

Statelessness in Canadian Context

A Discussion Paper



July 2003



UNHCR

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The author would like to thank Judith Kumin, UNHCR Representative in Canada, for her guidance and rigorous editing; Christine Aubin, former UNHCR Legal Officer for her preliminary research into this subject; and Carol Batchelor, Senior Legal Officer at UNHCR Headquarters in Geneva for her expert advice. The constructive assistance of Glynnis Williams (Action Réfugiés Montréal) and Ezat Mossallenejad (Canadian Center for Victims of Torture) is also gratefully acknowledged.

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EXECUTIVE SUMMARY – RESUMÉ

Article 15 of the Universal Declaration of Human Rights provides: “Everyone has the right to a nationality.” Sometimes called “the right to have rights,” nationality or citizenship is the fundamental criterion differentiating “insiders” who may benefit from the protection of the state and actively participate in governance, from “outsiders” who remain vulnerable and largely impotent in relation to the state and society.

Canadian law and policy generally recognize the importance of citizenship. Indeed, Canada’s policy of conferring citizenship on children born in the territory as well as on those born abroad to Canadian parents is among the most liberal in the world. However, UNHCR and partner organizations have long encountered difficulties in resolving the situation of individuals in Canada who are not recognized as nationals by any state under the operation of its laws, but who are also not found to be in need of international protection by the competent Canadian bodies.

This report examines the state of Canadian law, policy and practice with respect to statelessness, in the context of international law in this area. After discussing the impact of statelessness and the national and international legal frameworks, the paper moves on to analyze specific aspects of Canadian policy with respect to both the avoidance of statelessness and the protection of those who are already stateless. The report includes detailed recommendations for reform, and urges Canada to reconsider its decision not to accede to the 1954 *Convention relating to the Status of Stateless Persons*. It concludes with a proposal to promote the establishment of a tribunal or arbitral body to adjudicate disputes and set clear international standards regarding nationality.

Selon l’article 15 de la Déclaration universelle des Droits de l’homme, “Tout individu a droit à une nationalité”. Parfois appelé le “droit de posséder des droits”, la nationalité (ou citoyenneté) est le critère fondamental qui distingue ceux qui sont “inclus” dans une société, et qui peuvent donc bénéficier de la protection de l’état et y participer activement, de ceux qui sont “exclus” et qui restent vulnérables et impuissants face à l’état et à la société.

La loi et la politique canadiennes reconnaissent l’importance capitale de la citoyenneté. La politique canadienne d’accorder la nationalité aux enfants nés sur le territoire canadien ainsi qu’aux enfants nés à l’étranger des parents canadiens est parmi les plus généreuses du monde. Néanmoins, le HCR et ses partenaires rencontrent régulièrement des difficultés pour résoudre la situation des personnes qui se trouvent au Canada, et qui ne sont ni reconnus comme citoyens par aucun état, ni comme réfugiés par les instances compétentes canadiennes.

Ce rapport examine la loi, la politique et la pratique canadiennes en matière de nationalité et d’apatridie, dans le contexte du droit international applicable. Il examine l’impact de l’apatridie, le cadre juridique national et international, et des aspects particuliers de la politique canadienne destinés à éviter l’apatridie et à protéger ceux qui sont apatrides. Le rapport contient de nombreuses recommandations spécifiques et encourage le Canada à reconsidérer sa décision de ne pas adhérer à la Convention de 1954 relative au statut des apatrides. Il propose aussi la création d’un tribunal arbitral international pour résoudre des conflits en matière de nationalité.

INTRODUCTION

Citizenship has been called “the right to have rights.”¹ Providing the basic link between an individual and the state, citizenship or nationality² differentiates “insiders” who may benefit from the protection of the state and actively participate in governance, from “outsiders” who remain vulnerable and largely impotent in relation to the state and society.³

Canadian law and policy generally recognize the importance of citizenship. Indeed, Canada’s policy of conferring citizenship on children born in the territory as well as on those born abroad to Canadian parents is among the most liberal in the world. However, individuals in Canada who have no nationality *and* are not recognized as refugees or protected persons, remain very vulnerable.

This discussion paper has been prepared in the context of UNHCR’s efforts to address problems of statelessness around the world. The avoidance and elimination of statelessness is part of UNHCR’s mandate.⁴ There are close connections between statelessness and forced displacement, since displacement can be both a cause and a consequence of statelessness, and statelessness can be an obstacle to the resolution of refugee problems.⁵ In 2001, UNHCR’s Executive Committee⁶ noted the global dimension of statelessness, and welcomed UNHCR’s efforts to broaden its activities to reduce this phenomenon. UNHCR provides technical support and advice to states on issues related to statelessness, and encourages accession to the 1954 *Convention relating to the Status of Stateless Persons* and to the 1961 *Convention on the Reduction of Statelessness*.

The purpose of this paper is to assess the extent to which problems of statelessness arise in Canadian law and practice, and to propose workable solutions. UNHCR and partner organizations have long encountered difficulties in resolving the situation of individuals in Canada who are not recognized as nationals by any state under the operation of its laws, but who are also not found to be in need of international protection by the competent Canadian bodies. In addition, UNHCR has an interest in the approach taken to applications for protection filed by stateless persons, and in seeking to ensure that Canadian legislation pertaining to citizenship contains necessary safeguards to avoid rendering persons stateless.

¹ *Trop v. Dulles*, 356 U.S. 86 (1958) (USSC) at 102.

² The terms citizenship and nationality are used interchangeably in this paper.

³ C.A. Batchelor, “Stateless Persons: Some Gaps in International Protection,” 7 *IJRL* 2 (1995), at 235.

⁴ See United Nations General Assembly (UNGA) Resolution 3274 (XXIX) of 10 Dec. 1974, UN Doc. 3274(XXIX); UNGA Res. 31/36 of 30 Nov. 1976, UN Doc. A/RES/31/36; UNGA Res. 51/75 of 12 Dec. 1996, UN Doc. A/RES/51/75; UNGA Res. 56/137 of 19 Dec. 2001, UN Doc. A/RES/56/137; UNHCR Executive Committee Conclusion No. 78 (XLVI) 1995, UN Doc. A/AC.96/860.

⁵ UNHCR, *The State of the World’s Refugees: A Humanitarian Agenda*, (Oxford: Oxford University Press, 1997), at 244.

⁶ UNHCR Executive Committee Conclusion No. 90 (LII) 2001, UN Doc. A/AC.96/959, para. 22 (o)-(s).

It is hoped that this paper will shed some light on these complex questions and encourage more investigation into ways to avoid and resolve situations of statelessness. It is also hoped that this paper will encourage Canada to reconsider the possibility of acceding to the 1954 *Convention relating to the Status of Stateless Persons*.

Impact of statelessness

Statelessness has dramatic and debilitating effects on a person's life. U.S. Supreme Court Chief Justice Earl Warren described the situation of the stateless person this way:

His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights and, presumably, as long as he remained in this country, he would enjoy the limited rights of an alien, no country need do so, because he is stateless.⁷

He concluded that to be stateless is to lack "the right to have rights."⁸

Statelessness has dire consequences for everyday life. Since nationality is key to the protection of rights, stateless persons frequently have no recognized and protected right to own property, to employment, health care, education or mobility. They are often unable to register the birth of their children or to marry and found a family. In many jurisdictions, they do not enjoy legal protection.⁹ Though these are all considered to be "universal" human rights, the reality is that without a connection to a state, the rights are unenforceable and thus largely meaningless. Moreover, as discussed below, detention, sometimes indefinite, of those who cannot prove their nationality and who have no legal claim to remain in a state, is increasingly common around the world.¹⁰

In Canada, as elsewhere, stateless persons who do not have authorization to stay in the country live in a condition of legal limbo.¹¹ Some stateless persons are refugees and, once recognized as such, enjoy the full set of rights which attach to refugee status. However, non-refugee stateless persons are in an extremely precarious situation. These are persons who are not recognized as nationals by any country but also do not have a well-founded fear of persecution in any country on one of the grounds enumerated in the 1951 *Convention relating to the Status of Refugees*. It is this group of individuals, albeit small, who face the greatest problems in Canada and elsewhere. They are vulnerable and marginalized.

⁷ *Supra* n.1 at 101-2.

⁸ *Ibid.*, at 102.

⁹ Division of International Protection, UNHCR, "What would life be like if you had no nationality?" (Geneva: UNHCR, March 1999), at 3.

¹⁰ *Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, to the UN Commission on Human Rights, 59th Session* (Advance Edited Version), UN Doc. E/CN.4/2003/8520 (December 2002).

¹¹ Several articles and papers have been written on the situation of undocumented refugees in legal limbo in Canada (see e.g. A. Brouwer, *What's In A Name?* (Ottawa: Caledon Institute of Social Policy, 1999)). The circumstances of stateless persons are in many ways similar, except that stateless persons whose applications for refugee protection have been rejected have no assurance that they may remain in Canada.

Ivan's story: living in legal limbo

Ivan¹² was born and grew up in Russia during Soviet rule. Just before the break-up of the USSR, at the age of 20, he emigrated legally to the United States, through the US Refugee Program. At that time, persons resettled under this program were required by Moscow to renounce their USSR citizenship, in exchange for exit permission. Ivan did so. After a year in the US he became a permanent resident, but his residency status was later revoked when he was convicted on a forgery charge. The US authorities tried to deport him to Russia, but the authorities refused to admit him, arguing that he was not a Russian citizen.

He crossed the border into Canada without authorization, and was detained for illegal entry. The US would not readmit him. He remained in jail for more than two years, while the Canadian authorities tried unsuccessfully to send him to Russia. He was finally released from detention when it was evident that there was no reasonable prospect of his removal. He approached UNHCR for help to return voluntarily to Russia. Despite consistent efforts by UNHCR, the Russian authorities have not agreed to readmit him. Ivan has now spent more than three years without legal status in Canada.

Among the most painful aspects of life in legal limbo is indefinite family separation. Without status in Canada as a permanent resident or a citizen, stateless persons are ineligible to bring their children and spouses to Canada. Nor can they leave Canada, whether to relocate permanently or to visit their families. Unlike immigrants, who can leave at any time to visit or reunite with their families, stateless persons have no standing right to enter another country. If they do manage to leave Canada, they have no right to return.

As demonstrated by the case of Ivan set out above, non-refugee stateless persons in Canada who cannot acquire a legal status are subject to removal from the country, and may be detained pending removal. However, because removal is often impossible, what should be short-term detention in preparation for removal may become long-term or even indefinite, as Canadian officials try to convince another country to accept a non-national.

Like anyone who has no legal status in Canada, non-status stateless persons are ineligible for public assistance and subsidized medical care. They also face significant barriers to education. While youth are in principle entitled to attend primary and secondary school regardless of their status in Canada, post-secondary students require a student visa, which they are unlikely to be able to acquire if they have no status in Canada. Even if successful they will be charged much higher tuition fees than citizens or permanent residents. Public student loans are restricted to Canadian citizens and permanent residents, though a recent announcement indicates that protected persons will soon also be eligible for them.¹³

Non-status stateless persons also face difficulties obtaining work authorization and finding accommodation. As a result, they may feel they have little choice but to accept substandard conditions of work and housing.

¹² Case on file at UNHCR Ottawa. In this and in all subsequent case studies, the individuals' names have been changed to protect their privacy.

