenship has been described as a moral human right by different thinkers — from Hannah Arendt to Seyla Benhabib, Ruth Rubio-Marín, Joseph Carens, Ayelet Shachar and David Owen — who all develop convincing normative arguments why individuals should have a right to membership in the community they live in. The question then is how that moral right translates to international (human rights) law in the interplay between state sovereignty and individual rights. This core question lays at the heart of the book and guided the discussion in Chapters 4, 5 and 6 in particular.

Before turning to the level of individual (human) rights, however, Chapter 3 has discussed the evolution of the regulation of citizenship in international law from a historical perspective. It has shown that nationality matters were long theorized as questions that fall within states' *domaine réservé*; their internal jurisdiction. A closer look at the international legal framework discloses that this is no longer true or, in fact, has never been true. While nationality is closely connected to elemental functions of the states, and acquisition and loss of citizenship is regulated at the national level, nationality matters are also widely regulated in international law. States have long accepted limitations upon their sovereignty in nationality matters in international legal instruments. The regulation of nationality in international law is not only concerned with the avoidance of conflicts between domestic nationality regimes, it increasingly establishes substantive standards relating to the acquisition, change, enjoyment and loss of nationality. In recent years, more and more limitations have been imposed by international human rights law. Hence, states remain competent to determine the conditions for acquisition and loss of their respective nationalities — and make use of that competence to restrict access to nationality through stricter naturalization regulations and expanding denationalization powers. Nonetheless, international law draws the limits of that competence with the aim of protecting the rights of individuals. States' discretion in nationality matters is not unlimited.

Thus, the right to nationality is not merely an aspiration or an empty shell. This is the main argument developed in Chapters 4, 5 and 6. The in-depth analysis of the legal standards codifying the right to nationality in Chapter 4 has shown that the right is, in fact, enshrined in a great number of instruments. The codification began with the inclusion of the right to nationality in Article 15 UDHR at the founding moment of modern international human rights law in 1948. This provision still represents the starting point for the recognition of the right to nationality as a human right. Subsequently, the right to nationality has been included in almost all of the UN human rights treaties — often as a right of the child to acquire a nationality or through the principle of non-discrimination, and not as a general right to nationality. The right to nationality

is also reflected in the two Statelessness Conventions. Moreover, it is explicitly recognized in a large number of soft law instruments and in the jurisprudence of UN treaty bodies. Additionally, the right to nationality is reinforced by human rights instruments at the regional level, with the ACHR and the ECN being the most progressive instruments. Based on these regional instruments, monitoring bodies have interpreted the right to nationality and thereby contributed significantly to its recognition as a human right. Finally, some aspects of the right to nationality find increasing acceptance as customary international law, namely the right of the child to the nationality of the state of birth if it would otherwise be stateless, the principle of prevention and reduction of statelessness, and the prohibition of arbitrary deprivation of nationality. This broad legal framework shows that the right to nationality is indeed widely protected in international human rights law.

The principled analysis of the scope and content of the right to nationality in the current international legal framework in Chapter 5 has shown that the right to nationality is, in many respects, sufficiently precise to give rise to identifiable rights and obligations relating to the acquisition, change and loss of nationality but also its enjoyment, even though not all obligations find an equally strong basis in international legal instruments. In principle, the right to nationality has a general personal scope of application, even if some instruments limit its personal scope to children or to stateless persons only. In the context of acquiring nationality, specific obligations can be identified regarding the right of the child to a nationality if they would otherwise be stateless, facilitated acquisition of nationality by stateless persons and refugees, and acquiring nationality in cases of state succession. Obligations can also be identified regarding the right to change and, correspondingly, the right to renounce one's nationality. The right to change one's nationality can, under certain circumstances, even imply an obligation to accept dual or multiple citizenship if it would otherwise amount to an arbitrary denial of nationality. In the context of deprivation of nationality, not only arbitrary deprivation is prohibited under the right to nationality but also deprivation on discriminatory grounds, deprivation resulting in statelessness and deprivation for the sole purpose of expulsion. Furthermore, depriving children of nationality and mass deprivation of nationality are problematic from a human rights perspective. The principle of non-discrimination, the prohibition of arbitrary interference with the right to nationality and the duty to prevent and reduce statelessness apply as transversal obligations to all aspects of the right to nationality. Additionally, certain procedural standards can be identified that imply access to the procedure, procedural guarantees and a right to review. This being said, the right to nationality is not absolute and can be restricted under certain circumstances. In principle, the limit for lawful interferences with the right to nationality is

the prohibition of arbitrariness. Even though the standard of non-arbitrariness theoretically implies a lower threshold than the principle of proportionality, the prohibition of arbitrary interferences with the right to nationality is, in practice, often interpreted as precluding interferences that are disproportionate to the interest pursued or the gravity of the interference for the person concerned.

The breadth of specific rights and obligations based on the right to nationality that can be identified under the current international legal framework is considerable. The right to citizenship protects an individual's rights in nationality matters, from birthright acquisition of nationality, naturalization procedures, the issuance of documentation or deprivation of nationality. Nevertheless, there is one glaring omission: the right to the citizenship of a specific state. The right to nationality, as it is currently interpreted, does not grant a right to a specific citizenship; a given citizenship. In the context of international migration, this is a significant omission. It leaves non-citizens in a legal limbo when it comes to securing the rights to belong, to participate and to equal standing in the state in which they feel at home. Beyond the lack of a right to a given citizenship, the right to nationality often fails to provide protection where an individual is not at risk of statelessness and the threshold of arbitrariness cannot in all cases prevent interferences with the right to citizenship that prove to be disproportionate.

Against that background I have suggested in Chapter 6 to reinterpret the right to citizenship based on the principle of *jus nexi*. The principle of *jus nexi* — the genuine-connection principle of membership acquisition based on a person's effective ties as developed by Shachar — would address these protection gaps. The principle bears similarities to notions of integration under the right to private and family life and the concept of one's own country, which are well known in international human rights law. Through the perspective of the principle of *jus nexi*, I have argued, the state bearing the duty to respect, protect and fulfill the right to citizenship can be identified on the basis of a person's actual ties and life circumstances. This approach provides non-citizens with a legal pathway to full and effective membership and, at the same time, facilitates the enforceability of the right to citizenship in practice. Lastly, a *jus nexi*-based right to citizenship might enable us to accommodate moral considerations relating to equal membership in one's society that are essential for a humane and dignified life.

A right to citizenship does not automatically grant equal rights and participation for all. It is obviously not enough to frame a contested policy matter as a human right to achieve social change. Nevertheless, this book tries to show that international law offers a framework to improve the recognition and protection of the right to citizenship as a human right. This has important consequences.

Citizenship is transformed a formal legal status and a privilege of states to a right of individuals.[3] This destabilizes the existing hierarchies between states and non-citizens. The scope of state discretion is reduced. States must account for individual interests. Individuals are given a voice in citizenship matters, not just if they have sufficient funds to buy citizenship or social, economic or cultural capital to fulfil restrictive naturalization criteria but based on their rights by virtue of being human.[4] Demands relating to nationality can be framed in a rights' language.[5] International norms can be invoked before domestic and international authorities.[6] Specific claims can be made in real procedures and cases. Recognizing the right to citizenship as an effective and judiciable human right ultimately means that citizenship is no longer a matter of states choosing their ideal citizens but of individuals claiming a right to membership in the place they belong. Ultimately, citizenship shifts from being a discretionary privilege of states to an individual human right.

Recognizing the right to citizenship as a human right for the most part does not require the adoption of a new international treaty or the inclusion of new provisions in existing instruments. As this book has argued, it merely requires the full recognition of the right to citizenship as already enshrined in existing international instruments and its effective implementation and enforcement at the domestic level by law-makers and authorities. At the same time, having an effective and enforceable right to citizenship in a specific state on the basis of one's actual social connections would fundamentally transform the relationship between states and individuals, between citizens and non-citizens, between belonging and exclusion. At a time when large-scale international migratory movements intersect with a re-emerging nationalism, the closure of territorial borders and the construction of symbolic boundaries of belonging and an increasing skepticism of the significance and potential of international human rights law, the novel interpretation of the right to citizenship suggested in this book would offer significant safeguards for the rights of individuals.

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3 See also Kim Rubenstein and Daniel Adler, 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7 Indiana Journal of Global Legal Studies 546.

4 See on citizenship as a form of capital Sara Kalm, 'Citizenship Capital' (2020) 34 Global Society 528.

5 Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff 2010) 100.

6 See on the initiatives to strengthen the right to nationality and reduce statelessness by means of strategic litigation the work of the European Network on Statelessness <www.statelessness.eu> or the Open Society Justice Initiative <https://www.opensocietyfoundations.org/who-we-are/programs/open-society-justice-initiative>.

Bibliography

Abel P, 'Denationalization' (1942) 6 The Modern Law Review 57.

Abizadeh A, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders' (2008) 36 Political Theory 37.

Achermann A, *Die völkerrechtliche Verantwortlichkeit fluchtverursachender Staaten: ein Beitrag zum Zusammenwirken von Flüchtlingsrecht, Menschenrechten, kollektiver Friedenssicherung und Staatenverantwortlichkeit* (Nomos Verlagsgesellschaft 1997).

Achermann A and von Rütte B, 'Kommentar zu Art. 37 BV' in Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (eds), *Basler Kommentar Bundesverfassung* (Helbing Lichtenhahn 2015).

Achermann A and von Rütte B, 'Kommentar zu Art. 38 BV' in Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (eds), *Basler Kommentar Bundesverfassung* (Helbing Lichtenhahn 2015).

Achiume ET, 'Governing Xenophobia' (2018) 51 Vanderbilt Journal of Transnational Law 333.

Achiume ET, 'Migration as Decolonization' (2019) 71 Stanford Law Review 1509.

Acosta D, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (Cambridge University Press 2018).

Adejumobi S, 'Citizenship, Rights, and the Problem of Conflicts and Civil Wars in Africa' (2001) 23 Human Rights Quarterly 148.

Adjami M and Harrington J, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27 Refugee Survey Quarterly 93.

Adjolohoun HS, 'African Commission on Human and Peoples' Rights Resolution 234 on the Right to Nationality' (2014) 53 International Legal Materials 413.

Albarazi Z, 'Regional Report on Citizenship: The Middle East and North Africa (MENA)' (Global Citizenship Observatory (GLOBALCIT) 2017) GLOBALCIT Comparative Report 2017/3 <http://cadmus.eui.eu/bitstream/handle/1814/50046/RSCAS_GLOBALCIT_Comp_2017_03.pdf?sequence=1&isAllowed=y> accessed 12 September 2022.

Aleinikoff TA, 'Theories of Loss of Citizenship' (1986) 84 Michigan Law Review 1471.

Allam W, 'The Arab Charter on Human Rights: Main Features' (2014) 28 Arab Law Quarterly 40.

Anghie A, *Imperialism, Sovereignty, and the Making of International Law* (1st ed, Cambridge University Press 2007).

Arendt H, *The Human Condition* (2nd ed, University of Chicago Press 1958).

Arendt H, *The Origins of Totalitarianism* (Harcourt 1973).

Aron R, 'Is Multinational Citizenship Possible?' (1974) 41 Social Research 638.

Arrighi J-T and Bauböck R, 'A Multilevel Puzzle: Migrants' Voting Rights in National and Local Elections' (2017) 56 European Journal of Political Research 619.

Arrighi J-T and Piccoli L, 'SWISSCIT: Index on Citizenship Law in Swiss Cantons' (nccr — on the move 2018) <https://indicators.nccr-onthemove.ch/how-inclusive-are-citizenship-laws-in-the-26-swiss-cantons/> accessed 12 September 2022.

Autem M, 'The European Convention on Nationality: Is a European Code of Nationality Possible?' in Council of Europe (ed), *Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality* (Council of Europe 1999).

Bader VM, 'Citizenship of the European Union. Human Rights, Rights of Citizens of the Union and of Member States' (1999) 12 Ratio Juris 153.

Baer S, 'Politische Rechte' in Arnd Pollmann and Georg Lohmann (eds), *Menschenrechte: Ein interdisziplinäres Handbuch* (Metzler 2012).

Balaton-Chrimes S, *Ethnicity, Democracy and Citizenship in Africa: Political Marginalisation of Kenya's Nubians* (Routledge 2016).

Balot RK, 'Revisiting the Classical Ideal of Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

Barker V, 'Democracy and Deportation: Why Membership Matters Most' in Katia Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press 2013).

Batchelor CA, 'UNHCR and Issues Related to Nationality: International Assistance to Stateless Persons' (1995) 14 Refugee Survey Quarterly 91.

Batchelor CA, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 International Journal of Refugee Law 156.

Batchelor CA, 'Developments in International Law: The Avoidance of Statelessness Through Positive Application of the Right to a Nationality' in Council of Europe (ed), *Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality* (Council of Europe 1999).

Batchelor CA, 'The International Legal Framework Concerning Statelessness and Access for Stateless Persons, Contribution to the European Union Seminar on the Content and Scope of International Protection' (UNHCR 2002).

Batchelor CA, 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation Within the European Union Member States and Recommendations for Harmonization' (2005) 22 Refuge 31.

Batchelor CA, 'Transforming International Legal Principles into National Law: The Right to a Nationality and the Avoidance of Statelessness' (2006) 25 Refugee Survey Quarterly 8.

Bauböck R, *Transnational Citizenship, Membership and Rights in International Migration* (Edward Elgar Publishing 1994).

Bauböck R, 'Citizenship and Migration — Concepts and Controversies' in Rainer Bauböck (ed), *Migration and Citizenship, Legal Status, Rights and Political Participation* (Amsterdam University Press 2006).

Bauböck R, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' (2006) 75 Fordham Law Review 2393.

Bauböck R, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8 Theoretical Inquiries in Law 453.

Bauböck R, 'Global Justice, Freedom of Movement and Democratic Citizenship' (2009) 50 European Journal of Sociology 1.

Bauböck R, 'The Rights and Duties of External Citizenship' (2009) 13 Citizenship Studies 475.

Bauböck R, 'The Three Levels of Citizenship within the European Union' (2014) 15 German Law Journal 751.

Bauböck R, 'Political Membership and Democratic Boundaries' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

Bauböck R, 'Democratic Inclusion. A Pluralistic Theory of Citizenship' in Rainer Bauböck (ed), *Democratic Inclusion* (Manchester University Press 2018).

Bauböck R, 'Genuine Links and Useful Passports: Evaluating Strategic Uses of Citizenship' (2019) 45 Journal of Ethnic and Migration Studies 1015.

Bauböck R and Paskalev V, 'Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation' (2015) 30 Georgetown Immigration Law Journal 47.

Bellamy R, *Citizenship: A Very Short Introduction* (Oxford University Press 2008).

Benhabib S, *The Rights of Others, Aliens, Residents, and Citizens* (5th printing, Cambridge University Press 2007).

Benhabib S, 'Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times' (2007) 11 Citizenship Studies 19.

Bennouna M, 'De la reconnaissance d'un "droit à la nationalité" en droit international' in Société française pour le droit international (ed), *Droit international et nationalité* (Editions Pedone 2012).