¹³ Hon. J. Manley, *Building the Canada We Want: The Budget Speech 2003*, (Ottawa: Department of Finance, 18 February 2003) at 10.

CITIZENSHIP AND STATELESSNESS: THE ISSUES

The International Court of Justice in the *Nottebohm Case* defined nationality as “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.”¹⁴ Nationality is the prerequisite for the enjoyment of other rights, including such basic ones as the right to remain in one’s country and to re-enter from abroad, and, in democratic countries, the right to vote and to participate fully in public affairs. As well, nationality is the basis on which a state extends protection to individuals in other states, through the mechanism of consular assistance. Importantly, nationality is also the main way for individuals to invoke their universal human rights, as the international human rights system is premised on state responsibility for the rights of nationals, with a more limited set of rights for “aliens.”

De jure v. de facto statelessness

A person who is described as *de jure* stateless is stateless by operation of law. That is, no state recognizes the person as its own national. This may be because the person’s former state has collapsed or changed into a new state, or the person may have been stripped of nationality. In other cases a person might be *de jure* stateless because she or he has never had a nationality.

On the other hand, a person may formally have a nationality under the law of a particular state, but that nationality may not be “effective.” Ineffective nationality means that even though a person is recognized as a national in a country’s domestic law, the person does not receive the kind of protection and benefit from the state that is expected of a state with respect to its nationals. A person

in this situation is considered at international law to be *de facto* stateless.

A contemporary situation of *de facto* statelessness arises in the context of trafficking of women. Traffickers often steal or destroy the identity documents of their victims, making it impossible for them to prove their nationality. International agencies frequently encounter trafficked women held in detention in the country they were trafficked to or stranded in, unable to return home because their country of citizenship refuses to admit them without proof of nationality, and the country in which they are detained refuses to release them without proper documentation.¹⁵

In order to ensure that everyone may be an “insider” somewhere, and hence enjoy the full protection of a state and of international law, the 1948 *Universal Declaration of Human Rights* (UDHR) provides:

Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality.¹⁶

¹⁴ *Nottebohm Case*, [1955] ICJ Rep. 4 at 23.

¹⁵ UNHCR, “UNHCR’s Activities in the Field of Statelessness: Progress Report,” UN Doc. EC/51/SC/CRP.14, 13 May 2001, at 18.

¹⁶ 1948 UDHR, Art. 15.

But though the right to a nationality is clearly a fundamentally important one, it has little meaning unless the next question is addressed: to *which* nationality does an individual have a right? Rephrased, the question is how to determine which state has the obligation to accord its nationality to a particular individual. International law provides that the granting of citizenship falls within the sovereign authority of states. While this does not leave states free to grant or withhold citizenship arbitrarily¹⁷, it does provide room for a variety of approaches to granting citizenship.

The two most common approaches to determining whether to grant citizenship to an individual are based on an assessment of the person's link to the state by either blood or soil. Under *jus sanguinis*, or "right of blood," citizenship is granted on the basis of descent to children born to nationals of the state. Under *jus soli*, or "right of the soil," citizenship is granted to children on the basis of their place of birth. Both systems are in use around the world, in varying forms.

At the conceptual level, it would appear that either approach, if adopted universally and without discrimination, could meet the goal of Article 15 of the UDHR. Every child is born to a parent, so a universal system of *jus sanguinis* should ensure a nationality to every child — as long as every parent has a nationality in the first place. Alternatively, a universal system of *jus soli* should ensure that every child acquires a nationality, since every child is born in the territory of one state or another — provided every state is willing to provide an effective nationality to every person born on its territory.

In reality, however, the existence of two different approaches, and countless variations on each, works against realization of the universal right to a nationality. The most commonly cited example is of a child born in state A to parents who are nationals of state B, where state A grants nationality by descent (*jus sanguinis*) and state B grants nationality by place of birth (*jus soli*). In such a case the child is left stateless.

Indeed, the two principles are also applied in different ways by different states, reflecting various cultures and biases. For instance, *jus sanguinis* citizenship is often restricted to children of fathers who are nationals of a state and excludes matrilineal citizenship.¹⁸ As well, it often includes provisions for severing the chain of nationality where the link to the state is considered to be too weak. *Jus soli* likewise may take a variety of forms, including restrictions relating to minimum residence in the state. Some states, including Canada, grant citizenship on both grounds.

An additional factor affecting nationality, highlighted by the International Court of Justice in *Nottebohm*, is the concept of a genuine and effective link between the citizen and

¹⁷ "It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality." *Convention on Certain Questions relating to the Conflict of Nationality Laws*, (Hague Convention), 179 LNTS 89, Art. 1.

¹⁸ Division of International Protection, UNHCR, *Information and Accession Package: The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness*, Geneva: UNHCR, June 1996; Rev. Jan. 1999, at 10.

the state. Though in that case the Court was dealing with a situation of dual nationalities, the lack of a genuine and effective link may limit access to citizenship in both *jus sanguinis* and *jus soli* jurisdictions.¹⁹

Conflicts of laws are not the only causes of statelessness. A major contemporary cause is state succession, such as that which resulted from the break-up of the Soviet Union and of Yugoslavia. Laws relating to marriage and the registration of births also give rise to statelessness, whether in the context of state succession or in normal circumstances. Other causes include administrative practices, automatic loss of citizenship through the loss of an effective link to the state, and renunciation of citizenship without the prior acquisition of another nationality.²⁰

Melita's story: protected as a refugee

Melita was born in Bosnia-Herzegovina in 1952, when it was part of the Socialist Federal Republic of Yugoslavia. Her father, an officer in the Yugoslav army, was an ethnic Serb. Her mother was of Serbian-Jewish background. In 1972 she moved to Croatia, where she lived until war broke out there in 1991. Because of the conflict she moved briefly to Montenegro, before leaving for Canada, where she applied for refugee status in 1992. The Immigration and Refugee Board found that she was not a citizen of the newly independent Croatia, nor automatically entitled to the citizenship of the newly proclaimed

Federal Republic of Yugoslavia, and hence was stateless. The Board also found that she had a well-founded fear of persecution in her country of former habitual residence (Croatia) on grounds of her ethnicity and membership in a particular social group (families of former Yugoslav Army officers). She was recognized as a Convention refugee and as such, was able to apply for permanent residence in Canada and subsequently for Canadian citizenship, thereby resolving her situation of unclear citizenship and possible statelessness.²¹

States have also used the grant or removal of citizenship as a political tool. As long ago as A.D. 212 the Roman emperor Caracalla, seeking to prop up a faltering empire and to expand his tax revenue base, passed the *Constitutio Antoniniana*, granting Roman citizenship to "all aliens throughout the world."²² On the other side of the equation is mass denationalisation, used most infamously by the Nazi regime in 1930s Germany to strip Jews and some others of their German citizenship.²³ As well, at the end of the war, mass denationalisation of ethnic Germans was undertaken in Czechoslovakia, Poland and Hungary.²⁴

¹⁹ For a detailed exploration of the genuine and effective link concept in the field of nationality, see: C.A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 IJRL 156 (1998).

²⁰ Ibid.

²¹ CRDD No. 197, T93-06867, T93-06868, T93-06869 (1993).

²² R. Debray, "Nous sommes tous américains," *Harper's Magazine*, May 2003, at 13; P.N. Stearns et al, eds., *Encyclopedia of World History: Ancient, Medieval, and Modern*, 6th ed., (Boston: Houghton Mifflin Company, 2001), at II. E. 4. b.

²³ The Law of July 14, 1933, concerning Cancellation of Naturalisations and Deprivation of Nationality (RGBl vol. I, p. 480), revoked the citizenship of Jews, Trotskyites and others. Stripped of legal status and subjected to the Nazi racial laws, those who were not interned or murdered by the Reich fled Germany to seek protection in other countries.

²⁴ P. Weis, *Nationality and Statelessness in International Law*, 2nd rev. ed., (Aalpen aan den Rijn: Sijthoff & Noordhoff International Publishers BV, 1979) at 120.

THE INTERNATIONAL LEGAL REGIME

It was in response to the horrors of the Second World War and the failure of the international community to respond appropriately to the flow of stateless persons and refugees, that the international community decided to draft multilateral conventions on the matter. In 1947, the UN Commission on Human Rights urged “that early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any Government, in particular pending the acquisition of nationality, as regards their legal and social protection and their nationality.”²⁵ At the time, refugees and stateless persons were generally regarded as a single group, defined as being outside of their place of origin and lacking the protection of any state.²⁶

Studies were conducted and committees and working groups convened to look into the issue and develop instruments to protect stateless persons. Yet the work quickly zeroed in on refugees, leaving non-refugee stateless persons on the sidelines:

In view of the urgency of the refugee problem and the responsibility of the United Nations in this field, the Committee decided to address itself first to the problem of refugees, whether stateless or not, and to leave to later stages of its deliberations the problems of stateless persons who are not refugees.²⁷

Thus in 1951 the *Convention relating to the Status of Refugees* was adopted on its own, and the planned Protocol relating to the Status of Stateless Persons, which was intended to accompany it, was deferred for further study. While the 1951 Refugee Convention applies to some stateless persons, its application is limited to those who are also refugees. Article 1 A (2) provides that the Convention applies to a person who:

...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or *who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.* (emphasis added)

Only those stateless persons who are outside of their country of habitual residence and who have a well-founded fear of persecution on one of the enumerated grounds are protected under the 1951 Refugee Convention. That Convention has been very widely ratified, the number currently standing at 142 ratifications. Canada acceded to the 1951 Refugee Convention in 1969.²⁸

²⁵ UN Doc E/600, (1947), at 46, quoted in Batchelor, *supra* n. 3 at 241.

²⁶ *Ibid.*, at 240.

²⁷ *Report of the Ad Hoc Committee on Statelessness and Related Problems*, UN Doc. E/1618 and Corr. 1, 17 Feb. 1950, 120, quoted in Batchelor, *supra* n. 3 at 243.

²⁸ UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol* (Geneva: UNHCR, 1 April 2003), www.unhcr.ch.

The 1954 Convention relating to the Status of Stateless Persons²⁹

The planned Protocol relating to the Status of Stateless Persons was replaced by a Convention which was adopted three years later. The 1954 *Convention relating to the Status of Stateless Persons*, which has just 55 parties and has *not* been ratified by Canada, applies to “a person who is not considered as a national by any State by the operation of its law.”³⁰ This definition reflects controversy among the drafters about the difference between, and protection required by, *de jure* stateless persons and those who are *de facto* stateless, the latter group comprising persons who, “without having been deprived of their nationality no longer enjoy the protection and assistance of their national authorities.”³¹ It was widely assumed at the time that most *de facto* stateless persons were refugees, in which case they were already protected under the 1951 Refugee Convention. In addition, it was feared that including *de facto* stateless persons might provide a loophole for those seeking a new nationality for the sake of convenience, by allowing them to renounce their nationality and then put themselves under the wider definition of statelessness. For these reasons primarily, the 1954 Convention was limited in direct application to those who are *de jure* stateless.³² However, a recommendation included in the Final Act of the Conference encourages states to extend their protection to *de facto* stateless persons. The Final Act:

Recommends that each Contracting State, when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to that person the treatment which the Convention accords to stateless persons.³³

The 1954 Convention seeks to regulate and improve the legal status of stateless persons, and to ensure non-discriminatory protection of their fundamental rights and freedoms by the state in which they reside. Many of its provisions are identical to those of the 1951 Refugee Convention, which seeks to protect the rights of refugees. These include, *inter alia*, the core non-discrimination obligation³⁴, provisions on religious freedom³⁵, juridical

²⁹ See *Main Provisions of the 1954 Convention relating to the Status of Stateless Persons*, attached as Appendix A.

³⁰ 1954 Convention, Art. 1(1).

³¹ *A Study of Statelessness*, UN Doc. E/1112 (1 Feb. 1949); E/1112/Add.1 (19 May 1949).

³² Batchelor, *supra* n. 3 at 248.

³³ *Final Act of the United Nations Conference on the Status of Stateless Persons*, item 3.

³⁴ 1954 Convention, Art. 3.

³⁵ *Ibid.*, Art. 4.

status³⁶, employment³⁷, welfare³⁸, freedom of movement³⁹, issuance of travel and identity documents⁴⁰, and an obligation to “facilitate assimilation and naturalisation.”⁴¹ In addition, the 1954 Convention prohibits expulsion of stateless persons “save on grounds of national security or public order.”⁴²

Thus the 1954 Convention encourages the naturalization of stateless persons, but it does not *require* a state to grant its nationality to a stateless person. The 1954 Convention seeks to ensure a legal status and minimum level of protection for stateless persons wherever they may be, but leaves aside the question of which nationality an individual should have. As pointed out in UNHCR’s *Information and Accession Package* for the 1954 Convention, “The improvement of the rights and status of stateless persons under the provisions of this Convention does not...diminish the necessity of acquiring a nationality nor does it alter the fact that the individual is stateless.”⁴³

The 1954 Convention has been called an “orphan convention” because it does not provide for a supervisory body. Had it remained a Protocol to the 1951 Refugee Convention, stateless persons would have had the benefit of Article 35 of the Refugee Convention, which established a supervisory role for UNHCR. However, this possibility was lost when the Protocol became a Convention in its own right.

55 States Parties to the 1954 Convention relating to the status of Stateless Persons⁴⁴

Albania	Brazil	Hungary	Netherlands	Trinidad and Tobago
Algeria	Chad	Ireland	Norway	Tunisia
Antigua and Barbuda	Costa Rica	Israel	Republic of Korea	Uganda
Argentina	Croatia	Italy	Saint Vincent and the Grenadines	United Kingdom of Great Britain and Northern Ireland
Armenia	Denmark	Kiribati	Slovakia	Yugoslavia (now Serbia and Montenegro)
Australia	Ecuador	Latvia	Slovenia	Zambia
Azerbaijan	Fiji	Lesotho	Spain	Zimbabwe
Barbados	Finland	Liberia	Swaziland	
Belgium	France	Libyan Arab Jamahiriya	Sweden	
Bolivia	Germany	Lithuania	Switzerland	
Bosnia and Herzegovina	Greece	Luxemburg	The former Yugoslav Republic of Macedonia	
Botswana	Guatemala	Mexico		
	Guinea			

³⁶ Ibid., Arts. 12-16.

³⁷ Ibid., Arts. 17-19.

³⁸ Ibid., Arts. 20-24.

³⁹ Ibid., Art. 26.

⁴⁰ Ibid., Arts. 27-28.

⁴¹ Ibid., Art. 32.

⁴² Ibid., Art. 31(1).

⁴³ *Supra* n. 18 at 38.

⁴⁴ United Nations Treaty Website, untreaty.un.org. As of July 15, 2003 the UN website did not yet reflect the accession of Albania, which deposited its instrument of accession with the UN Office of Legal Affairs on July 9, 2003 (Source: UNHCR Geneva).

The 1961 Convention on the Reduction of Statelessness⁴⁵

In 1961, a further instrument was adopted on the subject of statelessness. The 1961 *Convention on the Reduction of Statelessness* aims at reducing *future* statelessness by setting international standards for national laws on the acquisition and loss of nationality. The Convention provides for the acquisition of nationality by those who would otherwise be stateless *and who have an appropriate link with the State through birth on the territory or through descent from nationals*, and for the retention of nationality for those who will be made stateless should they inadvertently lose the State's nationality.⁴⁶ (emphasis added)

The Convention thus accepts both the *jus sanguinis* and *jus soli* approaches to citizenship. It includes detailed provisions on the grant of nationality⁴⁷, loss and renunciation of nationality⁴⁸, deprivation of nationality⁴⁹ and transfer of territory⁵⁰. It provides for an international agency to assist stateless persons⁵¹, and like other international conventions, for the submission, rarely resorted to, of inter-state disputes regarding its interpretation or application to the International Court of Justice.⁵² The Final Act of the Conference, like that of the 1954 Convention, recommends that *de facto* stateless persons be treated as far as possible like the *de jure* stateless, so that they too may acquire effective nationality.⁵³

There are, however, cases of statelessness which are not necessarily eliminated under the terms of the 1961 Convention, and where additional measures could prove useful. Article 11 of the final text of the 1961 Convention provides for the establishment of "a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority." (This function has been delegated to UNHCR.⁵⁴) However, the original version of the article also called for an independent tribunal that would be competent to decide any disputes between parties and to hear complaints presented by the agency on behalf of stateless individuals.⁵⁵ States rejected the tribunal proposal by a vote of 21 to 2 with 3 abstentions.⁵⁶

⁴⁵ See *Main Provisions of the 1961 Convention on the Reduction of Statelessness*, attached as Appendix B.

⁴⁶ *Supra* n. 18 at 40.

⁴⁷ 1961 Convention, Arts. 1-4.

⁴⁸ *Ibid.*, Arts. 5-7.

⁴⁹ *Ibid.*, Arts. 8-9.

⁵⁰ *Ibid.*, Art. 10.

⁵¹ *Ibid.*, Art. 11.

⁵² *Ibid.*, Art. 14.

⁵³ *Final Act of the United Nations Conference on the Elimination or Reduction of Future Statelessness*, Resolution I.

⁵⁴ UNGA Resolution 3274 (XXIX) of 10 Dec. 1974.

⁵⁵ Batchelor, *supra* n. 3 at 252.

⁵⁶ *Ibid.*, at 254.

Though the 1961 Convention has been ratified by just 27 states (including Canada in 1978)⁵⁷, it has had a wide reach, with its terms incorporated into the laws of many states, including non-parties to the Convention as well as parties.⁵⁸

Albania	Bosnia and Herzegovina	Denmark	Libyan Arab Jamahiriya	Swaziland
Armenia	Canada	Germany	Netherlands	Sweden
Australia	Chad	Guatemala	Niger	Tunisia
Austria	Costa Rica	Ireland	Norway	United Kingdom of Great Britain and Northern Ireland
Azerbaijan	Czech Republic	Kiribati	Slovakia	Uruguay
Bolivia		Latvia		

The continuing regulatory gap: de facto stateless who are not refugees

As noted above, when the refugee and statelessness conventions were being drafted, there was a widespread assumption that *de facto* stateless persons were also refugees. The drafters do not appear to have considered the possibility that there could be persons who were *de facto* stateless but who would not come within the terms of the refugee definition, except for those who had voluntarily relinquished their nationality for reasons of personal convenience and had no claim to international protection. With the 1951 Refugee Convention already completed, the drafters of the 1954 *Convention relating to the Status of Stateless Persons* could therefore focus on those who lacked nationality *at law*.

Yet as noted, there are people for whom formal status as a national does not result in effective state protection. One example is the ambiguous status of Jews in Germany after the denationalisation laws: though classed by the Reich as “non-citizens”, they were still recognized as German nationals.⁶⁰ Another more contemporary example are Cuban nationals who have overstayed the validity of their exit permits and are therefore denied re-entry to Cuba.

These examples demonstrate that the legal status of “national” does not necessarily carry with it the usual attributes of nationality, specifically state protection. The distinction lies in the *effectiveness* of the nationality, more than in the legal designation. This was the point made by the International Court of Justice in the *Nottebohm Case*. The matter is as relevant to the determination of whether someone is stateless as it is to sorting out which

⁵⁷ www.unhcr.ch/html/menu3/b/treaty4_.htm

⁵⁸ UNHCR, *supra* n. 18 at 32.

⁵⁹ United Nations Treaty Website, untreaty.un.org. As of July 15, 2003 the UN website did not yet reflect the accession of Albania, which deposited its instrument of accession with the UN Office of Legal Affairs on July 9, 2003 (Source: UNHCR Geneva).

⁶⁰ See Batchelor, *supra* n. 3 at 233.

nationality of several is an individual's "true" one. In both scenarios, the answer lies not in the label but in the actual experience of the person.

Several commentators have highlighted the gaps left by formalistic approaches to statelessness. In 1952 Manley Hudson, the International Law Commission's Special Rapporteur on nationality and statelessness, warned that "purely formal solutions...might reduce the number of stateless persons, but not the number of unprotected persons. They might lead to a shifting from statelessness *de jure* to statelessness *de facto*."⁶¹ Paul Weis has argued that the terms *de jure* stateless person and *de facto* stateless person are misleading and inaccurate, and proposed using instead the terms "*de jure* unprotected person" and "*de facto* unprotected person," the latter including refugees, a proposal which would emphasize protection rather than formal legal status.⁶² UNHCR's Carol Batchelor has also highlighted the need to fill "the gap left between a simple conflicts of law issue and an unprotected person who does not fit categorically into any of the definitions."⁶³

Mahmoud's story: nowhere to go

Mahmoud was born in the late 1920s in what was then the British Mandate of Palestine. After the war of 1948 he relocated to Lebanon where he lived until 1951. Then he moved to Syria, where he lived and worked until 1957. In Syria he married a Palestinian refugee woman and they had a child. In 1958 they relocated to Qatar where he had obtained employment. In 1981 his employment in Qatar terminated and the family relocated to the United Arab Emirates, where Mahmoud had found employment and where they remained until 1995, when they came to Canada and made a refugee claim. The Immigration and Refugee Board (IRB) assessed their claim only against the

United Arab Emirates, their last country of permanent residence, and found them not to have a well-founded fear of being persecuted there, although they could not be readmitted to the UAE as their previous status there (and in the other countries where they had lived) had been dependent on the head of family's employment. The applicants were therefore determined not to be Convention refugees, although the IRB panel declared that it was "not without sympathy" for the claimants, calling them "persons who have literally nowhere to go, legally."⁶⁴

⁶¹ M. Hudson, *Report on Nationality, including Statelessness, ILC 4th Sess.* UN Doc A/CN.4/50, 21 Feb 1952, at 49, quoted in Batchelor, *supra* n. 3 at 234.

⁶² Weis, *supra* n. 24 at 164.

⁶³ Batchelor, *supra* n. 3 at 258.

⁶⁴ CRDD No. 318, U95-03043, U95-03045, U95-03450, (1996).