Bescotti E et al, 'Passportization. Russia's "Humanitarian" Tool for Foreign Policy, Extra-Territorial Governance, and Military Intervention' *Verfassungsblog* (23 March 2022) <https://verfassungsblog.de/passportization/> accessed 12 September 2022.

Besson S, 'The European Union and Human Rights: Towards A Post-National Human Rights Institution?' (2006) 6 Human Rights Law Review 323.

Besson S, 'Sovereignty', *Max Planck Encyclopedia of Public International Law* (2011) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472> accessed 12 September 2022.

Besson S, *Völkerrecht — Droit international public* (2. Auflage, Dike 2010).

Besson S and Utzinger A, 'Toward European Citizenship' (2008) 39 Journal of Social Philosophy 185.

Bhabha J (ed), *Children Without a State: A Global Human Rights Challenge* (The MIT Press 2014).

Bhabha J, 'The Importance of Nationality for Children' in Institute on Statelessness and Inclusion (ed), *The World's Stateless: Children* (Wolf Legal Publishers 2017).

Bialosky J, 'Regional Protection of the Right to a Nationality' (2015) 24 Cardozo Journal of International & Comparative Law 153.

Bianchini K, 'A Comparative Analysis of Statelessness Determination Procedures in 10 EU States' (2017) 29 International Journal of Refugee Law 42.

Bianchini K, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons across EU States* (Brill Nijhoff 2018).

Blackman J, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law' (1998) 19 Michigan Journal of International Law 1141.

Blitz BK, 'The State and the Stateless. The Legacy of Hannah Arendt Reconsidered' in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *End Statelessness?* (Routledge 2017).

Bloemraad I, 'Does Citizenship Matter?' in Ayelet Shachar and others (eds), *Oxford Handbook of Citizenship* (Oxford University Press 2017).

Bloemraad I and Sheares A, 'Understanding Membership in a World of Global Migration: (How) Does Citizenship Matter?' (2017) 51 International Migration Review 823.

Bloom T, 'Problematizing the Conventions on Statelessness' (United Nations University Institute on Globalization, Culture and Mobility (UNU — GCM) 2013) Policy Report No. 02/01 <http://collections.unu.edu/eserv/UNU:1969/pdf0201BLOOM.pdf> accessed 12 September 2022.

Bloom T, '*Noncitizenism: Recognising Noncitizen Capabilities in a World of Citizens*' (Routledge 2018).

Bloom T, 'Are the Global Compacts on Refugees and for Migration Addressing Statelessness Appropriately?' (*European Network on Statelessness Blog*, 7 February 2018) <https://www.statelessness.eu/blog/are-global-compacts-refugees-and-migration-addressing-statelessness-appropriately> accessed 12 September 2022.

Boekestein TL and de Groot G-R, 'Discussing the Human Rights Limits on Loss of Citizenship: A Normative-Legal Perspective on Egalitarian Arguments Regarding Dutch Nationality Laws Targeting Dutch-Moroccans' (2019) 23 Citizenship Studies 320.

Boillet V and Akiyama H, 'Statelessness and International Surrogacy from the International and European Legal Perspectives' (2017) 27 Swiss Review of International and European Law 513.

Boll AM, *Multiple Nationality and International Law* (Martinus Nijhoff 2007).

Bosniak L, 'Citizenship Denationalized' (2000) 7 Indiana Journal of Global Legal Studies 447.

Bosniak L, 'Multiple Nationality and the Postnational Transformation of Citizenship' in David A Martin and Kay Hailbronner (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects* (Kluwer Law International 2003).

Bosniak L, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2006).

Bosniak L, 'Persons and Citizens in Constitutional Thought' (2010) 8 International Journal of Constitutional Law 9.

Bosniak L, 'Status Non-Citizens' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

Brandvoll J, 'Deprivation of Nationality' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

Brownlie I, 'The Relations of Nationality in Public International Law' (1963) 39 British Yearbook of International Law 284.

Brubaker R, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992).

Burchardt D and Gulati R, 'International Counter-Terrorism Regulation and Citizenship-Stripping Laws — Reinforcing Legal Exceptionalism' (2018) 23 Journal of Conflict and Security Law 203.

Calamur K, 'How Countries Use Passports as a Geopolitical Tool' *The Atlantic* (26 April 2019) <https://www.theatlantic.com/international/archive/2019/04/russia-passports-separatists-ukraine-common/588160/> accessed 12 September 2022.

Çalı B, Costello C and Cunnighamn S, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (2020) 21 German Law Journal 355.

Carens J, *The Ethics of Immigration* (Oxford University Press 2013).

Carlier J-Y, 'Droits de l'homme et nationalité' (2003) 63 Annales de Droit de Louvain 243.

Caroni M and Scheiber N, 'Art. 9 CEDAW' in Erika Schläppi, Silvia Ulrich and Judith Wyttenbach (eds), *CEDAW: Kommentar zum UNO-Übereinkommen über die Beseitigung jeder Form der Diskriminierung der Frau: Allgemeine Kommentierung, Umsetzung in der Schweiz, Umsetzung in Österreich* (Stämpfli, Manz 2015).

Carvalho Ramos A de, 'Immigration and Human Rights: The Impact of the Inter-American Court of Human Rights Precedents (Towards a "Latin American Migration Policy"?)' (2018) 56 Archiv des Völkerrechts 155.

Cassee A, 'Das Recht auf globale Bewegungsfreiheit: Eine Verteidigung' (2014) 141 Archiv für Rechts- und Sozialphilosphie, Beihefte 55.

Cassee A, *Globale Bewegungsfreiheit: ein philosophisches Plädoyer für offene Grenzen* (1. Aufl., Suhrkamp 2016).

Cassuto T, 'Identity and Nationality' in Council of Europe (ed), *Challenges to National and International Law on Nationality at the Beginning of the New Millenium, Proceedings of the 2nd European Conference on Nationality* (Council of Europe 2001).

Castles S, 'Nation and Empire: Hierarchies of Citizenship in the New Global Order' (2005) 42 International Politics 203.

Cera R, 'Article 18 [Liberty of Movement and Nationality]' in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer International Publishing 2017).

Chan JM, 'The Right to a Nationality as a Human Right' (1991) 12 Human Rights Law Journal 1.

Chetail V, 'Sources of International Migration Law' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012).

Chetail V, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014).

Chetail V, 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel' (2016) 27 European Journal of International Law 901.

Chetail V, *International Migration Law* (Oxford University Press 2019).

Chimni BS, 'Global Compact on Refugees: One Step Forward, Two Steps Back' (2018) 30 International Journal of Refugee Law 630.

Cholewinski R, 'Strasbourg's "Hidden Agenda"?: The Protection of Second-Generation Migrants from Expulsion under Article 8 of the European Convention on Human Rights' (1994) 12 Netherlands Quarterly of Human Rights 287.

Clerici R, 'Freedom of States to Regulate Nationality: European Versus International Court of Justice?' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law* (T MC Asser Press 2013).

Conklin WE, *Statelessness: The Enigma of the International Community* (Hart Publishing 2014).

Cornelisse G, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff 2010).

Cornelisse G, 'A New Articulation of Human Rights, or Why the European Court of Human Rights Should Think Beyond Westphalian Sovereignty' in Marie-Bénédicte Dembour and Tobias Kelly (eds), *Are Human Rights for Migrants?: Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Routledge 2011).

Corral BA, 'Staatsangehörigkeit und Staatsbürgerschaft vor den Herausforderungen des demokratischen Verfassungsstaates' (2007) 46 Der Staat 349.

Costamagna F, 'Statelessness in the Context of State Succession, An Appraisal under International Law' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013).

Costello C, 'On Refugeehood and Citizenship' in Ayelet Shachar and others (ed), The Oxford Handbook of Citizenship (Oxford University Press 2017).

Cottier T and others, 'The Principle of Proportionality in International Law: Foundations and Variations' (2017) 18 The Journal of World Investment & Trade 628.

Crawford J, 'The Criteria for Statehood in International Law' (1977) 48 British Yearbook of International Law 93.

Crawford J, *The Creation of States in International Law* (2nd ed, Clarendon Press 2006).

Crawford J, 'State', *Max Planck Encyclopedia of Public International Law* (2011) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1473> accessed 12 September 2022.

Crawford J, *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press 2019).

Crenshaw K, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 University of Chicago Legal Forum 139.

D'Agnone G, 'Determining the Nationality of Companies in ICSID Arbitration' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013).

Dauvergne C, 'Challenges to Sovereignty: Migration Laws for the 21st Century' (2003) UNHCR Working Paper No. 92 <http://www.unhcr.org/research/working/3f2f69e74/challenges-sovereignty-migration-laws-21st-century-catherine-dauvergne.html> accessed 12 September 2022.

Dauvergne C, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 The Modern Law Review 588.

Dauvergne C, 'Citizenship with a Vengeance' (2007) 8 Theoretical Inquiries in Law 489.

Dauvergne C, 'Irregular Migration, State Sovereignty and the Rule of Law' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014).

de Chickera A, 'GCM Commentary: Objective 4: Ensure That All Migrants Have Proof of Legal Identity and Adequate Documentation' (*Refugee Law Initiative Blog*, 8 November 2018) <https://rli.blogs.sas.ac.uk/2018/11/08/gcm-commentary-objective-4/> accessed 12 September 2022.

de Groot G-R, 'The European Convention on Nationality: A Step towards a Ius Commune in the Field of Nationality Law' (2000) 7 Maastricht Journal of European and Comparative Law 117.

de Groot G-R, 'Children, Their Right to a Nationality and Child Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

de Groot G-R and Vink M, 'Loss of Citizenship. Trends and Regulations in Europe' (EUDO Citizenship Observatory 2010) <http://cadmus.eui.eu/bitstream/handle/1814/19575/LossOfCitizenship_rev_20101014.pdf?sequence=1&isAllowed=y> accessed 12 September 2022.

de Groot G-R and Vonk O, 'Nationality, Statelessness and ECHR's Article 8: Comments on Genovese v Malta' (2012) 14 European Journal of Migration and Law 317.

de Groot G-R and Vonk O, *International Standards on Nationality Law: Texts, Cases and Materials* (Wolf Legal Publishers 2016).

De Guchteneire P and Pécoud A, 'Introduction: The UN Convention on Migrant Workers' Rights' in Ryszard Cholewinski, Antoine Pécoud and Paul De Guchteneire (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Paris: UNESCO Publishing; Cambridge, England: Cambridge University Press 2009).

De Schutter H and Ypi L, 'Mandatory Citizenship for Immigrants' (2015) 45 British Journal of Political Science 235.

Decaux E, 'Le droit à une nationalité, en tant que droit de l'homme' (2011) 22 Revue trimestrielle des droits de l'homme 237.

Deinhard M, *Das Recht der Staatsangehörigkeit unter dem Einfluss globaler Migrationserscheinungen* (BWV, Berliner Wiss-Verl 2015).

Dembour M-B, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg' (2003) 21 Netherlands Quarterly of Human Rights 63.

Dembour M-B, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015).

Dembour M-B, 'Ramadan v Malta: When Will the Strasbourg Court Understand That Nationality Is a Core Human Rights Issue?' (*Strasbourg Observers*, 22 July 2016) <http://blogs.brighton.ac.uk/humanrights/2016/07/22/ramadan-v-malta-when-will-the-strasbourg-court-understand-that-nationality-is-a-core-human-rights-issue/> accessed 12 September 2022.

Denza E, 'Nationality and Diplomatic Protection' (2018) 65 Netherlands International Law Review 463.

Deutsche Welle, 'Bundesregierung verschärft Einbürgerungsregeln' *DW.COM* (17 April 2020) <https://www.dw.com/de/bundesregierung-versch%C3%A4rft-einb%C3%BCrgerungsregeln/a-53161205> accessed 12 September 2022.

Diaconu I, *Racial Discrimination* (Eleven International Publishing 2011).

Diener AC, 'Re-Scaling the Geography of Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

Doek JE, 'The CRC and the Right to Acquire and to Preserve a Nationality' (2006) 25 Refugee Survey Quarterly 26.

Dolidze A, 'Lampedusa and Beyond: Recognition, Implementation, and Justiciability of Stateless Persons' Rights under International Law' (2011) 6 Interdisciplinary Journal of Human Rights Law 123.

Donner R, *The Regulation of Nationality in International Law* (2nd ed, Transnational Publishers 1994).

Donner R, 'Dual Nationality in International Law' (2006) 47 Acta Juridica Hungarica 15.

Dörr O, 'Nationality' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006).

Dumbrava C, 'Kick Off Contribution: Bloodlines and Belonging: Time to Abandon Ius Sanguinis?' in Costica Dumbrava and Rainer Bauböck (eds), *Bloodlines and Belonging: Time to Abandon Ius Sanguinis?* (2015) <http://cadmus.eui.eu/bitstream/handle/1814/37578/RSCAS_2015_80.pdf?sequence=1&isAllowed=y> accessed 12 September 2022.

Dumbrava C, 'The Ethno-Demographic Impact of Co-Ethnic Citizenship in Central and Eastern Europe' (2019) 45 Journal of Ethnic and Migration Studies 958.

Dumbrava C and Bauböck R (eds), *Bloodlines and Belonging: Time to Abandon Ius Sanguinis?* (2015) <http://cadmus.eui.eu/bitstream/handle/1814/37578/RSCAS_2015_80.pdf?sequence=1&isAllowed=y> accessed 12 September 2022.

Echeverría G, 'Report on Citizenship Law: Ecuador' (GLOBALCIT 2017) GLOBALCIT Country Report 2017/5 <http://cadmus.eui.eu/bitstream/handle/1814/45373/GLOBALCIT_CR_2017_05.pdf> accessed 12 September 2022.

Edwards A, 'Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women' (UN High Commissioner for Refugees (UNHCR) 2009) PPLAS/2009/02 <http://www.refworld.org/docid/4a8aa8bd2.html> accessed 12 September 2022.

Edwards A, The Meaning of Nationality in International Law in an Era of Human Rights, Procedural and Substantive Aspects' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

Eide A and Alfredsson G, 'Introduction' in Asbjørn Eide and others (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992).

Ersbøll E, 'The Right to a Nationality and the European Convention on Human Rights' in Stéphanie Lagoutte, Hans-Otto Sano and Scharff Smith (eds), *Human Rights in Turmoil: Facing Threats, Consolidating Achievements* (Martinus Nijhoff 2007).

Ersbøll E, 'Nationality and Identity Issues — A Danish Perspective Special Issue: EU Citizenship: Twenty Years on: Part II: Legal Citizenship in the EU and Its Frontiers' (2014) 15 German Law Journal 835.

Ersbøll E, 'Retain Ius Sanguinis, but Don't Take It Literally!' in Costica Dumbrava and Rainer Bauböck (eds), *Bloodlines and Belonging: Time to Abandon Ius Sanguinis?* (2015) <http://cadmus.eui.eu/bitstream/handle/1814/37578/RSCAS_2015_80.pdf?sequence=1&isAllowed=y> accessed 12 September 2022.

Ersbøll E, 'Birthright Citizenship and Children Born in a Conflict Zone' (*European Network on Statelessness*, 5 February 2020) <https://www.statelessness.eu/blog/birthright-citizenship-and-children-born-conflict-zone> accessed 12 September 2022.

Esbrook L, 'Citizenship Unmoored: Expatriation as a Counter-Terrorism Tool' (2016) 37 University of Pennsylvania Journal of International Law 1273.

European Network on Statelessness, 'Statelessness Determination and the Protection Status of Stateless Persons' (European Network on Statelessness (ENS) 2013) <http://www.refworld.org/docid/53162a2f4.html> accessed 12 September 2022.

European Network on Statelessness, 'Statelessness Index' (European Network on Statelessness (ENS) 2019) <https://index.statelessness.eu/> accessed 12 September 2022.

Ewumbue Monono DE, 'People's Right to a Nationality and the Eradication of Statelessness in Africa' (2021) 3 Statelessness and Citizenship Review 33.

Faist T (ed), *Dual Citizenship in Europe: From Nationhood to Societal Integration* (Ashgate 2007).

Farahat A, 'The Exclusiveness of Inclusion: On the Boundaries of Human Rights in Protecting Transnational and Second Generation Migrants' (2009) 11 European Journal of Migration and Law 253.

Farahat A, *Progressive Inklusion: Zugehörigkeit und Teilhabe im Migrationsrecht* (Springer 2014).

Farahat A and Markard N, 'Forced Migration Governance: In Search of Sovereignty' (2016) 17 German Law Journal 923.

Fargahi B, *Das Konzept des eigenen Landes gemäss Art. 12 Abs. 4 UNO-Pakt II im Lichte der Strassburger sowie der Schweizer Wegweisungspraxis gegenüber Ausländern der zweiten Generation* (Dike 2016).

Fassbender B, 'Peace of Westphalia (1648)', *Max Planck Encyclopedia of Public International Law* (2011) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e739> accessed 12 September 2022.

Fellmeth AX, *Paradigms of International Human Rights Law* (Oxford University Press 2016).

Ferris D and others, 'Noncitizen Voting Rights in the Global Era: A Literature Review and Analysis' (2020) 21 Journal of International Migration and Integration 949.

Fischer Williams J, 'Denationalization' (1927) 8 British Year Book of International Law 45.

Fitzgerald DS, 'The History of Racialized Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

Forlati S, 'Nationality as a Human Right' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013).

Foster M and Baker TR, 'Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?' (2021) 11 Columbia Journal of Race and Law 83.

Fraser J, 'Inclusive Democracy: Franchise Limitations on Non-Resident Citizens as an Unjust Restriction of Rights under the European Convention on Human Rights' (2017) 33 Utrecht Journal of International and European Law 23.

Fripp E, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016).

Gammeltoft-Hansen T, 'The Normative Impact of the Global Compact on Refugees' (2019) 30 International Journal of Refugee Law 605.

Gammeltoft-Hansen T and Gammeltoft-Hansen H, 'The Right to Seek — Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 European Journal of Migration and Law 439.

Garner O, 'The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status' (2018) 20 Cambridge Yearbook of European Legal Studies 116.

Gettleman J and Kumar H, 'Four Million Indians in One State Risk Being Denied Citizenship. Most Are Muslims'. *The New York Times* (17 August 2019) <https://www.nytimes.com/2019/08/17/world/asia/india-muslims-narendra-modi.html> accessed 12 September 2022.

Gibney MJ, 'Should Citizenship Be Conditional? The Ethics of Denationalization' (2013) 75 The Journal of Politics 646.

Gibney MJ, 'Statelessness and Citizenship in Ethical and Political Perspective' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

Gibney MJ, 'Denationalization' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

Gibney MJ, 'Denationalisation and Discrimination' (2020) 46 Journal of Ethnic and Migration Studies 2551.

Gil AR, 'Amendments to the Portuguese Nationality Law — Towards an (Even) More Inclusive Citizenship' *GLOBALCIT* (1 August 2018) <http://globalcit.eu/amendments-to-the-portuguese-nationality-law-towards-an-even-more-inclusive-citizenship/> accessed 12 September 2022.

Global Citizenship Observatory (GLOBALCIT), 'Denmark: The Law on Dual Citizenship Came into Effect on 1 September' *GLOBALCIT* (1 September 2015) <http://globalcit.eu/denmark-the-law-on-dual-citizenship-comes-into-effect-on-1-september/> accessed 12 September 2022.

Global Citizenship Observatory (GLOBALCIT), 'New Citizenship Deprivation Rules in the Wake of Paris Attacks' *GLOBALCIT* (9 December 2015) <http://globalcit.eu/new-citizenship-deprivation-rules-in-the-wake-of-paris-attacks/> accessed 12 September 2022.

Global Citizenship Observatory (GLOBALCIT), 'Hollande Drops Plans to Revoke Citizenship of Terrorism Suspects' *GLOBALCIT* (30 March 2016) <http://globalcit.eu/hollande-drops-plans-to-revoke-citizenship-of-terrorism-suspects/> accessed 12 September 2022.

Global Citizenship Observatory (GLOBALCIT), 'Global Birthright Indicators, Version 3.0' (Global Citizenship Observatory (GLOBALCIT) 2017) <https://public.tableau.com/profile/lorenz03504#!/vizhome/Globalbirthrightindicators/Globalbirthrightindicators> accessed 12 September 2022.

Global Citizenship Observatory (GLOBALCIT), 'Global Database on Modes of Acquisition of Citizenship, Version 1.0' (GLOBALCIT 2017) <https://globalcit.eu/modes-acquisition-citizenship/> accessed 12 September 2022.

Global Citizenship Observatory (GLOBALCIT), 'Global Database on Modes of Loss of Citizenship, Version 1.0' (GLOBALCIT 2017) <https://globalcit.eu/modes-loss-citizenship/> accessed 12 September 2022.

Global Citizenship Observatory (GLOBALCIT), 'Citizenship Case Law Database' (GLOBALCIT 2018) <http://globalcit.eu/citizenship-case-law/> accessed 12 September 2022.

Goertz S and Goertz-Neumann M, *Politisch motivierte Kriminalität und Radikalisierung* (Kriminalistik 2018).

Goldston JA, 'Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens' (2006) 20 Ethics & International Affairs 321.

Goodin RE, 'Enfranchising All Affected Interests, and Its Alternatives' (2007) 35 Philosophy & Public Affairs 40.

Goodwin-Gill G, *Introduction to the 1954 Convention Relating to the Status of Stateless Persons, from the United Nations Audiovisual Library of International Law* (2010) <https://legal.un.org/avl/ha/cssp/cssp.html> accessed 12 September 2022.

Goodwin-Gill G, *Introduction to the 1961 Convention on the Reduction of Statelessness, from the United Nations Audiovisual Library of International Law* (2011) <https://legal.un.org/avl/ha/crs/crs.html> accessed 12 September 2022.

Goonesekere SWE, 'Article 9' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press 2012).

Goris I, Harrington J and Köhn S, 'Statelessness: What It Is and Why It Matters' (2009) 32 Forced Migration Review 4.

Gortázar Rotaeche CJ, 'Identity, Member States Nationality and EU Citizenship. Restitution of Former European Nationals v Naturalisation of New European Residents?' in Elspeth Guild (ed), *The Reconceptualization of European Union Citizenship* (Martinus Nijhoff 2014).

Govil R and Edwards A, 'Women, Nationality and Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

Grahl-Madsen A, *Commentary of the Refugee Convention 1951* (UNHCR 1997) <https://www.unhcr.org/3d4ab5fb9.pdf> accessed 12 September 2022.

Griffin WL, 'The Right to a Single Nationality' (1966) 40 Temple Law Quarterly 57.

Guild E, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004).

Guild E (ed), *The Reconceptualization of European Union Citizenship* (Martinus Nijhoff 2014).

Guild E, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?' (2018) 30 International Journal of Refugee Law 661.

Gündogdu A, *Rightlessness in an Age of Rights* (Oxford University Press 2015).

de Guttry A, 'The Right of Aliens to Vote and to Carry Out Political Activities: A Critical Analysis of the Relevant International Obligations Incumbent on the State of Origin and on the Host State' (2018) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 933.

Gyulai G, 'The Determination of Statelessness and the Establishment of a Statelessness-Specific Protection Regime' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

Haase A-M, '„Reichsbürger und Selbstverwalter" im Kontext politisch motivierter Gewalt in Sachsen' (2018) 15 Totalitarianism and Democracy 47.

Hailbronner K, 'Rights and Duties of Dual Nationals: Changing Concepts and Attitudes' in David A Martin and Kay Hailbronner (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects* (Kluwer Law International 2003).

Hailbronner K, 'Nationality in Public International Law and European Law' in Rainer Bauböck and others (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries, Volume 1: Comparative Analyses* (Amsterdam University Press 2006).

Hailbronner K, 'Der Staat und der Einzelne als Völkerrechtssubjekte' in Wolfgang Graf Vitzthum (ed), *Völkerrecht* (4. Aufl., De Gruyter 2007).

Hailbronner K and others (eds), *Staatsangehörigkeitsrecht* (6. Aufl., CH Beck 2017).

Hainmueller J, Hangartner D and Pietrantuono G, 'Catalyst or Crown: Does Naturalization Promote the Long-Term Social Integration of Immigrants?' (2017) 111 American Political Science Review 256.

Hall S, 'The European Convention on Nationality and the Right to Have Rights' (1999) 24 European Law Review 586.

Hanimann C, 'Dschihadismus und Rechtsstaatlichkeit: Ein Urteil über die denkbare Zukunft' *WOZ Die Wochenzeitung* (4 August 2016) <https://www.woz.ch/-6fd7> accessed 12 September 2022.

Hannum H, 'The Status of the Universal Declaration of Human Rights in National and International Law 111: The Status and Future of the Customary International Law of Human Rights' (1995) 25 Georgia Journal of International and Comparative Law 287.

Hannum H, 'Reinvigorating Human Rights for the Twenty-First Century' (2016) 16 Human Rights Law Review 409.

Harpaz Y, *Citizenship 2.0: Dual Nationality as a Global Asset* (Princeton University Press 2019).

Harrington C, 'Groundbreaking Arab League Declaration Heightens Global Momentum to End Gender Discrimination in Nationality Laws' (*European Network on Statelessness Blog*, 8 March 2018) <https://www.statelessness.eu/blog/groundbreaking-arab-league-declaration-heightens-global-momentum-end-gender-discrimination> accessed 12 September 2022.

Harvey A, 'Recent Developments on Deprivation of Nationality on Grounds of National Security and Terrorism Resulting in Statelessness' (2014) 28 Journal of Immigration, Asylum and Nationality Law 336.

Hathaway JC, *The Rights of Refugees Under International Law* (2nd ed, Cambridge University Press 2021).

Helbling M, Simon S and Schmid SD, 'Restricting Immigration to Foster Migrant Integration? A Comparative Study Across 22 European Countries' (2020) 46 Journal of Ethnic and Migration Studies 2603.

Held D, 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 Legal Theory 1.

Henckaerts J-M, *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff Publishers 1995).

Henrard K, 'The Shifting Parameters of Nationality' (2018) 65 Netherlands International Law Review 269.

Herdegen M, *Völkerrecht* (16. Aufl., CH Beck 2017).

Hillgruber C, 'Souveränität — Verteidigung eines Rechtsbegriffs' (2002) 57 JuristenZeitung 1072.

Hirsch Ballin E, *Citizens' Rights and the Right to Be a Citizen* (Brill Nijhoff 2014).

Hobe S, *Einführung in das Völkerrecht* (10. Aufl., Francke 2014).

Hodgson D, 'The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness' (1993) 7 International Journal of Law, Policy and the Family 255.

Hofmann R, 'Denaturalization and Forced Exile' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013).

Honohan I, 'Just What's Wrong with Losing Citizenship? Examining Revocation of Citizenship from a Non-Domination Perspective' (2020) 24 Citizenship Studies 355.

Honohan I and Rougier N, 'Global Birthright Citizenship Laws: How Inclusive?' (2018) 65 Netherlands International Law Review 337.

Human Rights Watch, 'India: Citizenship Bill Discriminates Against Muslims' (2019) <https://www.hrw.org/news/2019/12/11/india-citizenship-bill-discriminates-against-muslims> accessed 12 September 2022.

Huneeus A and Urueña R, 'Treaty Exit and Latin America's Constitutional Courts' (2017) 111 American Journal of International Law Unbound 456.

Institute on Statelessness and Inclusion, 'Statelessness and Human Rights: The Universal Periodic Review' (Institute on Statelessness and Inclusion 2017) <http://www.statelessnessandhumanrights.org/assets/files/statelessness-and-upr.pdf> accessed 12 September 2022.

Institute on Statelessness and Inclusion and Global Citizenship Observatory GLOBALCIT, 'Instrumentalising Citizenship in the Fight against Terrorism. A Global Comparative Analysis of Legislation on Deprivation of Nationality as a Security Measure' (Institute on Statelessness and Inclusion 2022) <https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf> accessed 12 September 2022.

Irving H, *Citizenship, Alienage, and the Modern Constitutional State: A Gendered History* (Cambridge University Press 2017).

Jacobson D, *Rights Across Borders: Immigration and the Decline of Citizenship* (Johns Hopkins University Press 1996).

Jayal NG, 'Reconfiguring Citizenship in Contemporary India' (2019) 42 South Asia: Journal of South Asian Studies 33.

Jensen KK and others, 'Roadblocks to Citizenship: Selection Effects of Restrictive Naturalisation Rules' (2021) 47 Journal of Ethnic and Migration Studies 1047.

Jesserun d'Oliveira HU, 'Once Again: Plural Nationality' (2018) 25 Maastricht Journal of European and Comparative Law METRO 22.

Joppke C, 'Transformation of Citizenship: Status, Rights, Identity' (2007) 11 Citizenship Studies 37.

Joppke C, 'The Inevitable Lightening of Citizenship' (2010) 51 European Journal of Sociology 9.

Joppke C, 'The Instrumental Turn of Citizenship' (2019) 45 Journal of Ethnic and Migration Studies 858.

Joseph S and Castan M, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, Oxford University Press 2013).

Juss SS, 'Nationality Law, Sovereignty, and the Doctrine of Exclusive Domestic Jurisdiction' (1994) 9 Florida Journal of International Law 219.

Kälin W, 'Forced Assimilation' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010).

Kälin W and Künzli J, 'Das Verhältnismässigkeitsprinzip als Bestandteil des zwingenden Völkerrechts? Gedanken zu Art. 139 Abs. 3 BV' (2014) Jusletter vom 23. Juni 2014.

Kälin W and Künzli J, *The Law of International Human Rights Protection* (Second edition, Oxford University Press 2019).

Kälin W and Künzli J, *Universeller Menschenrechtsschutz: der Schutz des Individuums auf globaler und regionaler Ebene* (4. Aufl., Helbing Lichtenhahn Verlag 2019).