International Human Rights Instruments

Numerous international human rights instruments have been developed in the years since the adoption of the refugee and statelessness conventions. These are universal instruments which guarantee the rights of all persons, irrespective of their status. Unlike the 1948 UDHR⁶⁵, these Conventions are binding on states parties. The 1966 *International Covenant on Civil and Political Rights* (ICCPR) and the 1966 *International Covenant on Economic, Social and Cultural Rights* (ICESCR), to which Canada acceded in 1976, give legal expression to the general commitments of the UDHR. Other treaties such as the 1965 *Convention on the Elimination of All Forms of Racial Discrimination* (CERD), to which Canada acceded in 1970, the 1979 *Convention on the Elimination of Discrimination Against Women* (CEDAW), to which Canada acceded in 1981, and the 1989 *Convention on the Rights of the Child* (CRC), to which Canada acceded in 1991, have combined to articulate more fully the universal rights which states parties are obliged to respect.

The basic principle of non-discrimination lies at the heart of all of these treaties. As the UN Special Rapporteur on the rights of non-citizens has observed, “The architecture of international human rights is built on the premise that all persons, by virtue of their essential humanity, enjoy certain rights.”⁶⁶ While there may be situations in which states may legitimately treat non-citizens differently from citizens, these are exceptional cases: “In general, differential treatment of non-citizens may be acceptable only if based on reasonable and objective criteria and designed to achieve a legitimate purpose.”⁶⁷ The 1966 ICESCR prohibits any distinction between citizens and non-citizens with respect to economic, social and cultural rights. With respect to civil and political rights under the 1966 ICCPR, the only permissible distinction in times of domestic stability relates to political participation rights and certain rights of entry and residence.⁶⁸ As the Human Rights Committee observed in its General Comment 15⁶⁹ on the position of aliens:

[T]he rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness ... The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”⁷⁰

Differential treatment *among* non-citizens may, in some circumstances, be permissible at international law, according to the Special Rapporteur. Article 1(3) of the 1965 CERD pro-

⁶⁵ It should be acknowledged that, though not formally binding as a Declaration of the General Assembly and not requiring ratification by individual member states, it is often observed that the 1948 UDHR has nevertheless evolved into customary international law.

⁶⁶ *Progress report on the rights of non-citizens*, UN Doc E/CN.4/Sub.2/2002/—(2002) at 11.

⁶⁷ *Ibid.*, at 50.

⁶⁸ *Ibid.*

⁶⁹ *General Comment 15 of the Human Rights Committee* (11/04/86), UN Doc. A/41/40 (1986) Annex VI (pp. 117-119).

⁷⁰ *Ibid.* It is worth noting, however, that Art. 15 of the UDHR is not incorporated in the ICCPR. As a result, while the Covenant articulates a broad range of civil and political rights that apply to stateless persons, it does not address the underlying problem of statelessness itself.

vides: “Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.” In order to assess the legitimacy of such provisions, the criteria for differential treatment must be assessed in light of the objects and purposes of the Convention. As the Committee on the Elimination of Racial Discrimination has observed in its General Recommendation 14, “In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.”⁷¹ This probably encompasses by analogy discrimination against persons because they are stateless.

Citizenship or immigration status may be used as a ground for differential treatment only in limited areas. For example, the 1966 ICCPR distinguishes between persons who are lawfully within the territory of a state and those who are not, with respect to freedom of movement and the right to choose one’s place of residence⁷², and the right to certain procedural protections in expulsion proceedings.⁷³

International human rights law also provides norms for the acquisition of citizenship at birth and through naturalization. Article 24 of the ICCPR provides that “Every child has the right to acquire a nationality.” Article 7 of the 1989 *Convention on the Rights of the Child* requires that a child born to non-citizen parents in the territory of a state party to the Convention “shall be registered immediately after birth and shall have the right from birth to a name, [and] the right to acquire a nationality ... States parties shall ensure the implementation of these rights in accordance with their national instruments in this field, in particular where the child would otherwise be stateless.” However, Article 7 does not stipulate *which* state has the obligation to confer nationality in these circumstances. For the provision to have meaning, there must be a default position for the conferral of nationality or citizenship where there would otherwise be a vacuum, for example where the parents are nationals of a state that confers citizenship on the basis of *jus soli* but the child is born in a state that follows *jus sanguinis*. In such situations, it makes sense for the child to receive the citizenship of the state in which she or he was born. As observed by the Special Rapporteur on the rights of non-citizens:

In view of the near universal ratification of the *Convention on the Rights of the Child*, the principle of *jus soli* has emerged as the default international norm governing the conferral of nationality on children born to non-citizen parents.⁷⁴ This right must be enforced without discrimination as to the gender of the parent.⁷⁵

⁷¹ Committee on the Elimination of Racial Discrimination, General Recommendation 14, “Definition of Discrimination” at 2, UN Doc. A/48/18, September 15, 1993.

⁷² 1966 ICCPR, Art. 12.

⁷³ *Ibid.*, Art. 13.

⁷⁴ Citing Asbjørn Eide, “Citizenship and international law with specific reference to human rights law: status, evolution and challenges”, 2001.

⁷⁵ *Supra* n. 66 at 48.

With regard to naturalization, the core principle of non-discrimination has direct relevance, and applies to discrimination in both purpose and effect. International human rights bodies investigating citizenship legislation in newly independent states have shown growing concern about citizenship laws that result in statelessness.⁷⁶ The UN Human Rights Committee observed in 1995 that stringent criteria in Estonian citizenship law prevented a “significantly large segment of the population” from enjoying Estonian citizenship, and that “permanent residents who are non-citizens are ... deprived of a number of rights under the Covenant.”⁷⁷ Similarly with regard to Latvian citizenship legislation the Committee observed that the law “contains criteria of exclusion which give room to discrimination under Articles 2 and 26 of the Covenant,”⁷⁸ and called on that government to “take all necessary measures to guarantee that the citizenship and naturalization legislation facilitate the full integration of all permanent residents of Latvia, with a view to ensuring compliance with the rights guaranteed under the Covenant.”⁷⁹

International law also provides for a right to return to one’s country. Article 13(2) of the UDHR provides that “Everyone has the right to leave any country, including his own, *and to return to his country*” (emphasis added). Article 9 prohibits arbitrary exile. Similarly, Article 12(4) of the ICCPR states that: “No one shall be arbitrarily deprived of the right to enter his own country.” The UN Human Rights Committee has observed that any deprivation of this core right must be “reasonable,” and that “there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.”⁸⁰

The right to enter one’s country is not necessarily limited to those who have formal status as nationals. When Article 12(4) of the ICCPR was being drafted, the first suggested language was “the country of which he is a national”. However, several states objected that the right to return was governed not by nationality but by the notion of a permanent home.⁸¹ In *Stewart v. Canada*, the Human Rights Committee went further. The Committee found that the right to enter one’s own country “embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien.”⁸² This would be the case, for instance, of persons stripped of their nationality in violation of international law, or who became stateless as a result of state succession or transfer of territory. The Human Rights Committee has suggested that

⁷⁶ *Ibid.*, at 44-46.

⁷⁷ UN Human Rights Committee, *Comments on Estonia*, UN Doc. CCPR/C/79/Add.59 (1995) at 12 - 13, quoted in *Progress report on the rights of non-citizens*, *supra* n. 66 at 45.

⁷⁸ UN Human Rights Committee, *Comments on Latvia*, UN Doc. CCPR/C/79/Add.53 (1995) at 17, quoted in *Progress report on the rights of non-citizens*, *supra* n. 66 at 45. Articles 2 and 26 of the ICCPR are the non-discrimination provisions.

⁷⁹ *Progress report on the rights of non-citizens*, *supra* n. 66 at 27.

⁸⁰ UN Human Rights Committee, *General Comment 27 (1999): Freedom of Movement*, UN Doc. A/55/40, Vol. 1 (2000), Annex VI A (pp. 128-132) at 21.

⁸¹ This discussion is cited in: Amnesty International, “Bhutan: Nationality, Expulsion, Statelessness and the Right to Return,” Amnesty International Index ASA 14/001/2000 (2000), at 21.

⁸² *Stewart v. Canada* (Communication No. 538/1993), Views of the Human Rights Committee, Nov. 1, 1996, UN Doc. A/52/40 (Vol II.), Annex VI, Section G (pp. 47-69) at 12.4.

the right to enter one's "own country" extends also to other categories of long-term residents, particularly stateless people arbitrarily deprived of the right to acquire the nationality of the country of such residence.⁸³ The Committee reaffirmed this view in its 1999 General Comment on Freedom of Movement.⁸⁴ It is worth noting that, in addition to the violation of the human rights of the person in question, it also infringes on the sovereignty of other states if a state expels or refuses to admit its own nationals.

Artur's story

Artur was born in the mid-1960s in Baku in what was then the USSR and is now the capital of independent Azerbaijan. In the early 1990s he arrived in Canada as a seaman on board a cargo vessel, holding a seaman's passport issued by the former USSR. He applied for refugee status but was found not to have a well-founded fear of persecution in any country. The Canadian authorities tried to remove him to Azerbaijan, but the authorities there refused to recognize him as their citizen, noting

that his parents were of Armenian origin. His father was deceased; his mother had moved to Armenia. However, the Armenian authorities refused to recognize Artur as an Armenian citizen. The Russian authorities were contacted as his expired USSR seaman's passport had been issued in Moscow, but the Russian Federation also declined to readmit him. Artur was therefore left in legal limbo in Canada.⁸⁵

⁸³ Ibid.

⁸⁴ *Supra*, n.80 at 20.

⁸⁵ Case on file at UNHCR Ottawa.

STATELESSNESS IN CANADIAN LAW AND PRACTICE

As noted, Canada is a party to the 1961 *Convention on the Reduction of Statelessness* but has declined to accede to the 1954 *Convention relating to the Status of Stateless Persons*. In response to UNHCR's enquiries, Canada has articulated three reasons for this: Canada believes that the 1951 Refugee Convention to a large extent duplicates the 1954 Statelessness Convention and thus there is no need to accede to both; Canadian law contains all necessary safeguards to cover adequately the situation of stateless persons; and, Canada has concerns that ratification and subsequent inclusion in Canadian legislation of specific provisions governing the status of stateless persons would encourage stateless persons to come to Canada from other countries, and would encourage persons already in Canada to renounce their citizenship.

Despite the fact that Canada has acceded only to the 1961 *Convention on the Reduction of Statelessness*, and not to the 1954 *Convention relating to the Status of Stateless Persons*, the division of labour between the two Conventions provides a convenient structure for the analysis of Canadian law and practice with respect to statelessness. Accordingly, the next section of this report will examine: (1) legal provisions to avoid statelessness (the subject matter of the 1961 Convention), including rules for the acquisition of citizenship at birth, and loss of citizenship and (2) legal protection for those who are already stateless (the subject matter of the 1954 Convention), including refugee protection, access to permanent resident status, and naturalization. A third section will address issues relating specifically to the treatment of stateless persons, including the provision of travel documents, detention and removal.

Avoiding statelessness

The Citizenship Act

As a party to the 1961 *Convention on the Reduction of Statelessness*, Canada is obliged to ensure that its citizenship laws and policies reflect the provisions of the Convention so that those who might otherwise be stateless may be granted citizenship. It appears that Canada's current legislation, though the word "stateless" does not appear anywhere in it, largely conforms to these Convention obligations.

Indeed, Canada's citizenship rules are considered to be among the most liberal in the world.⁸⁶ Under the provisions of the current *Citizenship Act*⁸⁷, citizenship is granted on both *jus soli* and *jus sanguinis* bases.⁸⁸ That is, as a general rule, all children born in Canada as well as all children born abroad to Canadian parents are Canadian citizens.