Kalm S, 'Affective Naturalization: Practices of Citizenship Conferment' (2019) 44 Alternatives: Global, Local, Political 138.

Kalm S, 'Citizenship Capital' (2020) 34 Global Society 528.

Kammann K, *Probleme mehrfacher Staatsangehörigkeit unter besonderer Berücksichtigung des Völkerrechts* (Peter Lang 1984).

Kanics J, 'Preventing Statelessness: Ensuring Migrant and Refugee Children's Right to Acquire a Nationality' (2019) 2 Schweizerische Zeitschrift für Asylrecht und -Praxis ASYL 10.

Kapur R, 'The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion' (2007) 8 Theoretical Inquiries in Law 537.

Kenny C, 'Legislated Out of Existence: Mass Arbitrary Deprivation of Nationality Resulting in Statelessness as an International Crime' (2020) 20 International Criminal Law Review 1026.

Kerber LK, 'The Meanings of Citizenship' (1997) 84 The Journal of American History 833.

Kesby A, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012).

Kimminich O, 'The Conventions for the Prevention of Double Citizenship and Their Meaning for Germany and Europe in an Era of Migration' (1995) 38 German Yearbook of International Law 224.

Kind A, *Der diplomatische Schutz: Zwischenstaatlicher Rechtsdurchsetzungsmechanismus im Spannungsfeld von Individualrechten, Ausseninteressen, Staatsangehörigkeit und Schutzpflichten: Eine schweizerische Perspektive* (Dike Verlag 2014).

Kingston LN, *Fully Human: Personhood, Citizenship, and Rights* (Oxford University Press 2019).

Knocke B, *Das europäische Übereinkommen über die Staatsangehörigkeit als Schranke für die Regelung des nationalen Staatsangehörigkeitsrechts: Stand der Vereinbarkeit des Staatsangehörigkeitsrechts der Schweiz, der Bundesrepublik Deutschland, des Vereinigten Königreichs und Frankreichs mit den Vorgaben des Übereinkommens* (GCA-Verlag 2005).

Knop K, 'Relational Nationality: On Gender and Nationality in International Law' in T Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001).

Knop K and Chinkin C, 'Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law' (2001) 22 Michigan Journal of International Law 523.

Kochenov D, *EU Citizenship and Federalism: The Role of Rights* (2017).

Kochenov D and Lindeboom J (eds), *Kälin and Kochenov's Quality of Nationality Index: An Objective Ranking of the Nationalities of the World* (Hart Publishing 2020).

Kostakopoulou D, *The Future Governance of Citizenship* (Cambridge University Press 2008).

Kostakopoulou D, 'When EU Citizens Become Foreigners' (2014) 20 European Law Journal 447.

Krasniqi G, 'Contested Territories, Liminal Polities, Performative Citizenship: A Comparative Analysis' (Global Citizenship Observatory GLOBALCIT, Robert Schuman Centre for Advanced Studies, European University Institute 2018) RSCAS 2018/13 <https://cadmus.eui.eu/handle/1814/52225> accessed 12 September 2022.

Kraus MS, *Menschenrechtliche Aspekte der Staatenlosigkeit* (Pro-Universitate-Verlag 2013).

Kreuzer C, *Staatsangehörigkeit und Staatensukzession: die Bedeutung der Staatensukzession für die staatsangehörigkeitsrechtlichen Regelungen in den Staaten der ehemaligen Sowjetunion, Jugoslawiens und der Tschechoslowakei* (Duncker & Humblot 1998).

Krüger HC, 'Opening Speech' in Council of Europe (ed), *Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality* (Council of Europe 1999).

Kruma K, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge* (Martinus Nijhoff 2014).

Kuch A, 'Naturalization of Burundian Refugees in Tanzania: The Debates on Local Integration and the Meaning of Citizenship Revisited' (2017) 30 Journal of Refugee Studies 468.

Kunz JL, 'The Nottebohm Judgment' (1960) 54 American Journal of International Law 536.

Kurt S and von Rütte B, 'Ist die Schweiz zum Entzug der Staatsangehörigkeit berechtigt?' (*NCCR — on the move*, 31 May 2016) <http://blog.nccr-onthemove.ch/ist-die-schweiz-zum-entzug-der-staatsangehoerigkeit-berechtigt/?lang=de> accessed 12 September 2022.

Kymlicka W and Norman W, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' (1994) 104 Ethics 352.

Lagoutte S, Gammeltoft-Hansen T and Cerone J, 'Introduction: Tracing the Roles of Soft Law in Human Rights' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016).

Lansbergen A and Shaw J, 'National Membership Models in a Multilevel Europe' (2010) 8 International Journal of Constitutional Law 50.

Lappin R, 'The Right to Vote for Non-Resident Citizens in Europe' (2016) 65 International and Comparative Law Quarterly 859.

Lauterpacht H, 'The Universal Declaration of Human Rights' (1948) 25 British Year Book of International Law 354.

Lauterpacht H, *An International Bill of the Rights of Man* (*Reprint*) (Oxford University Press 2013).

Lawson A, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn' (2007) 34 Syracuse Journal of International Law and Commerce 563.

Lesińska M and Héjj D, 'Pragmatic Trans-Border Nationalism: A Comparative Analysis of Poland's and Hungary's Policies Towards Kin-Minorities in the Twenty-First Century'(2021) 20 Ethnopolitics 53.

Loick D, 'Wir Flüchtlinge. Überlegungen zu einer Bürgerschaft jenseits des Nationalstaats' (2017) 45 Leviathan 574.

Lori N, *Offshore Citizens: Permanent Temporary Status in the Gulf* (Cambridge University Press 2019).

Lyons PJ, 'Trump Wants to Abolish Birthright Citizenship. Can He Do That?' *The New York Times* (New York, 22 August 2019) <https://www.nytimes.com/2019/08/22/us/birthright-citizenship-14th-amendment-trump.html> accessed 12 September 2022.

Maas W, 'European Governance of Citizenship and Nationality' (2016) 12 Journal of Contemporary European Research 532.

Macklin A, 'Who Is the Citizen's Other? Considering the Heft of Citizenship' (2007) 8 Theoretical Inquiries in Law 333.

Macklin A, 'The Securitization of Dual Citizenship' (2007) SSRN Scholarly Paper ID 1077489 <https://papers.ssrn.com/abstract=1077489> accessed 12 September 2022.

Macklin A, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' (2014) Vol. 40 Queen's Law Journal 1.

Macklin A, 'Sticky Citizenship' in Rhoda E Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015).

Macklin A, '"Jihadi Jack" and the Folly of Revoking Citizenship' (*The Conversation*, 20 August 2019) <http://theconversation.com/jihadi-jack-and-the-folly-of-revoking-citizenship-122155> accessed 12 September 2022.

Macklin A and Bauböck R (eds), *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* (2015) <https://cadmus.eui.eu/handle/1814/34617> accessed 12 September 2022.

Mahalic D and Mahalic JG, 'The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination' (1987) 9 Human Rights Quarterly 74.

Makarov AN, *Allgemeine Lehren des Staatsangehörigkeitsrechts* (1. Aufl., W Kohlhammer 1947).

Makarov AN, 'Das Urteil des Internationalen Gerichtshofes im Fall Nottebohm' (1955) 16 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 407.

Mamdani M, *Citizen and Subject: Contemprary Africa and the Legacy of Late Colonialism* (Princeton University Press 2018).

Manby B, 'Citizenship Law in Africa: A Comparative Study' (Open Society Foundations 2010).

Manby B, *Citizenship and Statelessness in Africa: The Law and Politics of Belonging* (Wolf Legal Publishers 2015).

Manby B, *Citizenship in Africa: The Law of Belonging* (Hart Publishing 2018).

Manby B, '"Restore the Factory Settings": Efforts to Control Executive Discretion in Nationality Administration in Africa' (*Citizenship Rights in Africa Initiative Blog*, 16 April 2018) <http://citizenshiprightsafrica.org/restore-the-factory-settings-efforts-to-control-executive-discretion-in-nationality-administration-in-africa/> accessed 12 September 2022.

Manby B, 'Anudo Ochieng Anudo v Tanzania (African Court on Human and Peoples' Rights, App No 012/2015, 22 March 2018)' (2019) 1 The Statelessness and Citizenship Review 170.

Mantu S, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives* (Brill Nijhoff 2015).

Mantu S, '"Terrorist" Citizens and the Human Right to Nationality' (2018) 26 Journal of Contemporary European Studies 28.

Marchadier F, 'L'articulation des sources du droit de la nationalité' in Société française pour le droit international (ed), *Droit international et nationalité* (Editions Pedone 2012).

Martin DA, 'Effects of International Law on Migration Policy and Practice: The Uses of Hypocrisy' (1989) 23 The International Migration Review 547.

Marx R, 'Article 34, Naturalization' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011).

Matias G, *Citizenship as a Human Right, The Fundamental Right to a Specific Citizenship* (Palgrave Macmillan 2016).

Mauerhofer K, *Mehrfache Staatsangehörigkeit — Bedeutung und Auswirkungen aus Sicht des schweizerischen Rechts* (Helbing Lichtenhahn 2004).

McAdam J, '"Disappearing States", Statelessness and the Boundaries of International Law' [2010] UNSW Law Research Paper.

McDougal MS, Lasswell HD and Chen L, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press 1980).

McDougal MS, Lasswell HD and Chen L, 'Nationality and Human Rights: The Protection of the Individual and External Arenas' (1980) 83 Yale Law Journal 900.

Midtbøen AH, 'Dual Citizenship in an Era of Securitisation: The Case of Denmark' (2019) 9 Nordic Journal of Migration Research 293.

Midtbøen AH, 'No Longer the "Last Man Standing": Norway Decides to Allow Dual Citizenship' *GLOBALCIT* (9 January 2019) <http://globalcit.eu/no-longer-the-last-man-standing-norway-decides-to-allow-dual-citizenship/> accessed 12 September 2022.

Midtbøen AH and others, 'Assessments of Citizenship Criteria: Are Immigrants More Liberal?' (2020) 46 Journal of Ethnic and Migration Studies 2625.

Mikulka V, 'First Report on State Succession and Its Impact on the Nationality of Natural and Legal Persons' (International Law Commission 1995) UN Doc. A/CN.4/467 <https://legal.un.org/ilc/documentation/english/a_cn4_467.pdf> accessed 12 September 2022.

Mikulka V, 'Second Report on State Succession and Its Impact on the Nationality of Natural and Legal Persons' (International Law Commission 1996) UN Doc. A/CN.4/474 <https://legal.un.org/ilc/documentation/english/a_cn4_474.pdf> accessed 12 September.

Mikulka V, 'Third Report on Nationality in the Relation to the Succession of States' (International Law Commission 1997) UN Doc. A/CN.4/480 <https://legal.un.org/ilc/documentation/english/a_cn4_480.pdf> accessed 12 September.

Miller D, *On Nationality* (Oxford University Press 1995).

Molnár T, 'Stateless Persons under International Law and EU Law: A Comparative Analysis Concerning Their Legal Status, With Particular Attention to the Added Value of the EU Legal Order' (2010) 51 Acta Juridica Hungarica 293.

Molnár T, 'The Prohibition of Arbitrary Deprivation of Nationality under International Law and EU Law: New Perspectives' (2014) Hungarian Yearbook of International Law and European Law 67.

Mona M, *Das Recht auf Immigration: rechtsphilosophische Begründung eines originären Rechts auf Einwanderung im liberalen Staat* (Helbing Lichtenhahn 2007).

Mongia RV, 'Race, Nationality, Mobility: A History of the Passport' (1999) 11 Public Culture 527.

Mongia RV, 'Historicizing State Sovereignty: Inequality and the Form of Equivalence' (2007) 49 Comparative Studies in Society and History 384.

Morel M, *The Right Not to Be Displaced in International Law* (Intersentia 2014).

Morsink J, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 1999).

Mrekajová E, 'Facilitated Naturalization of Stateless Persons' (2014) 19 Tilburg Law Review 203.

Muchmore AI, 'Passports and Nationality in International Law' (2005) 26 Immigration and Nationality Law Review 327.

Neumann F and Szigetvari A, 'Die politische Taktik hinter dem Doppelpass für Südtiroler' *Der Standard* (23 December 2017) <https://www.derstandard.at/story/2000070925036/die-politische-taktik-hinter-dem-dopelpass-fuer-suedtiroler> accessed 12 September 2022.

Nonnenmacher S and Cholewinski R, 'The Nexus Between Statelessness and Migration' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

Nowak M, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, NP Engel 2005).

Okin SM, 'Women, Equality, and Citizenship' (1992) 99 Queen's Quarterly 56.

Opeskin B, Perruchoud R and Redpath-Cross J, 'Conceptualising International Migration Law' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012).

Oppenheim LFL, Jennings RY and Watts AD, *Oppenheim's International Law* (9th ed, Longman 1993).

Orgad L, 'Naturalization' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

Orgad L, 'The Citizen-Makers: Ethical Dilemmas in Immigrant Integration' (2019) 25 European Law Journal 524.

Orgad L and Lepoutre J, 'Should EU Citizenship Be Disentangled from Member State Nationality?' (European University Institute 2019) Working Paper EUI RSCAS 2019/24 <http://cadmus.eui.eu//handle/1814/62229> accessed 12 September 2022.

Ouguergouz F, 'African Charter on Human and Peoples' Rights (1981)' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e741> accessed 12 September 2022.

Owen D, 'Resident Aliens, Non-Resident Citizens and Voting Rights: Toward a Pluralist Theory of Transnational Political Equality and Modes of Political Belonging' in Gideon Calder, Phillip Cole and Jonathan Seglow (eds), *Citizenship Acquisition and National Belonging* (Palgrave Macmillan 2009).

Owen D, 'Transnational Citizenship and the Democratic State: Modes of Membership and Voting Rights' (2011) 14 Critical Review of International Social and Political Philosophy 641.

Owen D, 'Citizenship and Human Rights' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (2017).

Owen D, 'The Prior Question: What Do We Need State Citizenship For?' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer International Publishing 2018).

Owen D, 'On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights' (2018) 65 Netherlands International Law Review 299.

Paulose RM, 'A New Dawn? Statelessness and Assam' (2019) 7 Groningen Journal of International Law 99.

Pedroza L, *Citizenship Beyond Nationality: Immigrant's Right to Vote Across the World* (University of Pennsylvania Press 2019).

Peltier E, 'No Handshakes, No New Citizens: Coronavirus Halts Danish Naturalizations' *The New York Times* (7 March 2020) <https://www.nytimes.com/2020/03/07/world/europe/denmark-coronavirus-citizenship.html> accessed 12 September 2022.

Pérez AM, 'Spanish Congress Passes Law Granting Citizenship to Sephardic Jews' (*GLOBALCIT*, 17 June 2015) <http://globalcit.eu/spanish-congress-passes-law-granting-citizenship-to-sephardic-jews/> accessed 12 September 2022.

Perruchoud R, 'State Sovereignty and Freedom of Movement' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012).

Peters A, 'Humanity as the A and O of Sovereignty' (2009) 20 European Journal of International Law 513.

Peters A, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction' (2010) 53 German Yearbook of International Law 623.

Peters A, 'Drei Versionen der Verhältnismässigkeit im Völkerrecht' in Giovanni Biaggini and others (eds), *Polis und Kosmopolis: Festschrift für Daniel Thürer* (Dike 2015).

Peters A, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016).

Philpott D, 'Sovereignty: An Introduction and Brief History' (1995) 48 Journal of International Affairs 353.

Piçarra N and Gil AR, 'EUDO Citizenship Observatory: Country Report Portugal' (Global Citizenship Observatory (GLOBALCIT) 2012) RSCAS/EUDO-CIT-CR 2012/08 <https://cadmus.eui.eu/bitstream/handle/1814/19632/RSCAS_EUDO_CIT_2012_8.pdf?sequence=3&isAllowed=y> accessed 12 September 2022.

Piccoli L, '2018: A Year in Citizenship' (*GLOBALCIT*, 8 March 2019) <http://globalcit.eu/2018-a-year-in-citizenship/> accessed 12 September 2022.

Pilgram L, 'International Law and European Nationality Laws' [2011] EUDO Citizenship Observatory <http://cadmus.eui.eu/handle/1814/19455> accessed 12 September 2022.

Plender R, 'The Right to a Nationality as Reflected in International Human Rights Law and the Sovereignty of States in Nationality Matters' (1995) 49 Austrian Journal of Public and International Law 43.

Pocock JGA, 'The Ideal of Citizenship Since Classical Times' (1992) Queen's Quarterly 31.

Pogonyi S, 'The Right of Blood: 'Ethnically' Selective Citizenship Policies in Europe' (2022) National Identities 1.

Punathil S, 'Precarious Citizenship: Detection, Detention and 'Deportability' in India' (2022) Citizenship Studies.

Abdul Rahman TA, 'Identifying the 'Outsider'. An Assessment of Foreigner Tribunals in the Indian State of Assam' (2020) 2 Statelessness and Citizenship Review 112.

Raj S and Gettleman J, 'A Mass Citizenship Check in India Leaves 2 Million People in Limbo' *The New York Times* (31 August 2019) <https://www.nytimes.com/2019/08/31/world/asia/india-muslim-citizen-list.html> accessed 12 September 2022.

Rathje J, '"Reichsbürger" — Verschwörungsideologie mit deutscher Spezifik' (2017) 1 Wissen schafft Demokratie 238.

Rehof LA, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff 1993).

Research in International Law of the Harvard Law School, 'The Law of Nationality' (1929) 23 American Journal of International Law 21.

Louise Reyntjens, 'Citizenship Deprivation under the European Convention-System: A Case Study of Belgium' (2019) 1 Statelessness and Citizenship Review 263.

Rezek JF, 'Le droit international de la nationalité' (1986) 198 Collected Courses of the Hague Academy of International Law 333.

Robinson M, 'The Universal Declaration of Human Rights: A Living Document' (1998) 52 Australian Journal of International Affairs 117.

Robinson N, *Convention Relating to the Status of Stateless Persons. Its History and Interpretation* (UNHCR 1955) <https://www.refworld.org/docid/4785f03d2.html> accessed 12 September 2022.

Rodrigues P and Stein J, 'The Prevention of Child Statelessness at Birth: A Multilevel Perspective' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking stock after 25 years and looking ahead* (Brill Nijhoff 2017).

Rodríguez CM, 'Noncitizen Voting and the Extraconstitutional Construction of the Polity' (2010) 8 International Journal of Constitutional Law 30.

Rothfritz LP, *Die Konvention der Vereinten Nationen zum Schutz der Rechte von Menschen mit Behinderungen: Eine Analyse unter Bezugnahme auf die deutsche und europäische Rechtsebene* (Peter Lang 2010).

Rubenstein K, 'Globalization and Citizenship and Nationality' in Catherine Dauvergne (ed), *Jurisprudence for an Interconnected Globe* (Ashgate 2003).

Rubenstein K and Adler D, 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7 Indiana Journal of Global Legal Studies 519.

Rubio-Marín R, 'National Limits to Democratic Citizenship' (1998) 11 Ratio Juris 51.

Rubio-Marín R, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge University Press 2000).

Rubio-Marín R, 'Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants' (2006) 81 New York University Law Review 117.

Rubio-Marín R, 'Introduction: Human Rights and the Citizen/Non-Citizen Distinction Revisited' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014).

Rudan D, 'Nationality and Political Rights' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013).

Sabbagh D, 'Jack Letts Stripped of British Citizenship' *The Guardian* (18 August 2019) <https://www.theguardian.com/world/2019/aug/18/jack-letts-stripped-british-citizenship-isis-canada> accessed 12 September 2022.

Sadiq K, 'Postcolonial Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

Sassen S, *Losing Control?: Sovereignty in an Age of Globalization* (Columbia University Press 1996).

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

Schabas W, *The European Convention on Human Rights: A Commentary* (1st ed, Oxford University Press 2015).

Schade H, 'The Draft European Convention on Nationality' (1995) 49 Austrian Journal of Public and International Law 99.

Schärer R, 'The Council of Europe and the Reduction of Statelessness' (2006) 25 Refugee Survey Quarterly 33.

Schmahl S, *Kinderrechtskonvention: mit Zusatzprotokollen* (2. Aufl., Nomos 2017).

Schotel B, *On the Right of Exclusion: Law, Ethics and Immigration Policy* (Routledge 2012).

Schram GG, 'Article 15 UDHR' in Asbjørn Eide and others (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992).

Schwelb E, 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15 International and Comparative Law Quarterly 996.

Seemann A, 'The Mandatory Handshake in Danish Naturalisation Procedures: A Critical Race Studies Perspective' (2020) 3 Nordic Journal on Law and Society 1.

Sejersen TB, '"I Vow to Thee My Countries" — The Expansion of Dual Citizenship in the 21st Century' (2008) 42 The International Migration Review 523.

Sen A, 'Elements of A Theory of Human Rights' (2004) 32 Philosophy & Public Affairs 315.

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

Shachar A, 'The Future of National Citizenship: Going, Going, Gone?' (2009) 59 University of Toronto Law Journal 579.

Shachar A, 'Earned Citizenship: Property Lessons for Immigration Reform' (2011) 23 Yale Journal of Law and the Humanities 110.

Shachar A, 'The Marketization of Citizenship in an Age of Restrictionism' (2018) 32 Ethics & International Affairs 3.

Shachar A, 'Introduction: Citizenship — Quo Vadis?' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship*.

Shachar A, 'Beyond Open and Closed Borders: The Grand Transformation of Citizenship' (2020) 11 Jurisprudence 1.

Sharp D, 'Why Citizenship Tests Are Necessarily Illiberal: A Reply to Blake' (2022) 15 Ethics and Global Politics 1.

Shaw J, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' (European University Institute 2020) Working Paper <http://cadmus.eui.eu//handle/1814/67019> accessed 12 September 2022.

Shaw J, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press 2020).

Shaw J and Stiks I, 'Introduction: What Do We Talk about When We Talk about Citizenship Rights?' in Jo Shaw and Igor Stiks (eds), *Citizenship Rights* (Ashgate 2013).

Shaw J and Stiks I, 'Citizenship Rights: Statues, Challenges and Struggles' (2014) Belgrade Journal of Media and Communications.

Shaw MN, *International Law* (6th ed, Cambridge University Press 2008).

Shearer I and Opeskin B, 'Nationality and Statelessness' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012).

Simma B and Alston P, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 Australian Yearbook of International Law 82.

Sironi A, 'Nationality of Individuals in Public International Law, A Functional Approach' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013).

Sloane RD, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 Harvard International Law Journal 8.

Smith R, *International Human Rights Law* (8th ed, Oxford University Press 2017).

Soehl T, Waldinger R and Luthra R, 'Social Politics: The Importance of the Family for Naturalisation Decisions of the 1.5 Generation' (2020) 46 Journal of Ethnic and Migration Studies 1240.

Soysal Y, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago 1994).

Spiro PJ, 'Dual Nationality and the Meaning of Citizenship' (1997) 46 Emory Law Journal 1411.

Spiro PJ, 'Questioning Barriers to Naturalization' (1999) 13 Georgetown Immigration Law Journal 479.

Spiro PJ, 'Dual Citizenship as Human Right' (2010) 8 International Journal of Constitutional Law 111.

Spiro PJ, 'A New International Law of Citizenship' (2011) 105 The American Journal of International Law 694.

Spiro PJ, 'Citizenship, Nationality, and Statelessness' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014).

Spiro PJ, *At Home in Two Countries: The Past and Future of Dual Citizenship* (New York University Press 2016).

Spiro PJ, 'Multiple Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

Spiro PJ, 'The Equality Paradox of Dual Citizenship' (2019) 45 Journal of Ethnic and Migration Studies 879.

Spiro PJ, 'Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion' (2019) Investment Migration Working Paper No 2019/1 <https://investmentmigration.org/wp-content/uploads/2020/10/IMC-RP-2019-1-Peter-Spiro.pdf> accessed 12 September 2022.

Staatssekretariat für Migration, 'Zugehörigkeit zu einer terroristischen Organisation: SEM entzieht Doppelbürger das Schweizer Bürgerrecht' (Staatssekretariat für Migration (SEM) 2019) <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-76358.html> accessed 12 September 2022.

Stein J, 'The Prevention of Child Statelessness at Birth: The UNCRC Committee's Role and Potential' (2016) 24 The International Journal of Children's Rights 599.

Stolcke V, 'The "Nature" of Nationality' in Veit Michael Bader (ed), *Citizenship and Exclusion* (MacMillan Press, St Martin's Press 1997).

Strumia F, *Supranational Citizenship and the Challenge of Diversity: Immigrants, Citizens and Member States in the EU* (Brill Nijhoff 2013).

Studer B, Arlettaz G and Argast R, *Das Schweizer Bürgerrecht: Erwerb, Verlust, Entzug von 1848 bis zur Gegenwart* (Verlag Neue Zürcher Zeitung 2008).

Summers J, *Peoples and International Law* (2nd ed, Brill Nijhoff 2014).

Swider K, 'Why End Statelessness?' in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *End Statelessness?* (Routledge 2017).

Swider K, 'A Rights-Based Approach to Statelessness' (University of Amsterdam 2018).

Swider K, 'ECHR Alpeyeva and Dzhalagoniya v Russia: Mass-Confiscation of Passports Violates Article 8' (*Globalcit*, 16 July 2018) <http://globalcit.eu/echr-alpeyeva-and-dzhalagoniya-v-russia-mass-confiscation-of-passports-violates-article-8/> accessed 12 September 2022.

Swider K, 'Hoti v Croatia' (2019) 1 The Statelessness and Citizenship Review 184.

Swider K and Vlieks C, 'Learning from Naturalisation Debates: The Right to an Appropriate Citizenship at Birth' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer International Publishing 2018).

Syed IU, 'Hijab, Niqab, and the Religious Symbol Debates: Consequences for Health and Human Rights' (2021) 25 The International Journal of Human Rights 1420.

Sykes P, 'Denaturalisation and Conceptions of Citizenship in the "War on Terror"' (2016) 20 Citizenship Studies 749.

Tambakaki P, *Human Rights or Citizenship?* (Birkbeck Law 2010).

Tanasoca A, 'Distributing Some, but Not All, Rights of Citizenship According to Ius Sanguinis' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer International Publishing 2018).

Tanasoca A, *The Ethics of Multiple Citizenship* (Cambridge University Press 2018).

Thomas C, 'What Does the Emerging International Law of Migration Mean for Sovereignty?' (2013) 14 Melbourne Journal of International Law 392.

Thürer D, 'Soft Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1469> accessed 12 September 2022.

Thym D, 'Menschenrecht auf Regularisierung des Aufenthalts? Rechtsprechung des EGMR zum Schutz des Privat- und Familienlebens nach Art. 8 EMRK und deren Verhältnis zum nationalen Ausländerrecht' (2006) 33 Europäische Grundrechte-Zeitschrift 541.

Thym D, 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and Its Limits' in Maurice Adams and others (eds), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice Examined* (Hart Publishing 2013).

Thym D, 'Residence as De Facto Citizenship? Protection of Long-Term Residence Under Article 8 ECHR' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014).

Thym D, 'Frontiers of EU Citizenship: Three Trajectories and Their Methodological Limitations' in Dimitry Kochenov (ed), *EU Citizenship and Federalism. The Role of Rights* (Cambridge University Press 2017).

Tintori G, 'The Transnational Political Practices of "Latin American Italians"' (2011) 49 International Migration 168.

Tomuschat C, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century General Course on Public International Law (Volume 281)' [1999] Collected Courses of the Hague Academy of International Law.

Töndury AM, 'Existiert ein ungeschriebenes Grundrecht auf Einbürgerung?' in Patricia M Schiess Rütimann (ed), *Schweizerisches Ausländerrecht in Bewegung?* (Schulthess 2003).

Tonkiss K, 'Statelessness and the Performance of Citizenship-As-Nationality' in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017).

Torpey JC, *The Invention of the Passport: Surveillance, Citizenship and the State* (2nd ed, Cambridge University Press 2018).

de Torres AU, 'The Right to Nationality' in Laurence Burgorgue-Larsen and Amaya Ubeda de Torres (eds), *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011).

Trachtman JP, 'Fragmentation of Citizenship Governance' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

Troy D, 'Governing Imperial Citizenship: A Historical Account of Citizenship Revocation' (2019) 23 Citizenship Studies 304.

Tucker J, 'Questioning de Facto Statelessness: By Looking at de Facto Citizenship' (2014) 19 Tilburg Law Review 276.

Uslucan S, *Zur Weiterentwicklungsfähigkeit des Menschenrechts auf Staatsangehörigkeit: Deutet sich in Europa ein migrationsbedingtes Recht auf Staatsangehörigkeit an — auch unter Hinnahme der Mehrstaatigkeit?* (Duncker & Humblot 2012).

Valchars G, 'Verschärfung für Ungewollte' *Der Standard* (Wien, 9 July 2018) <https://www.derstandard.at/story/2000083140556/verschaerfung-fuer-ungewollte> accessed 12 September 2022.

van den Brink M, 'A Qualified Defence of the Primacy of Nationality over EU Citizenship' (2020) 69 International and Comparative Law Quarterly 177.

van Oers R, *Deserving Citizenship. Citizenship Tests in Germany, the Netherlands and the United Kingdom* (Brill Nijhoff 2013).

van Panhuys HF, *The Role of Nationality in International Law* (A W Sijthoff 1959).

van Waas L, *Nationality Matters: Statelessness under International Law* (Intersentia 2008).

van Waas L, 'Nationality and Rights' in Brad K Blitz and Maureen Lynch (eds), *Statelessness and the Benefits of Citizenship: A Comparative Study* (Geneva Academy of International Humanitarian Law 2009).

van Waas L, The UN Statelessness Conventions' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

van Waas L and Jaghai S, 'All Citizens Are Created Equal, but Some Are More Equal Than Others' (2018) 65 Netherlands International Law Review 413.