⁸⁶ Canadian Council for Refugees, *Statelessness: Addressing the Issues*, (Montreal: CCR, Nov. 1996), at s. 9.

⁸⁷ *Citizenship Act*, R.S.C. 1985, c. C-29.

⁸⁸ *Ibid.*, ss. 3-4.

The only exceptions to the *jus soli* rule are with respect to children born in Canada to diplomatic or consular officials and employees, and staff of UN or similar international agencies who have diplomatic status.⁸⁹ All other children born in Canada are entitled by law to Canadian citizenship, regardless of the legal status or nationality of their parents (including if they are stateless). With respect to *jus sanguinis* citizenship, there is an exception for children born abroad to a Canadian citizen parent who herself/himself was born outside of Canada: such persons must register their Canadian citizenship prior to their 28th birthday and must reside in Canada for three out of the six years prior to registration, or risk losing their status as Canadian citizens. These provisions generally accord with Canada's obligations under Articles 1-4 and 7(5) of the 1961 Convention.

In compliance with Article 2 of the 1961 Convention, the Act also provides that foundlings under the age of seven are deemed to have been born in Canada, and thus to be Canadian citizens, unless within seven years of being found it is demonstrated that the person was not born in Canada.⁹⁰ However, the Act does not provide for retention of Canadian citizenship where it is proved that a foundling was born outside Canada within the stated period, even where revocation would result in statelessness.

Canadian citizenship can be lost in three ways: renunciation, revocation, or failure to register by a second generation Canadian born abroad (as described above). Renunciation requires a formal application showing, *inter alia*, that the person is already or will become a citizen of another country upon renunciation of Canadian citizenship.⁹¹ Revocation requires fraud, misrepresentation or knowing concealment of material circumstances⁹², and may be appealed to the Federal Court.⁹³ The provisions for revocation and loss due to failure to register do not include any consideration of potential statelessness as a result, which is distressing from the perspective of the need to avoid statelessness; however, they appear to be within the range of exceptions allowed by the 1961 Convention.⁹⁴

This short overview of Canadian legislation on citizenship at birth, and loss of citizenship, is illustrative of Canadian compliance with obligations under the 1961 Convention. Still, where there is room for discretion in the application of the law, there may be inconsistent or less-than-complete compliance. While these factors have little impact on conferral of citizenship at birth, they can play a role in cases of revocation, as well as in naturalization proceedings, where decision makers have considerable discretion.

⁸⁹ *Ibid.*, s-s. 3(2)(c).

⁹⁰ *Ibid.*, s-s. 4(1).

⁹¹ *Ibid.*, s. 9.

⁹² *Ibid.*, s-s. 10(1). Note that s-s. 10(2) establishes a presumption that anyone who acquired permanent resident status by fraud, misrepresentation or knowingly concealing material circumstances also acquired citizenship by such means, where citizenship was granted on the basis of the prior acquisition of permanent resident status.

⁹³ *Ibid.*, s. 18.

⁹⁴ *i.e.* 1961 Convention, Arts. 7, 8(2)(b) and 8(4).

► *Recommendations:*

- i. *Principle:* The general principle of avoiding statelessness should be added to the interpretation section of the Citizenship Act (s. 2).
- ii. *Foundlings (Citizenship Act s-s. 4(1)):* An exception should be made allowing foundlings proved to have been born outside of Canada to retain Canadian citizenship if revocation would result in statelessness.
- iii. *Second generation born abroad (Citizenship Act s. 8):* An exception should be made where loss of Canadian citizenship would result in statelessness. This could be done via the “special cases” provision under s-s. 5(4) of the Citizenship Act.
- iv. *Simple revocation (Citizenship Act s-s. 10(1)):* An exception should be provided for those who would be rendered stateless as a result of revocation, allowing for discretion to impose alternative sanctions for fraud, misrepresentation or knowing concealment of material circumstances, where revocation would impose excessive hardship and the person has significant ties to Canada.

Bill C-18

Canada’s Citizenship Act is currently under review by the legislature. Three attempts have been made to replace it in recent years. Bill C-63, tabled by then-Minister Lucienne Robillard in 1998, died on the Order Paper, as did Bill C-16, tabled by Ms. Robillard’s successor, Minister Elinor Caplan, in 1999. A third bill, Bill C-18⁹⁵ was tabled on October 31, 2002 by Ms. Caplan’s successor, Minister Denis Coderre. The House of Commons Standing Committee on Citizenship and Immigration conducted public consultations on this bill over the following months, but the House rose for the 2003 summer break before the committee could table its report. Consideration of this bill is expected to continue in the autumn of 2003.

Bill C-18 leaves many of the existing provisions on the acquisition and renunciation of citizenship intact, and improves on some, including in the area of adoption.⁹⁶ At the same time, however, the bill expands the power of the Minister and Cabinet to revoke Canadian citizenship. Specifically, with respect to revocation of citizenship acquired by fraud, misrepresentation or concealment of material circumstances, and where the person is alleged to be inadmissible on grounds of security, human rights violations or organized criminality, s. 17 lays out a procedure for revocation via a court hearing from which both the affected citizen

⁹⁵ Bill C-18: *Citizenship of Canada Act*, 2nd Sess., 37th Parliament, 51 Elizabeth II, 2002, First reading, Thursday October 31, 2002.

⁹⁶ Bill C-18, s-s. 9(1) allows the acquisition of citizenship by adoptees of a Canadian citizen without requiring that they first acquire permanent resident status.

and counsel can be barred. The result cannot be appealed and leads to removal from Canada.⁹⁷ It is questionable whether this procedure conforms to the fair trial requirement of Article 8(4) of the 1961 Convention, which provides: “A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.”

Section 18 provides for ministerial annulment of citizenship on the basis of misrepresentation regarding identity in the acquisition of citizenship, or any of a range of criminal charges or convictions, in Canada or overseas.⁹⁸ There is no appeal on the merits of annulment, only judicial review by the Federal Court. Neither the provisions for revocation nor those for annulment provide for consideration of potential statelessness that may result. This would appear contrary to Article 8(1) of the 1961 Convention, which provides: “A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.” The circumstances outlined in ss. 17 and 18 do not seem to fall within the range of permitted exceptions to Article 8(1).⁹⁹

► *Recommendations:*

- v. *Principle:* The general principle of avoiding statelessness should be added to the purposes section of Bill C-18 (s. 3).
- vi. *Foundlings (Bill C-18 s-s. 5(4)):* An exception should be made allowing foundlings proved to have been born outside of Canada to retain Canadian citizenship if revocation would result in statelessness.
- vii. *Second generation born abroad (Bill C-18 s. 14):* An exception should be made where loss of Canadian citizenship would result in statelessness. This could be done via the “special cases” provision under s. 10 of Bill C-18.
- viii. *Simple revocation (Bill C-18 ss. 16-17):* An exception should be provided for those who would be rendered stateless as a result of revocation, allowing for discretion to impose alternative sanctions for fraud, misrepresentation or knowing concealment of material circumstances, where revocation would impose excessive hardship and where the person has significant ties to Canada.
- ix. *Revocation and inadmissibility (Bill C-18 s. 17):* Provisions should be included to ensure a fair hearing and access to appeal (as well as an exception for statelessness as per above).

⁹⁷ The procedure mirrors that in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

⁹⁸ The offenses are listed in s. 28.

⁹⁹ See Art. 8(2)-(4).

- x. *Annulment (C-18 ss. 18, 28)*: Provision should be made for an appeal on the merits of annulment decisions, and for exceptions where annulment would lead to statelessness causing excessive hardship and where the person has significant ties to Canada.

Protecting the stateless

Canada's legislation makes no specific provision for the protection of non-refugee stateless persons. Indeed, the general legislative attitude to statelessness is encapsulated in subsection 2(1) of the *Immigration and Refugee Protection Act*, which explicitly rejects the distinction between aliens who are nationals of another state, and those who are stateless: "foreign national' means a person who is not a Canadian citizen or a permanent resident, *and includes a stateless person*" (emphasis added). The unique situation and vulnerability of stateless persons — the fact that they are *not* nationals of any state and thus have no access to consular protection and are generally unable to return to another country — is not acknowledged.

Though Canada is not party to the 1954 *Convention relating to the Status of Stateless Persons*, the human rights of stateless persons in Canada, like those of asylum-seekers and other non-citizens, are protected under the Charter of Rights and Freedoms, as well as under the international human rights instruments to which Canada is party. However, unless they have legal status in Canada, stateless persons remain vulnerable to detention and (attempted) removal to any country which might admit them, but where they would not necessarily enjoy effective protection. Non-refugee stateless persons, like other non-citizens without legal status in Canada, are easily exploited by landlords and employers.

The legal limbo in which non-status stateless persons live is detrimental not only for the individuals themselves, but also for the communities in which they live. Unable to leave and lacking access to social services and legal authorization to work, such persons may have little choice but to resort to work in the untaxed informal economy; their stateless children will be unable to pursue higher education or training; and they will be unable to fully integrate into their communities and Canadian society.

To receive protection in Canada, stateless persons must acquire legal status. There are three kinds of status which may be available to a stateless person: recognition as a Convention refugee or person in need of protection ("refugee protection"), either through the in-Canada refugee status determination procedure, the Pre-Removal Risk Assessment, or via overseas resettlement; conferral of permanent resident status, either in Canada or from abroad; and naturalization. Permanent residence is a prerequisite for naturalization.

It is difficult to know how many stateless persons are currently in Canada, or how many arrive each year. While Citizenship and Immigration Canada (CIC) collects statistics on protection claims by stateless persons at airports, land borders and inland, as shall be discussed below the data are incomplete and do not correlate to data collected by the Immigration and Refugee Board (IRB).

Refugee protection

In Canada, the main way that statelessness may be resolved is via a process that begins with refugee protection. Stateless persons who are recognized as refugees may apply for permanent residence and, eventually, for Canadian citizenship. However, not all stateless persons are refugees, nor are all refugees *de jure* stateless.

Canada's *Immigration and Refugee Protection Act* (IRPA)¹⁰⁰ imports the 1951 Refugee Convention definition of a refugee, which encompasses those refugees who are stateless. Statelessness alone, however, is not enough to bring a person under the refugee definition; to gain protection as a refugee, a stateless person must show a well-founded fear of persecution in his or her country of former habitual residence, on one of the grounds enumerated in the 1951 Refugee Convention.¹⁰¹

The literature and domestic jurisprudence on refugee determination in cases of stateless persons reveal some controversy about how to ascertain which state or states are relevant to a stateless person's claim for refugee protection. The 1951 Refugee Convention definition requires simply that a stateless claimant be unable or, because of fear of persecution on an enumerated ground, unwilling to return to "the country of his former habitual residence."¹⁰² Difficulty arises, though, when a stateless person has lived in more than one country.

In *Canada (AG) v. Ward*¹⁰³, the Supreme Court ruled, *inter alia*, that "In considering the claim of a refugee who enjoys nationality in more than one country, the [Immigration and Refugee] Board must investigate whether the claimant is unable or unwilling to avail himself or herself of the protection of each and every country of nationality."¹⁰⁴ The Court was operating on the presumption that states in general are able to protect their nationals¹⁰⁵, and that "citizenship carries with it certain basic consequences...[including] the right to gain entry to the country at any time."¹⁰⁶

There are important differences, however, between the situation of dual nationals addressed in *Ward* and that of stateless persons, who have no nationality and hence neither state protection nor a right of return to any country. The 1951 Refugee Convention recognizes this distinction by differentiating between a national of a country, who must show her/his inability or unwillingness to "avail himself of the protection of that country," and a stateless person, who is presumed not to have access to state protection and instead must

¹⁰⁰ S.C. 2001, c.27.