Vermeer-Künzli A, 'Nationality and Diplomatic Protection, A Reappraisal' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013).

Vink M and others, 'The International Diffusion of Expatriate Dual Citizenship' (2019) 7 Migration Studies 362.

Vlieks C, 'Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?' (European Network on Statelessness (ENS) 2014) 09/14 <http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS%20Discussion%20Paper_September%202014.pdf> accessed 12 September 2022.

Vlieks C, 'Tjebbes and Others v Minister van Buitenlandse Zaken: A Next Step in European Union Case Law on Nationality Matters?' (2019) 24 Tilburg Law Review 142.

Vlieks C, Hirsch Ballin E and Recalde-Vela MJ, 'Solving Statelessness: Interpreting the Right to Nationality' (2017) 35 Netherlands Quarterly of Human Rights 158.

Volpp L, 'Feminist, Sexual, and Queer Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (2017).

von der Decken K and Koch N, 'Recognition of New Human Rights: Phases, Techniques and the Approach of "Differentiated Traditionalism"' in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights* (Cambridge University Press 2020).

von Rütte B, 'Die erleichterte Einbürgerung für Jugendliche der dritten Generation' (2017) Jusletter vom 20. März 2017.

von Rütte B, 'Das neue Bürgerrechtsgesetz' (2017) Anwaltsrevue 202.

von Rütte B, 'Social Identity and the Right to Belong — The ECtHR's Judgment in Hoti v Croatia' (2019) 24 Tilburg Law Review 147.

von Rütte B and Schlegel S, 'Auf dem falschen Fuss entlastet. Die Auswirkungen der geplanten BGG-Revision auf das Migrationsrecht' (2016) Jusletter vom 14. März 2016.

Vonk O, *Dual Nationality in the European Union, A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States* (Martinus Nijhoff 2012).

Vonk O, *Nationality Law in the Western Hemisphere: A Study on Grounds for Acquisition and Loss of Citizenship in the Americas and the Caribbean* (Brill Nijhoff 2014).

Vonk O, 'Comparative Report: Citizenship in Asia' (Global Citizenship Observatory (GLOBALCIT) 2017) 2017/04 <http://cadmus.eui.eu//handle/1814/50047> accessed 12 September 2022.

Vučković Šahović N, Doek JE and Zermatten J, *The Rights of the Child in International Law: Rights of the Child in a Nutshell and in Context: All About Children's Rights* (Stämpfli 2012).

Walker N, 'The Place of Territory in Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

Walmer N and The Copenhagen Post, 'Government Suspends Handshake Rule' *http://www.cphpost.dk/* (Copenhagen, 16 April 2020) <https://cphpost.dk/?p=112983> accessed 12 September 2022.

Walmsley A, 'Misuse of Nationality Laws' in Council of Europe (ed), *Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality* (Council of Europe 1999).

Walzer M, *Spheres Of Justice: A Defense of Pluralism and Equality* (Basic Books 1983).

Wautelet P, 'The Next Frontier: Dual Nationality as a Multi-Layered Concept' (2018) 65 Netherlands International Law Review 391.

Weil P, 'From Conditional to Secured and Sovereign: The New Strategic Link Between the Citizen and the Nation-State in a Globalized World' (2011) 9 International Journal of Constitutional Law 615.

Weis P, 'The Convention Relating to the Status of Stateless Persons' (1961) 10 International and Comparative Law Quarterly 255.

Weis P, 'The United Nations Convention on the Reduction of Statelessness, 1961' (1962) 11 The International and Comparative Law Quarterly 1073.

Weis P, *Nationality and Statelessness in International Law* (2nd ed, Sijthoff & Noordhoff 1979).

Weissbrodt D, *The Human Rights of Non-Citizens* (Oxford University Press 2008).

Weissbrodt D and Collins C, 'The Human Rights of Stateless Persons' (2006) 28 Human Rights Quarterly 245.

Wiessner S, 'Blessed Be the Ties That Bind: The Nexus between Nationality and Territory' (1986) 56 Mississippi Law Journal 447.

Winter E and Previsic I, 'The Politics of Un-Belonging: Lessons from Canada's Experiment with Citizenship Revocation' (2019) 23 Citizenship Studies 338.

Worster W, 'International Law and the Expulsion of Individuals with More than One Nationality' (2009) Vol. 14 UCLA Journal of International Law & Foreign Affairs 423.

Worster W, 'The Presumption of Customary International Law: A Case Study of Child Statelessness' (2017) <http://dx.doi.org/10.2139/ssrn.3091912> accessed 12 September 2022.

Worster W, 'The Obligation to Grant Nationality to Stateless Children Under Treaty Law' (2019) 24 Tilburg Law Review 204.

Young IM, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 Ethics 250.

Young IM, *Inclusion and Democracy* (Oxford University Press 2010).

Yuval-Davis N, 'Women, Citizenship and Difference' (1997) 57 Feminist Review on Women and Citizenship 4.

Ziegler KS, 'Domaine Réservé', *Max Planck Encyclopedia of Public International Law* (2013) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1398> accessed 12 September 2022.

Ziegler R, *Voting Rights of Refugees* (Cambridge University Press 2017).

Ziemele I, 'General Aspects of Nationality and Human Rights in Relation to State Succession' in Council of Europe (ed), *Challenges to National and International Law on Nationality at the Beginning of the New Millenium, Proceedings of the 2nd European Conference on Nationality* (Council of Europe 2001).

Ziemele I, *State Continuity and Nationality: The Baltic States and Russia: Past, Present and Future as Defined by International Law* (Martinus Nijhoff 2005).

Ziemele I, 'Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents' in Eugeen Verhellen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Brill Nijhoff 2007).

Ziemele I, 'State Succession and Issues of Nationality and Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

Zilbershats Y, 'Reconsidering the Concept of Citizenship' (2001) 36 Texas International Law Journal 689.

Zilbershats Y, *The Human Right to Citizenship* (Transnational Publishers 2002).

Zimmermann A and Landefeld S, 'Europäische Menschenrechtskonvention und Staatsangehörigkeitsrecht der Konventionsstaaten' (2014) Zeitschrift für Ausländerrecht und Ausländerpolitik 97.

Table of Other Materials

Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 'Sixth Session, Revisions and Amendments, Contribution by Kenya' (Ad Hoc Committee CRPD 2005) <https://www.un.org/esa/socdev/enable/rights/ahc6kenya.htm> accessed 12 September 2022.

Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 'Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on Its Sixth Session' (Ad Hoc Committee CRPD 2005) UN Doc. A/60/266 <https://www.un.org/esa/socdev/enable/rights/ahc6reporte.htm> accessed 12 September 2022.

Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 'Seventh Session, Daily Summary of Discussions, Afternoon Session' (Ad Hoc Committee CRPD 2006) <https://www.un.org/esa/socdev/enable/rights/ahc7sum19jan.htm> accessed 12 September 2022.

African Commission on Human and Peoples' Rights, 'Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons, Study on the Right to Nationality in Africa' (African Commission on Human and Peoples' Rights 2015) <https://www.achpr.org/public/Document/file/English/the_right_to_nationality_in_africa_eng.pdf> accessed 12 September 2022.

African Committee of Experts on the Rights and Welfare of the Child, 'General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child: "Birth Registration, Name and Nationality"' (ACERWC 2014) ACERWC/GC/02 <http://citizenshiprightsafrica.org/wp-content/uploads/2016/01/ACERWC-General-Comment-Article-6-Eng.pdf> accessed 12 September 2022.

African Union, 'Explanatory Memorandum to the Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa' (AU 2017) <https://au.int/sites/default/files/newsevents/workingdocuments/34197-wd-draft_protocol_explanatory_memo_en_may2017-jobourg.pdf> accessed 12 September 2022.

Commission on the Status of Women, 'Consideration of Proposals Concerning a New Instrument or Instruments of International Law to Eliminate Discrimination Against Women: Working Paper by the Secretary-General' (CSW 1973) UN Doc. E/CN.6/573.

Committee on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 21 on Equality in Marriage and Family Relations' (CtteeEDAW 1994) UN Doc. A/49/38.

Committee on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women' (CtteeEDAW 2010) UN Doc. CEDAW/C/GC/28.

Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Fourth Periodic Report of Singapore' (CtteeEDAW 2011) UN Doc. CEDAW/C/SGP/CO/4/Rev.1.

Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Initial to Fourth Periodic Reports and the Fifth Periodic Report of the Bahamas' (CtteeEDAW 2012) UN Doc. CEDAW/C/BHS/CO/1-5.

Committee on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women' (CtteeEDAW 2014) UN Doc. CEDAW/C/GC/32.

Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Lebanon' (CtteeEDAW 2015) UN Doc. CEDAW/C/LBN/CO/4-5.

Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Combined Second and Third Periodic Reports of the United Arab Emirates' (CtteeEDAW 2015) UN Doc. CEDAW/C/ARE/CO/2-3.

Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Ninth Periodic Report of Norway' (CtteeEDAW 2017) UN Doc. CEDAW/C/NOR/CO/9.

Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Seventh Periodic Report of Italy' (CtteeEDAW 2017) UN Doc. CEDAW/C/ITA/CO/7.

Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Yemen' (CEDAW 2021) UN Doc. CEDAW/C/YEM/CO/7-8.

Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 20 on Article 5 of the Convention' (CtteeERD 1996).

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Initial Report of Switzerland' (CtteeERD 1998) UN Doc. CERD/C/304/Add.44.

Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 27 on Discrimination against Roma' (CtteeERD 2000).

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Second and Third Periodic Reports of Switzerland' (CtteeERD 2002) UN Doc. CERD/C/60/CO/14.

Committee on the Elimination of Racial Discrimination, 'General Recommendation No. XXX on Discrimination Against Non-Citizens' (CtteeERD 2002).

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Third Periodic Report of Liechtenstein' (CtteeERD 2007) UN Doc. CERD/C/LIE/CO/3.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Ninth to Twelfth Periodic Reports of the Dominican Republic' (CtteeERD 2008) UN Doc. CERD/C/DOM/CO/12.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Eigth Periodic Report of Croatia' (CtteeERD 2009) UN Doc. CERD/C/HRV/CO/8.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Second Periodic Report of Kuwait' (CtteeERD 2011) UN Doc. CCPR/C/KWT/CO/2.

Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 34 on Racial Discrimination Against People of African Descent' (CtteeERD 2011) UN Doc. CERD/C/GC/34.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Seventeenth to Twenty-Second Periodic Reports of Cyprus' (CtteeERD 2013) UN Doc. CERD/C/CYP/CO/17-22.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Switzerland' (CtteeERD 2014) UN Doc. CERD/C/CHE/CO/7-9.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Twelfth to Sixteenth Periodic Reports of the Sudan' (CtteeERD 2015) UN Doc. CERD/C/SDN/CO/12-16.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Second to Fifth Periodic Reports of Oman' (CtteeERD 2016) UN Doc. CERD/C/OMN/CO/2-5.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Seventeenth to Nineteenth Periodic Reports of France' (CtteeERD 2016) UN Doc. CERD/C/FRA/CO/17-19.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Sixth to Eighth Periodic Reports of Lithuania' (CtteeERD 2016) UN Doc. CERD/C/LTU/CO/6-8.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Rwanda' (CtteeERD 2016) UN Doc. CERD/C/RWA/CO/18-20.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Eighteenth and Nineteenth Periodic Reports of Togo' (CtteeERD 2017) UN Doc. CERD/C/TGO/CO/18-19.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Eighteenth to Twenty-First Periodic Reports of the United Arab Emirates' (CtteeERD 2017) UN Doc. CERD/C/ARE/CO/18-21.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Ninth to Eleventh Periodic Reports of Tajikistan' (CtteeERD 2017) UN Doc. CERD/C/TJK/CO/9-11.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Eighth to Eleventh Periodic Reports of Turkmenistan' (CtteeERD 2017) UN Doc. CERD/C/TKM/CO/8-11.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Sixth to Twelfth Periodic Reports of Latvia' (CtteeERD 2018) UN Doc. CERD/C/LVA/CO/6-12.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Twenty-Second to Twenty-Fifth Periodic Reports of Iraq' (CtteeERD 2019) UN Doc. CERD/C/IRQ/CO/22-25.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Tenth to Twelfth Periodic Reports of Switzerland' (CtteeERD 2021) UN Doc. CERD/C/CHE/CO/10-12.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Twenty-Second to Twenty-Fourth Periodic Reports of Denmark' (CtteeERD 2022) UN Doc. CERD/C/DNK/CO/22-24.

Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Initial Report of Singapore' (CtteeERD 2022) UN Doc. CERD/C/SGP/CO/1.

Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Initial Report of Chile' (CtteeMW 2011) UN Doc. CMW/C/CHL/CO/1.

Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Second Periodic Report of Mexico' (CtteeMW 2011) UN Doc. CMW/C/MEX/CO/2.

Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'General Comment No. 1 (2011) on Migrant Domestic Workers' (CtteeMW 2011) UN Doc. CMW/C/GC/1.

Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'General Comment No. 2 (2013) on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families' (CtteeMW 2013) UN Doc. CMW/C/GC/2.

Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Initial Report of Timor-Leste' (CtteeMW 2015) UN Doc. CMW/C/TLS/CO/1.

Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Combined Second and Third Periodic Reports of Senegal' (CtteeMW 2016) UN Doc. CMW/C/SEN/CO/2-3.

Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Initial Report of Turkey' (CtteeMW 2016) UN Doc. CMW/C/TUR/CO/1.

Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Initial Report of Nigeria' (CtteeMW 2017) UN Doc. CMW/C/NGA/CO/1.

Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Concluding Observations on the Third Periodic Report of Mexico' (CtteeMW 2017) UN Doc. CMW/C/MEX/CO/3.

Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child, 'Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return' (CtteeMW and CtteeRC 2017) UN Doc. CMW/C/GC/4-CRC/C/GC/23.

Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Peru' (CtteeRPD 2012) UN Doc. CRPD/C/PER/CO/1.

Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Ecuador' (CtteeRPD 2014) UN Doc. CRPD/C/ECU/CO/1.

Committee on the Rights of Persons with Disabilities, 'General Comment No. 1 — Article 12: Equal Recognition Before the Law' (CtteeRPD 2014) UN Doc. CRPD/C/GC/1.

Committee on the Rights of Persons with Disabilities, 'Concluding Observations Gabon' (CtteeRPD 2015) UN Doc. CRPD/C/GAB/CO/1.

Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of the Dominican Republic' (CtteeRPD 2015) UN Doc. CRPD/C/DOM/CO/1.

Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of the European Union' (CtteeRPD 2015) UN Doc. CRPD/C/EU/CO/1.

Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Bolivia' (CtteeRPD 2016) UN Doc. CRPD/C/BOL/CO/1.

Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Ethiopia' (CtteeRPD 2016) UN Doc. CRPD/C/ETH/CO/1.

Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Guatemala' (CtteeRPD 2016) UN Doc. CRPD/C/GTM/CO/1.

Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Thailand' (CtteeRPD 2016) UN Doc. CRPD/C/THA/CO/1.

Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of the United Arab Emirates' (CtteeRPD 2016) UN Doc. CRPD/C/ARE/CO/1.

Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Uganda' (CtteeRPD 2016) UN Doc. CRPD/C/UGA/CO/1.

Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Armenia' (CtteeRPD 2017) UN Doc. CRPD/C/ARM/CO/1.

Committee on the Rights of the Child, 'Concluding Observations on the Initial Report of Myanmar' (CtteeRC 1997) UN Doc. CRC/C/15/Add.69.

Committee on the Rights of the Child, 'General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para 6)' (CtteeRC 2003) UN Doc. CRC/GC/2003/5.

Committee on the Rights of the Child, 'General Comment No. 9 (2006) on the Rights of Children with Disabilities' (CtteeRC 2007) UN Doc. CRC/C/GC/9.

Committee on the Rights of the Child, 'General Comment No. 11 (2009) on Indigenous Children and Their Rights Under the Convention' (CtteeRC 2009) UN Doc. CRC/C/GC/11.

Committee on the Rights of the Child, 'Concluding Observations on the Consolidated Third and Fourth Periodic Reports of Egypt' (CtteeRC 2011) UN Doc. CRC/C/EGY/CO/3-4.

Committee on the Rights of the Child, 'Concluding Observations on the Combined Third and Fourth Periodic Reports of Uzbekistan' (CtteeRC 2013) UN Doc. CRC/C/UZB/CO/3-4.

Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para 1)' (CtteeRC 2013) General Comment UN Doc. CRC /C/GC/14.

Committee on the Rights of the Child, 'Concluding Observations Netherlands' (CtteeRC 2015) UN Doc. CRC/C/NLD/CO/4.

Committee on the Rights of the Child, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Chile' (CtteeRC 2015) UN Doc. CRC/C/CHL/CO/4-5.

Committee on the Rights of the Child, 'Concluding Observations on the Combined Second to Fourth Periodic Reports of Switzerland' (CtteeRC 2015) UN Doc. CRC/C/CHE/CO/2-4.

Committee on the Rights of the Child, 'Concluding Observations on the Combined Second to Fourth Periodic Reports of Turkmenistan' (CtteeRC 2015) UN Doc. CRC/C/TKM/CO/2-4.

Committee on the Rights of the Child, 'Concluding Observations on the Combined Third to Fifth Periodic Report of Nepal' (CtteeRC 2016) UN Doc. CRC/C/NPL/CO/3-5.

Committee on the Rights of the Child, 'Concluding Observations on the Combined Third to Fifth Periodic Reports of Kenya' (CtteeRC 2016) UN Doc. CRC/C/KEN/CO/3-5.

Committee on the Rights of the Child, 'Concluding Observations on the Combined Third to Fifth Periodic Reports of Senegal' (CtteeRC 2016) UN Doc. CRC/C/SEN/CO/3-5.

Committee on the Rights of the Child, 'Concluding Observations on the Fifth Periodic Report of Pakistan' (CtteeRC 2016) UN Doc. CRC/C/PAK/CO/5.

Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Report of Gabon' (CtteeRC 2016) UN Doc. CRC/C/GAB/CO/2.

Committee on the Rights of the Child, 'Concluding Observations on the Third to Fifth Periodic Reports of Latvia' (CtteeRC 2016) UN Doc. CRC/C/LVA/CO/3-5.

Committee on the Rights of the Child, 'Concluding Observations on the Fifth Periodic Report of Mongolia' (CtteeRC 2017) UN Doc. CRC/C/MNG/CO/5.

Committee on the Rights of the Child, 'Concluding Observations on the Fourth Periodic Report of Georgia' (CtteeRC 2017) UN Doc. CRC/C/GEO/CO/4.

Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Report of Barbados' (CtteeRC 2017) UN Doc. CRC/C/BRB/CO/2.

Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Norway' (CtteeRC 2018) UN Doc. CRC/C/NOR/CO/5-6.

Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Report of Lesotho' (CtteeRC 2018) UN Doc. CRC/C/LSO/CO/2.

Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia' (CtteeRC 2019) UN Doc. CRC/C/AUS/CO/5-6.

Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Italy' (CtteeRC 2019) UN Doc. CRC/C/ITA/CO/5-6.

Committee on the Rights of the Child, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Japan' (CtteeRC 2019) UN Doc. CRC/C/JPN/CO-4-5.

Committee on the Rights of the Child, 'Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Bahrain' (CtteeRC 2019) UN Doc. CRC/C/BHR/CO/4-6.

Council of Europe, 'Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights

and freedoms other than those already included in the Convention and in the first Protocol thereto' (Council of Europe 1963).

Council of Europe, 'Explanatory Report to the Second Protocol Amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality' (Council of Europe 1993).

Council of Europe, 'Explanatory Report to the European Convention on Nationality' (Council of Europe 1997).

Council of Europe, 'Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality' (Council of Europe 1999).

Council of Europe, 'Explanatory Report to the Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession' (Council of Europe 2006).

Council of Europe, Committee of Ministers, 'Resolution (70) 2, Acquisition by Refugees of the Nationality of their Country of Residence' (Committee of Ministers 1970).

Council of Europe, Committee of Ministers, 'Resolution (77) 12 on the Nationality of Spouses of Different Nationalities' (Committee of Ministers 1977).

Council of Europe, Committee of Ministers, 'Resolution (77) 13 on the Nationality of Children Born in Wedlock' (Committee of Ministers 1977).

Council of Europe, Committee of Ministers, 'Recommendation No. R (84) 9 of the Committee of Ministers to the Member States on Second-Generation Migrants' (Committee of Ministers 1984).

Council of Europe, Committee of Ministers, 'Recommendation No. R (84) 21 of the Committee of Ministers to Member States on the Acquisition by Refugees of the Nationality of the Host Country' (Committee of Ministers 1984).

Council of Europe, Committee of Ministers, 'Recommendation No. R (99) 18 on the Avoidance and the Reduction of Statelessness' (Committee of Ministers 1999).

Council of Europe, Committee of Ministers, 'Recommendation Rec(2000)15 of the Committee of Ministers to Member States Concerning the Security of Residence of Long-Term Migrants' (Committee of Ministers 2000).

Council of Europe, Committee of Ministers, 'Recommendation CM/Rec(2009)13 of the Committee of Ministers of the Council of Europe on the Nationality of Children' (Committee of Ministers 2009) CM/Rec(2009)13.

ECOWAS, 'Nationality and Statelessness in West Africa — Background Note' (ECOWAS 2017) <https://www.unhcr.org/protection/statelessness/591c20ac7/statelessness-conference-2017-background-note-english.html> accessed 12 September 2022.

European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Centralised System for the Identification of Member States Holding Conviction Information on Third Country Nationals and Stateless Persons (TCN) to Supplement and Support the European Criminal Records Information System (ECRIS-TCN System) and Amending Regulation (EU) No 1077/

2011' (EU Commission 2017) COM(2017) 344 <https://ec.europa.eu/info/sites/info/files/commission_proposal_for_a_regulation_on_ecris-tcn_system_0.pdf> accessed 12 September 2022.

European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Investor Citizenship and Residence Schemes in the European Union' (European Commission 2019) COM(2019) 12 final <https://ec.europa.eu/info/sites/info/files/com_2019_12_final_report.pdf> accessed 12 September 2022.

Executive Committee of the High Commissioner's Programme, 'Prevention and Reduction of Statelessness and the Protection of Stateless Persons No. 78 (XLVI) — 1995' (UNHCR ExCom 1995) UN Doc. A/AC.96/860 <https://www.unhcr.org/excom/exconc/3ae68c443f/prevention-reduction-statelessness-protection-stateless-persons.html> accessed 12 September 2022.

Human Rights Committee, 'General Comment No. 15: The Position of Aliens Under the Covenant' (HRCttee 1986).

Human Rights Committee, 'General Comment No. 17: Article 24 (Rights of the Child)' (HRCttee 1989) UN Doc. CCPR/C/21/Rev.1/Add.9.

Human Rights Committee, 'General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (HRCttee 1990).

Human Rights Committee, 'General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)' (HRCttee 1996) UN Doc. CCPR/C/21/Rev.1/Add.7.

Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Colombia' (HRCttee 1997) UN Doc. CCPR/C/79/Add.76.

Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Ecuador' (HRCttee 1998) UN Doc. CCPR/C/79/Add.92.

Human Rights Committee, 'General Comment No. 27: Article 12 (Freedom of Movement)' (HRCttee 1999) UN Doc. CCPR/C/21/Rev.1/Add.9.

Human Rights Committee, 'General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (HRCttee 2004) UN Doc. CCPR/C/21/Rev.1/Add. 13.

Human Rights Committee, 'Concluding Observations on the Third Periodic Report of the Syrian Arab Republic' (HRCttee 2005) UN Doc. CCPR/CO/84/SYR.

Human Rights Committee, 'Concluding Observations on the Second Periodic Report of Kuwait' (HRCttee 2011) UN Doc. CCPR/C/KWT/CO/2.

Human Rights Committee, 'Concluding Observations on the Second Periodic Report of Nepal' (HRCttee 2014) UN Doc. CCPR/C/NPL/CO/2.

Human Rights Committee, 'General Comment No. 35 on Article 9 (Liberty and Security of Person)' (HRCttee 2014) UN Doc. CCPR/C/GC/35.

Human Rights Committee, 'Concluding Observations on the Second Periodic Report of Cambodia' (HRCttee 2015) UN Doc. CCPR/C/KHM/CO/2.

Human Rights Committee, 'Concluding Observations on the Fifth Periodic Report of Jordan' (HRCttee 2017) UN Doc. CCPR/C/JOR/CO/5.

Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of Belgium' (HRCttee 2019) UN Doc. CCPR/C/BEL/CO/6.

Human Rights Committee, 'Concluding Observations on the Fifth Periodic Report of Senegal' (HRCttee 2019) UN Doc. CCPR/C/SEN/CO/5.

Human Rights Council, 'Report of the Independent Expert on Minority Issues on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' (HRC 2008) UN Doc. A/HRC/7/23.

Human Rights Council, 'Resolution 7/10 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2008) UN Doc. A/HRC/RES/7/10.

Human Rights Council, 'Report 10/34 of the Secretary General on Arbitrary Deprivation of Nationality' (HRC 2009) UN Doc. A/HRC/10/34.

Human Rights Council, 'Resolution 10/13 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2009) UN Doc. A/HRC/RES/10/13.

Human Rights Council, 'Resolution 12/6 on Human Rights of Migrants: Migration and Human Rights of the Child' (HRC 2009) UN Doc. A/HRC/RES/12/6.

Human Rights Council, 'Report 13/34 of the Secretary General on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2009) UN Doc. A/HRC/13/34.

Human Rights Council, 'Resolution 13/2 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2010) UN Doc. A/HRC/RES/13/2.

Human Rights Council, 'Resolution 20/4 on the Right to a Nationality: Women and Children' (HRC 2012) UN Doc. A/HRC/RES/20/4.

Human Rights Council, 'Resolution 20/5 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2012) UN Doc. A/HRC/RES/20/5.

Human Rights Council, 'Universal Periodic Review, First Periodic Review of Luxembourg' (HRC 2013) UN Doc. A/HRC/23/10.

Human Rights Council, 'Universal Periodic Review, First Periodic Review of Romania' (HRC 2013) UN Doc. A/HRC/23/5.

Human Rights Council, 'Universal Periodic Review, First Periodic Review of Tonga' (HRC 2013) UN Doc. A/HRC/23/4.

Human Rights Council, 'Universal Periodic Review, First Periodic Review of Tuvalu' (HRC 2013) UN Doc. A/HRC/24/8.

Human Rights Council, 'Report 23/23 of the Secretary General on Discrimination Against Women on Nationality-Related Matters, Including the Impact on Children' (HRC 2013) UN Doc. A/HRC/23/23.

Human Rights Council, 'Report 25/28 of the Secretary General on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2013) UN Doc. A/HRC/25/28.

Human Rights Council, 'Resolution 26/14 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2014) UN Doc. A/HRC/RES/26/14.

Human Rights Council, 'Resolution 28/13 on Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law' (HRC 2015) UN Doc. A/HRC/RES/28/13.

Human Rights Council, 'Report 31/29 of the Secretary General on the Impact of the Arbitrary Deprivation of Nationality on the Enjoyment of the Rights of Children Concerned, and Existing Laws and Practices on Accessibility for Children to Acquire Nationality, Inter Alia, Of the Country in Which They Are Born, If They Otherwise Would Be Stateless' (HRC 2015) UN Doc. A/HRC/31/29

Human Rights Council, 'Universal Periodic Review, Second Periodic Review of Denmark' (HRC 2016) UN Doc. A/HRC/32/10.

Human Rights Council, 'Resolution 32/5 on Human Rights and Arbitrary Deprivation of Nationality' (HRC 2016) UN Doc. A/HRC/RES/32/5.

Human Rights Council, 'Universal Periodic Review, Third Periodic Review of Morocco' (HRC 2017) UN Doc. A/HRC/36/6.

Human Rights Council, 'Resolution 34/15 on Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law' (HRC 2017) UN Doc. A/HRC/RES/34/15.

Human Rights Council, 'Resolution S-27/1 on the Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar' (HRC 2017) UN Doc. A/HRC/RES/S-27/1.

Human Rights Council, 'Universal Periodic Review, Third Periodic Review of Botswana' (HRC 2018) UN Doc. A/HRC/38/8.

Human Rights Council, 'Universal Periodic Review, Third Periodic Review of Canada' (HRC 2018) UN Doc. A/HRC/39/11.

Human Rights Council, 'Universal Periodic Review, Third Periodic Review of Liechtenstein' (HRC 2018) UN Doc. A/HRC/38/16.

Inter-American Commission of Human Rights, 'Report on the Situation of Human Rights in the Dominican Republic' <http://www.oas.org/en/iachr/reports/pdfs/DominicanRepublic-2015.pdf> accessed 12 September 2022.

International Law Commission, 'Report on Nationality, Including Statelessness' (International Law Commission 1952) UN Doc. A/CN.4/50 <https://legal.un.org/ilc/documentation/english/a_cn4_50.pdf> accessed 12 September 2022.

International Law Commission, 'Commentary on the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States' (ILC 1999) Yearbook of the International Law Commission, 1999, Vol. II, Part Two <https://legal.un.org/ilc/texts/instruments/english/commentaries/3_4_1999.pdf> accessed 12 September 2022.

International Law Commission, 'Commentary on the Draft Articles on Diplomatic Protection' (ILC 2006) Yearbook of the International Law Commission, 2006, Vol. II, Part Two.

International Law Commission, 'Memorandum Prepared by the Secretariat on the Formation and Evidence of Customary International Law' (ILC 2013) UN Doc. A/CN.4/659.

International Law Commission, 'Commentary on the Draft Articles on the Expulsion of Aliens' (ILC 2014) Yearbook of the International Law Commission, 2011, Vol II, Part Two.

Office of the High Commissioner for Human Rights, 'Legislative History of the Convention on the Rights of the Child, Volume 1' (OHCHR 1978) <https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf> accessed 12 September 2022.