¹⁰¹ *Thabet v. Canada (MCI)*, [1998] 4 FC 21; [1998] FCJ No. 629, at 16.

¹⁰² 1951 Convention, Art. 1A(2); IRPA s. 96.

¹⁰³ [1993] 2 SCR 689.

¹⁰⁴ *Ibid.*, at 751.

¹⁰⁵ *Ibid.*, at 754.

¹⁰⁶ *Ibid.*

show inability or unwillingness simply to “return” to the country of former habitual residence. What, then, of a stateless person with more than one country of former habitual residence?

UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* affirms that while a stateless asylum-seeker may have more than one country of former habitual residence, and may have a fear of persecution in relation to more than one of them, the refugee definition does not require that s/he satisfies the criteria in relation to all of them.¹⁰⁷ The Handbook goes on to explain: “Once a stateless person has been determined a refugee in relation to ‘the country of former habitual residence,’ any further change of country of habitual residence will not affect his refugee status.”¹⁰⁸ Unfortunately, the Handbook does not provide guidance on how to determine which of several countries of former habitual residence is relevant for refugee determination.

In academic circles, there are two main competing views on this subject. Professor Ate Grahl-Madsen maintains that the *first* country of former habitual residence from which the stateless person had to flee is generally the only one relevant for the determination of the claim.¹⁰⁹ In contrast, Professor James Hathaway proposes to treat stateless asylum-seekers with multiple countries of former habitual residence analogously with asylum-seekers with multiple nationalities. In his view, a stateless person’s refugee claim should be assessed against *every* country of former habitual residence to which she or he may be “formally returned.”¹¹⁰

¹⁰⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, (Geneva: UNHCR), January 1992, at 104.

¹⁰⁸ *Ibid.*, at 105.

¹⁰⁹ A. Grahl-Madsen, *The Status of Refugees in International Law*, (Leyden: AW Sijthoff, 1966), vol. 1 at 162. Using this approach, the claimant need not have a right of return to that country, nor need she or he demonstrate a fear of persecution in any subsequent or prior countries of habitual residence: “The country from which a stateless person had to flee in the first instance, remains the ‘country of his former habitual residence’ throughout his life as a refugee, irrespective of any subsequent changes of factual residence.” Grahl-Madsen’s approach, which is focused on the country of original persecution, precludes consideration of a claim of persecution in any other or subsequent country of residence. This appears to be consistent with the provisions of the UNHCR Handbook. However, Grahl-Madsen also ignores the question of protection in other states. As Linden JA of the Federal Court of Appeal pointed out in *Thabet v. Canada (MCI)*, [1998] 4 F.C. 21 (C.A.), the decision in *Ward* requires Canadian courts to consider not just the fear of persecution, but also the availability of a safe alternative [at 21].

¹¹⁰ J. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworths, 1991), at 62. Following Hathaway’s logic, countries of former habitual residence to which the claimant cannot be formally returned are irrelevant because the claimant cannot be said to have a forward-looking fear of return to a place to which he or she cannot be returned. If a person has no right to return to any country, he or she would not be eligible for refugee status at all, since in Hathaway’s approach the core issue is non-refoulement, and refoulement in this scenario would be impossible. [G. Stobo, “Treatment of Stateless Refugee Claimants at CRDD” (memo to the Chair of the IRB by the Director of Legal Services), March 11, 1992, at 4.] As observed by Linden JA in *Thabet*, Hathaway’s approach is attractive because it “encourages a degree of symmetry between the concepts of nationality and habitual residence” [at 22]. However, the proposition is only valid if both concepts confer equal rights and equal protection; that is, if habitual residence and the possibility of return to a country is equivalent to nationality and a right of return. As has been discussed above, this is not necessarily so. The fact that a person will be allowed to enter a country does not guarantee that she or he will have protection there, nor that she or he will not be sent onward to a country where she or he faces persecution. It should also be reiterated that the 1951 Refugee Convention definition of “refugee” explicitly distinguishes between stateless asylum-seekers and those who are nationals of a country, in that the former, by virtue of their status, are not required to demonstrate the State’s inability to protect them. Hathaway’s approach fails to maintain this distinction.

In a memo on the treatment of stateless refugee claimants at the IRB’s Convention Refugee Determination Division (now the Refugee Protection Division) [cited above], the IRB’s Legal Services department weighed the two approaches, settling on Grahl-Madsen’s as the one “most in keeping with the language of the Convention refugee definition, the principles and spirit of refugee determination and Canada’s humanitarian tradition” [at 8]. The memo, however, did not resolve the issue for the CRDD’s independent decision makers, who continued to use both Hathaway’s and Grahl-Madsen’s approaches, nor for the Court.

Canadian courts and tribunals have been inconsistent on this issue, sometimes following Hathaway, sometimes Grahl-Madsen, and sometimes forging their own paths.¹¹¹ However, in 1998 the Federal Court of Appeal sought to bring some clarity to the question by reviewing the main strands of thought and setting out a coherent approach.

The current Canadian test: Any Country Plus the "Ward Factor"

In *Thabet v. Canada*¹¹², the Federal Court of Appeal found that the approach that best accords with the principles in *Ward* is a version of Grahl-Madsen's approach, such that a stateless claimant with multiple countries of former habitual residence need only show a fear of persecution in *one* of them, whether that is the first, the last, or another. However, the Court went on to require that the claimant demonstrate an inability or unwillingness to return to *any* of the countries in which she formerly resided:

[W]here a claimant has been resident in more than one country it is not necessary to prove that there was persecution at the hands of all those countries. But it is necessary to demonstrate that one country was guilty of persecution, and that the claimant is unable or unwilling to return to any of the states where he or she formerly habitually resided.¹¹³

Linden JA said that the requirement to show on the balance of probabilities an unwillingness or inability to return to all countries of former habitual residence is implicitly required by *Ward*. He explains: "While the obligation to receive refugees and offer safe haven is proudly and happily accepted by Canada, there is no obligation to a person if an alternate and viable haven is available elsewhere."¹¹⁴ *Thabet* remains the leading decision on this issue.

The question remains how to show unwillingness to return, since the Convention definition requires that the unwillingness to return be tied to the fear of persecution. If this is accepted, the Court of Appeal's approach in fact comes much closer to Hathaway's proposal and poses an extremely high threshold for stateless persons who have lived in several countries.

¹¹¹ For example, in *Thabet v. Canada (MCI)*, [1996] 1 FC 685, the Federal Court's Trial Division found that only the *last country of habitual residence* prior to entry to Canada is determinative in the adjudication of a stateless person's refugee claim. The trial judge rejected Hathaway's "all countries of former habitual residence" approach, arguing that it was incompatible with the refugee definition in the 1951 Refugee Convention and in Canadian immigration legislation, which uses the singular "country" of habitual residence for stateless persons and the plural "countries" for those with multiple nationalities, thereby demonstrating an intent to treat stateless persons differently from those with nationalities. However, the Court of Appeal rejected the Trial Division's "last country of habitual residence" approach.

A fourth approach, adopted by the Federal Court in *Maarouf v. Canada*, [1994] 1 FC 723 (1993); 72 F.T.R. 6; 23 Imm. L.R. (2d) 163 (T.D.) and *Martchenko et al v. Canada* (1995), 104 FTR 59 (FCTD), allows a claimant to make an asylum claim in respect of *any country of former habitual residence*. This is perhaps closest to Grahl-Madsen's approach, except that it does not limit "country of former habitual residence" to the country where the claimant *first* feared persecution. In *Thabet*, Linden JA criticized this approach for failing to take account of the availability of protection in other countries of former habitual residence. As he observed, the refugee definition requires not just that a claimant have a well-founded fear of persecution, but also that s/he be unable or unwilling to return: "If the claimant has available a place of former habitual residence which will offer safety from persecution, then he or she must return to that country."

¹¹² *Thabet v. Canada (MCI)*, [1998] 4 F.C. 21 (C.A.).

¹¹³ *Ibid.*, at 27.

¹¹⁴ *Ibid.*, at 28.

The Court of Appeal does not offer any guidance on the level of protection required in order to designate a country of former habitual residence sufficiently safe. From Linden JA's decision, it seems that any alternate haven is adequate, so long as it is "viable." No consideration of the effectiveness of state protection nor of its stability is provided for, nor is there an indication of whether viability means simply unlikelihood of *refoulement* or something more robust, equivalent perhaps to the level of protection that the person would receive in Canada were he or she permitted to remain.

Underlying this problem is the Court's attempt to draw a parallel between asylum-seekers with multiple nationalities (as in *Ward*) and stateless asylum-seekers with multiple countries of former habitual residence. The requirement in *Ward* that a claimant demonstrate the lack of protection in all countries of nationality makes sense, because it is based on the reasonable but rebuttable presumption that states protect their nationals. However, in extending the *Ward* approach to stateless persons, the Court also extends the presumption of effective protection. Yet statelessness by nature involves a *lack* of state protection. The presumption is in fact reversed: where nationals may be presumed to have state protection, stateless persons should be presumed *not* to have state protection.

Consolidated grounds

The *Immigration and Refugee Protection Act* also introduced the availability of protection based on the provisions of the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, to which Canada acceded in 1987. The Act provides protection to a

...person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

- (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the *Convention Against Torture*; or
- (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
 - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
 - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
 - (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.¹¹⁵

¹¹⁵ IRPA, s. 97.

Status as a “person in need of protection” is available to stateless persons as it is to any other “foreign national.” It is too early to tell what range of circumstances might be accepted by the IRB as meeting the threshold of “cruel and unusual treatment or punishment” that would not also meet the refugee definition,¹¹⁶ but it can be argued that statelessness *de jure* (via denationalization, for example), as well as *de facto* (where the impact is demonstrably severe), could and should be included, considering the effect of statelessness on a person’s ability to enjoy fundamental human rights.

Pre-Removal Risk Assessment (PRRA)

Section 112 of IRPA provides a last-chance process for acquiring protected person status in Canada. The Pre-Removal Risk Assessment (PRRA) is available to rejected refugee claimants and persons deemed ineligible to make a refugee claim who are subject to a removal order which is in force.¹¹⁷ The grounds for protection under the PRRA are similar to those considered by the IRB during refugee determination, though applicants who have already had a protection hearing before the Board may only submit new evidence. The PRRA procedure is generally done in writing¹¹⁸, though there are provisions for an oral hearing where credibility is at issue.¹¹⁹

Persons seeking status under the PRRA must submit their application within 15 days of receiving notification that they are eligible to apply. However, this notification is only provided to eligible persons once they become “removal ready”¹²⁰; i.e. once a country of removal has been identified and travel documents are in hand. It is thus unavailable for stateless persons as long as they remain in limbo — refused protection and permanent residence in Canada, but unable to be removed.

► *Recommendations:*

- xi. IRPA s-s. 95(1) should be amended to include in the grounds for conferral of Protected Person status those “stateless persons” who are unable to return to and enjoy effective protection in their countries of former habitual residence. An additional section should be added in this Division of the Act to provide a legal definition of stateless person, which should include both *de jure* statelessness and *de facto* statelessness.