Organization for Security and Co-operation in Europe, 'Helsinki Summit' (OSCE 1992) <https://www.osce.org/event/summit_1992> accessed 12 September 2022.

Organization for Security and Co-operation in Europe, 'Charter for European Security' (OSCE 1999) <https://www.osce.org/mc/17502> accessed 12 September 2022.

Organization for Security and Co-operation in Europe, 'The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations' (OSCE 2008) <https://www.osce.org/hcnm/bolzano-bozen-recommendations> accessed 12 September 2022.

Organization for Security and Co-operation in Europe, 'The Ljubljana Guidelines on Integration of Diverse Societies' (OSCE 2012) <https://www.osce.org/hcnm/ljubljana-guidelines> accessed 12 September 2022.

Parliamentary Assembly of the Council of Europe, 'Recommendation 87 (1955) on Statelessness' (PACE 1955).

Parliamentary Assembly of the Council of Europe, 'Recommendation 194 (1959) on the Nationality of Children of Stateless Persons' (PACE 1959).

Parliamentary Assembly of the Council of Europe, 'Recommendation 519 (1968) on the Nationality of Married Women' (PACE 1968).

Parliamentary Assembly of the Council of Europe, 'Recommendation 564 (1969) on Acquisition by Refugees of the Nationality of Their Country of Residence' (PACE 1969).

Parliamentary Assembly of the Council of Europe, 'Resolution 417 (1969) on Acquisition by Refugees of the Nationality of Their Country of Residence' (PACE 1969).

Parliamentary Assembly of the Council of Europe, 'Recommendation 696 (1973) on Certain Aspects of the Acquisition of Nationality' (PACE 1973).

Parliamentary Assembly of the Council of Europe, 'Recommendation 841 (1978) on Second Generation Migrants' (PACE 1978).

Parliamentary Assembly of the Council of Europe, 'Recommendation 984 (1984) on the Acquisition by Refugees of the Nationality of the Receiving Country' (PACE 1984).

Parliamentary Assembly of the Council of Europe, 'Recommendation 1081 (1988) on Problems of Nationality of Mixed Marriages' (PACE 1988).

Parliamentary Assembly of the Council of Europe, 'Recommendation 1500 (2001) on Participation of Immigrants and Foreign Residents in Political Life in the Council of Europe Member States' (PACE 2001).

Parliamentary Assembly of the Council of Europe, 'Recommendation 1504 (2001) on Non-Expulsion of Long-Term Immigrants' (PACE 2001).

Parliamentary Assembly of the Council of Europe, 'Recommendation 1654 (2004) on Nationality Rights and Equal Opportunities' (PACE 2004).

Parliamentary Assembly of the Council of Europe, 'Resolution 1617 (2008)' and 'Recommendation 1839 (2008) on The State of Democracy in Europe, Specific Challenges Facing European Democracies: The Case of Diversity and Migration' (PACE 2008).

Parliamentary Assembly of the Council of Europe, 'Access to Nationality and the Effective Implementation of the European Convention on Nationality' (PACE 2014) Doc. 13392 (2014).

Parliamentary Assembly of the Council of Europe, 'Resolution 1989 (2014) on Access to Nationality and the Effective Implementation of the European Convention on Nationality' (PACE 2014).

Parliamentary Assembly of the Council of Europe, 'Recommendation 2042 (2014) on Access to Nationality and the Effective Implementation of the European Convention on Nationality' (PACE 2014).

Parliamentary Assembly of the Council of Europe, 'Resolution 2006 (2014) on Integration of Migrants in Europe: The Need for a Proactive, Long-Term and Global Policy' (PACE 2014).

Parliamentary Assembly of the Council of Europe, 'Resolution 2043 (2015) on Democratic Participation for Migrant Diasporas' (PACE 2015).

Parliamentary Assembly of the Council of Europe, 'Resolution 2083 (2015) on Chinese Migration to Europe: Challenges and Opportunities' (PACE 2015).

Parliamentary Assembly of the Council of Europe, 'Resolution 2099 (2016) on the Need to Eradicate Statelessness of Children' (PACE 2016).

Parliamentary Assembly of the Council of Europe, 'Recommendation 2145 (2019) Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach?' (PACE 2019).

Parliamentary Assembly of the Council of Europe, 'Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach?' (PACE 2019) Doc. 14790 (2019).

Parliamentary Assembly of the Council of Europe, 'Resolution 2263 (2019) on Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach?' (PACE 2019) Doc. 14790 (2019).

UN Commission on Human Rights, 'Report on the 34th Session' (UN Commission on Human Rights 1978) UN Doc. E/CN.4/1292.

UN Commission on Human Rights, 'Question of a Convention on the Rights of the Child, Report of the Secretary-General' (UN Commission on Human Rights 1978) UN Doc. E/CN.4/1324.

UN Commission on Human Rights, 'Report on the 36th Session' (UN Commission on Human Rights 1980) UN Doc. E/CN.4/1408.

UN Commission on Human Rights, 'Report of the Working Group on a Draft Convention on the Rights of the Child, 41st Session' (UN Commission on Human Rights 1985) UN Doc. E/CN.4/1408.

UN Commission on Human Rights, 'Resolution 1997/36 on Human Rights and Arbitrary Deprivation of Nationality' (UN Commission on Human Rights 1997).

UN Commission on Human Rights, 'Resolution 1998/48 on Human Rights and Arbitrary Deprivation of Nationality' (UN Commission on Human Rights 1998).

UN Commission on Human Rights, 'Resolution 1999/28 on Human Rights and Arbitrary Deprivation of Nationality' (UN Human Rights Commission 1999) UN Doc. E/CN.4/RES/1999/28.

UN Commission on Human Rights, 'Resolution 2005/45 on Human Rights and Arbitrary Deprivation of Nationality' (UN Human Rights Commission 2005) UN Doc. E/CN.4/RES/2005/45.

UN Commission on Human Rights, Drafting Committee, 'Draft Outline of International Bill of Rights' (UDHR Drafting Committee 1947) UN Doc. E/CN.4/AC.1/3.

UN Commission on Human Rights, Drafting Committee, 'Plan of the Draft Outline of International Bill of Rights' (UDHR Drafting Committee 1947) UN Doc. E/CN.4/AC.1/3/Add.2.

UN Commission on Human Rights, Drafting Committee, 'Report of the Drafting Committee to the Commission on Human Rights, First Session' (UDHR Drafting Committee 1947) UN Doc. E/CN.4/21.

UN Commission on Human Rights, Drafting Committee, 'Summary Record of the 37th Meeting, Second Session' (UDHR Drafting Committee 1948) UN Doc. E/CN.4/AC.1/SR.37.

UN Commission on Human Rights, Drafting Committee, 'Summary Record of the 39th Meeting, Second Session' (UDHR Drafting Committee 1948) UN Doc. E/CN.4/AC.1/SR.39.

UN Commission on Human Rights, Drafting Committee, 'Proposed Amendments to the Draft Declaration on Human Rights/India and the United Kingdom' (UDHR Drafting Committee 1948) UN Doc. E/CN.4/99.

UN Commission on Human Rights, Drafting Committee, 'Summary Record of the 59th Meeting, Third Session' (UDHR Drafting Committee 1948) UN Doc. E/CN.4/SR.59.

UN Commission on Human Rights, Drafting Committee, 'Summary Record of the 89th Meeting, Third Session' (UDHR Drafting Committee 1948) UN Doc. E/CN.4/SR.89.

UN Commission on Human Rights, Drafting Committee, 'Summary Record of the 123rd Meeting, Third Session' (UDHR Drafting Committee 1948) UN Doc. A/C.3/SR.123.

UN Commission on Human Rights, Drafting Committee, 'Summary Record of the 124th Meeting, Third Session' (UDHR Drafting Committee 1948) UN Doc. A/C.3/SR.124.

UN Department of Economic and Social Affairs, 'The Number of International Migrants Reaches 272 Million, Continuing an Upward Trend in All World Regions' (UN DESA 2019) <https://www.un.org/development/desa/en/news/population/international-migrant-stock-2019.html> accessed 12 September 2022.

UN General Assembly, 'Resolution 3274 (XXIV)' (UN General Assembly 1974).

UN General Assembly, 'Resolution 31/36' (UN General Assembly 1976) UN Doc. A/RES/31/36.

UN General Assembly, 'Resolution 41/120: Setting International Standards in the Field of Human Rights' (UN General Assembly 1987).

UN General Assembly, 'Resolution 49/169' (UN General Assembly 1995) UN Doc. A/RES/49/169.

UN General Assembly, 'Resolution 50/152 on the Office of the United Nations High Commissioner for Refugees' (UN General Assembly 1996) UN Doc. A/RES/50/152.

UN General Assembly, 'Resolution 54/112' (UN General Assembly 1999) N Doc. A/RES/54/112.

UN General Assembly, 'Resolution 59/34' (UN General Assembly 2004) UN Doc. A/RES/59/34.

UN General Assembly, 'Resolution 61/137 on the Office of the United Nations High Commissioner for Refugees' (UN General Assembly 2007) UN Doc. A/RES/61/137.

UN General Assembly, 'Resolution 66/133' (UN General Assembly 2012) UN Doc. A/RES/66/133.

UN General Assembly, 'Resolution 67/149' (UN General Assembly 2013) UN Doc. A/RES/67/149.

UN General Assembly, 'Resolution 69/152' (UN General Assembly 2015) UN Doc. A/RES/69/152.

UN General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development, Resolution 70/1' (UN General Assembly 2015) UN Doc. A/RES/70/1.

UN General Assembly, 'Resolution 70/135' (UN General Assembly 2016) UN Doc. A/RES/70/135.

UN General Assembly, 'New York Declaration for Refugees and Migrants, Adopted by General Assembly Resolution 71/1' (UN General Assembly 2016) UN Doc. A/RES/71/1.

UN General Assembly, 'Resolution 72/150' (UN General Assembly 2018) UN Doc. A/RES/72/150.

UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration,General Assembly Resolution 73/195' (UN General Assembly 2018) UN Doc. A/RES/73/195.

UN General Assembly, 'Resolution 73/151' (UN General Assembly 2019) UN Doc. A/RES/73/151.

UN General Assembly, Third Committee, 'Draft International Covenants on Human Rights, Report of the 17th Session' (UN General Assembly 1963) UN Doc. A/5655.

UN General Assembly, Third Committee, 'Text of the Preamble and Articles of the International Convention on the Protection of the Rights of All Migrant Workers and Their Families to Which the Working Group Provisionally Agreed During the First Reading' (UN General Assembly 1983) A/C.3/38/WG.1/CRP.2/Rev.1.

UN Independent Expert on Minority Issues, 'Report on Minorities and the Discriminatory Denial or Deprivation of Citizenship'.

UN Office of the High Commissioner on Human Rights, 'Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine)' (OHCHR 2017) <https://www.ohchr.org/Documents/Countries/UA/Crimea2014_2017_EN.pdf> accessed 12 September 2022.

UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, 'Report on Racial Discrimination in the Context of in the Context of Laws, Policies and Practices Concerning Citizenship, Nationality and Immigration' (Special Rapporteur on Racism 2018) UN Doc. A/HRC/38/52.

UN Special Rapporteur on Minority Issues, 'Report of the Special Rapporteur on Minority Issues to the Human Rights Council' (2008) UN Doc. A/HRC/7/23.

UN Special Rapporteur on the Human Rights of Migrants, 'Report of the Special Rapporteur on the Human Rights of Migrants' (Special Rapporteur on the Rights of Migrants 2016) UN Doc. A/71/285.

UNHCR, 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness' (UNHCR 2012).

UNHCR, 'Expert Meeting — Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")' (UNHCR 2013).

UNHCR, 'Introductory Note to the Convention on the Reduction of Statelessness' (UNHCR 2014) <https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf> accessed 12 September 2022.

UNHCR, 'Handbook on Protection of Stateless Persons, under the 1954 Convention Relating to the Status of Stateless Persons' (UNHCR 2014) <http://www.refworld.org/docid/53b676aa4.html> accessed 12 September 2022.

UNHCR, 'Official Record of the 73rd Session: Global Compact on Refugees' (UNHCR 2018) UN Doc. A/73/12 (Part II).

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (UNHCR 2019).

UNHCR, 'Background Note on Gender Equality, Nationality Laws and Statelessness 2022' (UNHCR 2022) <https://www.refworld.org/docid/6221ec1a4.html> accessed 12 September 2022.

UNHCR and OSCE, 'Handbook on Statelessness in the OSCE Area: International Standards and Good Practices' (UNHCR 2017) <https://www.osce.org/handbook/statelessness-in-the-OSCE-area> accessed 12 September 2022.

Table of Cases

Universal and Regional Bodies

Permanent Court of International Justice/International Court of Justice

Barcelona Traction, Light and Power Company, Limited (*Belgium v Spain*) [1970] ICJ Reports 1970, p. 3.

Case of the SS Lotus (*Lotus Case*) [1927] PCIJ Series A No. 10.

Colombian-Peruvian Asylum Case (*Colombia v Peru*) [1950] ICJ Reports 1950, p. 266.

Island of Palmas Case (*United States v Netherlands*) [1928] PCA II RIAA 829.

Legality of the Threat or Use of Nuclear Weapons (*Advisory Opinion*) [1996] ICJ Reports 1996, p. 226.

Nationality Decrees Issued in Tunis and Morocco (*Advisory Opinion*) [1923] PCIJ Series B No. 4.

Nic*aragua v United States of America, Military and Paramilitary Activities* [1986] ICJ Reports 1986, p. 116.

North Sea Continental Shelf Cases (*Federal Republic of Germany v Denmark and Netherlands*) [1969] ICJ Reports 1969, p. 3.

Nottebohm (*Liechtenstein v Guatemala*) [1955] ICJ Reports 1955, p. 4.

Dissenting Opinion of Judge "Ad Hoc" Guggenheim in '*Liechtenstein v Guatemala* (Nottebohm)' (1955) ICJ Reports 1955, p. 4.

Panevezys-Saldutiskis Railway (*Estonia v Lithuania*) [1939] PCIJ (1938) PCIJ Series A./B. No. 76.

Question Concerning the Acquisition of Polish Nationality (*Advisory Opinion*) [1923] PCIJ Series B No. 7.

African Commission on Human and Peoples' Rights/African Court of Human and Peoples' Rights

Amnesty International v Zambia [1999] ACmHPR Communication No. 212/98.

Anudo Ochieng Anudo v United Republic of Tanzania [2018] ACtHPR Application No. 012/2015.

John K Modise v Botswana [2000] ACmHPR Communication No. 97/93.

Kenneth Good v Republic of Botswana [2010] ACmHPR Communication No. 313/05.

Legal Resources Foundation v Zambia [2001] ACmHPR Communication No. 211/98.

Malawi Africa Association and others v Mauritania [2000] ACmHPR Communications No. 54/91, 61/91, 96/93, 98/93, 164/97, 196/97, 210/98.

Mouvement ivoirien des droits humains (*midh*) *v Côte d'Ivoire* [2008] ACmHPR Communication No. 246/02.

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European Court of Human Rights/ European Commission of Human Rights

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