¹¹⁶ IRPA only came into effect on June 28, 2002.

¹¹⁷ IRPA s-s. 112(1).

¹¹⁸ IRPA s-s. 113(a).

¹¹⁹ IRPA s-s. 113(b).

¹²⁰ IRPA s-s. 112(1); Immigration and Refugee Protection Regulations, 2002 (IRPR), SOR/2002-227, Part 8, Div 1, s-ss. 160(1) & 160(3)(a).

- xii. The IRB's Refugee Protection Division members and PRRA officers should be provided with interpretative guidance with respect to "country of former habitual residence," indicating that this refers to any one country for the purpose of assessing fear of persecution. To make this approach meaningful, the onus to demonstrate that a stateless person has effective protection in another country of former habitual residence should lie with the Minister.
- xiii. Alternatively, IRPA s-s. 97(1)(b) should be amended to include *de facto* and *de jure* statelessness as constituting "cruel and unusual treatment or punishment" where the stateless person lacks effective protection in a country of former habitual residence.
- xiv. An exception to normal practice with respect to PRRA applications should be made for stateless persons, allowing "early" applications in cases where the person is not likely to become "removal ready" in the foreseeable future.

Permanent residence

As a rule, applications for permanent residence must be submitted and approved prior to arrival in Canada. Permanent residence must be acquired in order to apply for citizenship. An exception to the general rule that applications must be submitted from abroad is made for Protected Persons. Stateless persons who have been recognized as Protected Persons may apply for permanent residence from within Canada, provided they are able to provide satisfactory proof of their identity, which may be a particular challenge for stateless persons, and pay the requisite fees.

Rejected refugee claimants, including those who are stateless, may apply for permanent resident status in Canada on humanitarian or compassionate (H&C) grounds. Subsection 25(1) of IRPA provides:

The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

Immigration officers exercising delegated authority are instructed to consider approving H&C applications that fit within the following open-ended list of categories¹²¹:

- family relationship¹²²;
- personalized risk to life or security of the person¹²³;
- late application for permanent residence by a protected person¹²⁴;
- *de facto* family members¹²⁵;
- prolonged inability to leave leading to establishment¹²⁶;
- family violence¹²⁷; or
- former citizens.¹²⁸

Statelessness is not one of the enumerated categories, though it is not ruled out as a consideration, by virtue of the open-ended nature of the list. However, the requirement that the applicant demonstrated “establishment” could pose a significant obstacle for stateless persons,¹²⁹ since the reality of life in Canada as a stateless person makes it difficult to achieve social and economic “establishment”. This is particularly so where a stateless applicant has been detained, making it impossible to maintain employment. Nonetheless, the provision for H&C exemption for former citizens could in principle be a route to eventual reacquisition of citizenship by former citizens who became stateless following their loss of Canadian citizenship by virtue of revocation or failure to register.

With respect to the second category of exemptions under s-s. 25(1), that of “public policy,” the Minister has not yet made any provision for its use either in inland applications or overseas. However, there is nothing to prevent the Minister from establishing a category to allow for the conferral of permanent resident status on stateless persons.

¹²¹ The principle in H&C decision-making is discretion, so an officer may grant permanent resident status also for reasons not included on the list.

¹²² Citizenship and Immigration Canada, *Immigration Manual: Inland Processing*, Chapter IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds, at 12.

¹²³ *Ibid.*, at 13.1.

¹²⁴ *Ibid.*, at 13.7.

¹²⁵ *Ibid.*, at 13.8.

¹²⁶ *Ibid.*, at 13.9.

¹²⁷ *Ibid.*, at 13.10.

¹²⁸ *Ibid.*, at 13.11.

¹²⁹ Factors to consider when assessing establishment include: “Does the applicant have a history of stable employment? Is there a pattern of sound financial management? Has the applicant integrated into the community through involvement in community organizations, voluntary services or other activities? Has the applicant undertaken any professional, linguistic or other study that show integration into Canadian society? Do the applicant and family members have a good civil record in Canada (e.g., no interventions by police or other authorities for child or spouse abuse, criminal charges)?” (IP5, *supra* n. 122 at 11.2.).

► *Recommendation:*

- xv. In the absence of a more comprehensive solution through amendment to s. 95 and the recognition of statelessness as a ground for protected person status, the Minister should use the authority of s-s. 25(1) to establish “protection of stateless persons” as a public policy category for permanent resident status in cases processed both in Canada and overseas, where such stateless persons otherwise lack effective protection. Alternatively, Immigration Manual Chapter IP5, s. 13, should be amended to include statelessness as a persuasive factor in processing H&C applications generally, as well as with respect to applications of former citizens. Establishment requirements should be minimized or waived, in view of the special hardships faced by stateless persons.

Naturalization

The Citizenship Act

As observed earlier, the current Citizenship Act makes no explicit provision for the conferral of citizenship on stateless persons. Stateless persons may, however, apply for citizenship once they have been granted permanent resident status (usually after being recognized as protected persons) and have met the minimum residency requirement.

The *Citizenship Act* contains an exception paralleling s-s. 25(1) of IRPA: under s-s. 5(3) the Minister may grant citizenship to a person who does not fulfil the language and knowledge-of-Canada requirements¹³⁰; and s-s. 5(4) allows the Minister to waive any citizenship requirements in the interest of alleviating “cases of special and unusual hardship.” Statelessness has been considered as a factor under both of these provisions.

In *Re Daifallah*¹³¹ the Federal Court focused on a rejected citizenship applicant’s exceptional personal circumstances as grounds for compassionate consideration under s-s. 5(3), explicitly noting that she had been stateless for over 40 years. In *Goudimenko v. Canada (MCI)*¹³² the citizenship judge took into account an applicant’s statelessness under s-s. 5(4), but still denied the application. The court upheld the decision:

The citizenship judge considered the appellant’s evidence relative to his being ‘stateless’ and the travel constraints associated with such status or lack thereof. The judge concluded that, in her opinion, it was a matter of inconvenience [rather than hardship] for Mr. Goudimenko. The citizenship judge considered whether or not to recommend an exercise of discretion and declined to so recommend.¹³³

¹³⁰ *Citizenship Act*, s-ss. (1)(d) and (e).

¹³¹ *Daifallah (Re)*, [1992] F.C.J. No. 441 (T.D.).

¹³² *Goudimenko v. Canada (MCI)*, [2002] F.C.J. No. 581 (T.D.).

¹³³ *Ibid.*, at 22.

These cases suggest that while statelessness may be a consideration, it will likely be necessary to meet a high threshold of duration and hardship to qualify an applicant for exceptional measures.

Bill C-18

Bill C-18, the proposed new Citizenship of Canada Act, maintains both the compassionate and hardship exceptions.¹³⁴ It also includes a new “bloodline connection” provision for the acquisition of citizenship by a stateless person who is under 28 years of age, was born abroad to a person who was a Canadian citizen at the time, has lived in Canada for at least three of the six years immediately prior to application and has not been convicted of “an offence against national security.”¹³⁵ There remain questions about how a stateless person would travel to Canada to fulfil the residency requirement.

In contrast with these improvements, ss. 21-22 of the bill provide the Minister and Cabinet with the power unilaterally to refuse citizenship to any person, regardless of connection to Canada, if he or she is deemed to have shown “flagrant and serious disregard for the principles and values underlying a free and democratic society.” The decision would be “final and ... not subject to appeal to or review by any court.”¹³⁶ Statelessness is not a factor in the decision, and the absence of procedural guarantees is cause for concern.

► *Recommendations:*

- xvi. The Citizenship Act s-s. 5(4) and/or Bill C-18 s. 10 should be amended to include statelessness as an example of “special and unusual hardship” warranting the discretionary granting of citizenship to a person who may not fulfil all of the usual criteria.
- xvii. Bill C-18 ss. 21-22 should be amended to include basic procedural safeguards, including clearly defined parameters and a mechanism for review.

¹³⁴ Bill C-18, s-s. 7(2)(a) and s. 10, *supra* n. 95.

¹³⁵ *Ibid.*, at s. 11. This provision appears to be based on Arts. 4(1)(b) and 4(2) of the 1961 Convention.

¹³⁶ *Ibid.*, at s-s. 22(3).

Refugee resettlement

Canada also provides refugee protection via resettlement from abroad. The *Immigration and Refugee Protection Regulations* (IRPR) set out two classes of persons who may be resettled to Canada: Convention Refugees Abroad and Humanitarian-Protected Persons Abroad.¹³⁷ The first category is self-explanatory; the second consists of two classes, Country of Asylum and Source Country. Members of the country of asylum class must be “outside all of their countries of nationality and habitual residence¹³⁸; and ... have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries.”¹³⁹ The source country class is restricted to nationals or habitual residents of a specific list of countries which currently includes: Colombia, Democratic Republic of the Congo, El Salvador, Guatemala, Sierra Leone, and Sudan.¹⁴⁰ To qualify for resettlement, a person must be residing in the country of nationality or habitual residence, that country must be on the list, and the person must need protection on one or more of the following grounds:

they

- (i) are being seriously and personally affected by civil war or armed conflict in that country,
- (ii) have been or are being detained or imprisoned with or without charges, or subjected to some other form of penal control, as a direct result of an act committed outside Canada that would, in Canada, be a legitimate expression of freedom of thought or a legitimate exercise of civil rights pertaining to dissent or trade union activity, or
- (iii) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, are unable or, by reason of such fear, unwilling to avail themselves of the protection of any of their countries of nationality or habitual residence.¹⁴¹

While stateless persons may be included in these groups, as they are for in-Canada refugee processing, there are no provisions for protection of stateless persons *qua* stateless persons. Stateless persons must bring themselves within the general protection criteria that apply to any person seeking resettlement in Canada.

¹³⁷ IRPR, s. 138ff, *supra* n. 120.

¹³⁸ One might question the criterion of being outside of one's country of former habitual residence in this context, as at some point the country of asylum itself might be considered to have become a place of habitual residence, inadvertently disqualifying the stateless applicant from the class. The Immigration Manual seems to indicate that the requirement is simply that the applicant be outside of any country of former habitual residence *where he or she faced persecution*, but this is not entirely clear. (cf. Citizenship and Immigration Canada, *Immigration Manual: Overseas Processing*, Chapter OP 5: Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian Protected Persons Abroad Class.)

¹³⁹ IRPR, s. 147.

¹⁴⁰ *Ibid.*, Schedule 2.

¹⁴¹ *Ibid.*, s. 148.

► *Recommendation*

- xviii. *Immigration and Refugee Protection Regulations*, Part 8, Division 1, and Immigration Manual Chapter OP5 should be amended to include *de jure* and *de facto* statelessness as a ground for resettlement to Canada, where the stateless person lacks effective protection and access to a durable solution within a reasonable time.

Immigration

Prospective immigrants may apply for Canadian permanent resident status from abroad as members of the family class, skilled worker class or business class, or under a provincial selection program. There are no special provisions for stateless persons seeking status in Canada as permanent residents; stateless persons may apply for permanent residence like any other foreign national, subject to the same criteria.

With respect to overseas applications, officers are instructed to consider the hardship that would result from a refusal of the application, including factors such as close family members in Canada; strong cultural and/or emotional ties to Canada; and close family, friends and support in another country.¹⁴² Statelessness is not identified as relevant factor in the open-ended list.

Those who are accepted by Canada as immigrants may apply for Canadian citizenship after a residency period.

► *Recommendation:*

- xix. With respect to overseas applications, Immigration Manual Chapter OP4, s. 8 should be amended to include statelessness as a persuasive factor for the exercise of the officer's discretion in assessing hardship.

Travel Documents

The Canadian Passport Office issues two types of travel documents to non-Canadians: the Refugee Travel Document and the Certificate of Identity.

Protected persons in Canada are eligible to apply for a Refugee Travel Document, which is normally valid for all countries *except* the individual's country of origin. Article 28 of the 1951 Refugee Convention, to which Canada is party, requires Canada to provide travel documents to all recognized refugees. In the past, recognized refugees who had not yet acquired permanent resident status (were not "landed"), were not given Refugee Travel

¹⁴² Citizenship and Immigration Canada, *Immigration Manual: Overseas Processing, Chapter OP4: Processing of Applications under s. 25 of IRPA*, at 8.3.

Documents. Some refugees are not landed, or face long delays in landing, because they lack satisfactory identity documents from their countries of origin. This is a problem which stateless refugees are likely to face.

However, since entry into force in June 2002 of the *Immigration and Refugee Protection Act*, protected persons may be issued with Refugee Travel Documents even if they are not yet landed, as long as they are in possession of the protected person status document provided for in the *Immigration and Refugee Protection Act*.¹⁴³ This does not resolve the situation of stateless persons who have not been granted protected person status, as such persons are not eligible for the Refugee Travel Document. (It is worth noting that Article 28 of the 1954 Convention contains a provision paralleling Article 28 of the 1951 Convention, requiring states parties to provide travel documents to stateless persons.)

A second type of travel document, the Certificate of Identity, is issued to non-citizens by Canada's Passport Office. A Certificate of Identity is an extraordinary travel document issued under the authority of the Minister of Foreign Affairs and International Trade. It is valid only for the specific countries to which the applicant has indicated a need to travel. It is not normally made valid for travel to the country of origin or nationality. The Certificate of Identity has an initial validity of one year, renewable to a maximum of three years. The website of the Passport Office specifies that it is issued to "persons who are legally landed in Canada for less than three years who are stateless or who are unable to obtain a national passport for a valid reason."¹⁴⁴ Thus a stateless person without permanent resident status in Canada would not normally be able to obtain a Certificate of Identity. As in the case of the Refugee Travel Document, the bearer of the Certificate of Identity must secure the necessary visas for entry to other countries.

Detention and Removal

Aliens who have failed to acquire legal status are obliged to leave Canada.¹⁴⁵ However, statelessness — in particular *de jure* statelessness — and the resulting lack of a right of entry to any country, often makes departure difficult or impossible. If a person fails to depart voluntarily, he or she will become subject to removal, and may be detained until removal takes place.¹⁴⁶

Statistics provided by Citizenship and Immigration Canada (CIC) indicate that CIC removed 228 reportedly stateless individuals between 1997 and 2002. A further 152 persons whose nationality is listed as "unknown" were removed from Canada during this

¹⁴³ Sub Section 31(1) of the *IRPA* provides: "A permanent resident and a protected person shall be provided with a document indicating their status."

¹⁴⁴ See www.ppt.gc.ca/travel_docs/traveldoc_types_e.asp.

¹⁴⁵ See *IRPA* s. 49.

¹⁴⁶ *IRPA* s. 55.

period.¹⁴⁷ However, no details are available with respect to the countries to which these persons were removed, nor how such destinations were selected. Canadian removals policy does not appear to take into consideration the likely status of a stateless person in the receiving country. No mention is made in the Act, Regulations, or Immigration Manual of the need for special procedures or considerations for stateless persons in the context of removal.

The failure to seek durable solutions to individuals' statelessness is a fundamental problem. The removal of stateless persons to countries where they cannot achieve a secure status may relegate them to on-going legal limbo, and to situations in which their social and economic rights, as well as their civil and political rights, may be violated. While removal of a stateless person may address immediate enforcement issues for the removing state, it may also leave unresolved problems both for the individual and the receiving country. In many cases a stateless person is not able to secure entry to any country, let alone to a country of former habitual residence where he or she will enjoy effective protection.

Sometimes, difficulty in securing entry to another country for a stateless person means that what should be short-term pre-deportation detention becomes prolonged and potentially indefinite.¹⁴⁸ When this occurs, the detention itself becomes vulnerable to challenge under both domestic and international human rights law. Section 7 of the *Canadian Charter of Rights and Freedoms* guarantees the fundamental right of everyone to "life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 9 adds the specific provision that "Everyone has the right not to be arbitrarily detained or imprisoned."

Similar guarantees are to be found in international and regional human rights instruments to which Canada is a party. Article 3 of the *Universal Declaration of Human Rights* states: "Everyone has the right to life, liberty and security of person." Article 1 of the *American Declaration on the Rights and Duties of Man* similarly declares: "Every human being has the right to life, liberty and the security of his person." And Article 9(1) of the *International Covenant on Civil and Political Rights* provides: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." International law limits detention to what is "reasonable and necessary in a democratic society."¹⁴⁹

¹⁴⁷ Statistics provided to UNHCR by Investigations and Removals Branch of CIC.

¹⁴⁸ Inter Church Committee for Refugees, *Towards Detention & Deportation Procedures Which Are More Just, Equal, Expeditious & Open* (Brief to the Standing Committee on Citizenship and Immigration), March 18, 1998; C. Gauvreau and G. Williams, "Detention in Canada: Are We On the Slippery Slope?", 20 *Refugee* 3.

¹⁴⁹ G. Goodwin-Gill, *The Refugee in International Law*, 2nd edition, Oxford: Clarendon, 1996, at 247-8.

UNHCR's Detention Guidelines¹⁵⁰ provide as follows:

Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release. The detaining authorities should make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the individual's nationality status in order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their readmission.¹⁵¹

Under s. 57 of IRPA, the Immigration Division of the Immigration and Refugee Board must review the reasons for continued detention within 48 hours after the beginning of detention. The reasons must be reviewed again after seven days, and every 30 days thereafter.¹⁵² The Immigration Division is required under the Act to order release of immigration detainees unless it is satisfied, taking into account the prescribed factors enumerated above, that:

- (a) they are a danger to the public;
- (b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);
- (c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or
- (d) the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.¹⁵³

Upon ordering the release of a detainee, the Immigration Division may impose "any conditions that it considers necessary," including the payment of a cash bond.¹⁵⁴

While prolonged immigration detention is not ruled out by IRPA, the Federal Court has ruled that people may not be held indefinitely. In *Sabin v. Canada (MCI)*¹⁵⁵, Rothstein J set out a four-part test for determining whether continued detention is permissible:

¹⁵⁰ UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (Geneva: UNHCR, February 1999).

¹⁵¹ *Ibid.*, Guideline 9.

¹⁵² IRPA s-s. 57 (1), (2).

¹⁵³ IRPA s-s. 58(1).

¹⁵⁴ IRPA s-s. 58(3).

¹⁵⁵ *Sabin v. Canada (MCI)*, [1995] 1 F.C. 214 (T.D.).

- i. Reasons for detention: There is a stronger case for continued and long detention if the person presents a danger to the public.
- ii. Expected length of detention: If the person has already been detained for a long time, and/or if the length of future detention cannot be assessed, this factor favours release.
- iii. Who is responsible for any delay? Unexplained delay or unexplained lack of diligence weighs against the offending party, whether that be the minister or the detainee.
- iv. Alternatives to detention: The availability of effective and appropriate alternatives, such as release, bail bond, or periodic reporting, weighs in favour of release.¹⁵⁶

However, in *Kidane v. Canada (MCI)*¹⁵⁷, a subsequent decision of the Federal Court (Trial Division), Jerome ACJ found that the *Sabin* test did not necessarily rule out prolonged detention. In that case, the Court said the fact that the Minister considered the detainee to pose a danger to the public, combined with the complainant's own responsibility for delays and his failure to co-operate, justified ongoing detention, although he had been in detention for two years and there was no immediate prospect of removal because CIC was having difficulty finding a country to which to send him.¹⁵⁸

The IRB's *Guidelines on Detention*¹⁵⁹ provide further guidance on the detention of non-citizens. Noting that "custody is preventive rather than punitive," and is "an exceptional measure in our society," the Guidelines emphasize that decisions about detention must balance the public interest against the individual right to liberty, and must be consistent with the Charter, the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* and the *Convention on the Rights of the Child*.¹⁶⁰

Pre-removal detention is not the only context in which stateless persons are particularly vulnerable. IRPA also provides immigration officers with wide discretion to detain non-citizens for lack of satisfactory proof of identity.¹⁶¹ Stateless persons, who frequently lack proof of identity in the form of a passport, travel document or national identity card, are thus at particular risk of detention. The Regulations elaborate the factors that immigration officers must take into consideration in assessing whether an individual is "a foreign national whose

¹⁵⁶ *Ibid.*, at 30.

¹⁵⁷ *Kidane v. Canada (MCI)*, [1997] F.C.J. No. 990.

¹⁵⁸ *Ibid.*, at 8.

¹⁵⁹ Immigration and Refugee Board, *Chairperson's Guidelines on Detention*, Ottawa: IRB, March 12, 1998 (www.irb.gc.ca/en/about/guidelines/detention/detention_e.htm. Accessed 17 April 2003).

¹⁶⁰ *Ibid.*, at 3-4.

¹⁶¹ IRPA, s-s. 55(2)(b).

identity has not been established”¹⁶², as does the Immigration Manual¹⁶³; however, neither document cites statelessness as a relevant factor for consideration.

► *Recommendations:*

- xx. Detention of stateless persons should always be avoided except where, and for as long as, it is demonstrably necessary and justifiable.
- xxi. *Immigration and Refugee Protection Regulations*, s. 247 and Immigration Manual Chapter ENF 20 s. 5 should be amended explicitly to note the unique situation of stateless persons vis-à-vis access to identity documents as well as travel documents, so that they are not unnecessarily or unjustly detained.
- xxii. Stateless persons should only be removed to countries of former habitual residence where they will have effective protection and a legal status.

Data Collection on Stateless Persons¹⁶⁴

The importance of collecting and reporting accurate data regarding stateless persons can hardly be overstated. Data on statelessness is necessary to ascertain the extent of the problem and to design effective solutions. Accurate information is necessary in order to understand who the affected persons are, and how they are being treated. In the context of international responsibility-sharing, it is important for Canada to report on how many stateless persons it is resettling or protecting, and where these persons previously resided. Data collection and dissemination are also crucial tools for maintaining government accountability for the treatment of stateless persons.

Despite the importance of full and accurate information, data on statelessness is notoriously difficult to obtain and often unreliable. This is the case both in Canada and at the international level. As discussed in the UNHCR Statistical Yearbook:¹⁶⁵

The difficulties in quantifying statelessness arise from a number of factors, including confusion about who is a stateless person, lack of adequate registration and political sensitivities. Stateless persons are also hard to categorise: rather than being a distinct group, such as refugees or internally displaced, stateless persons share the common characteristic of not having the citizenship of any country, whether they are displaced or not. Their numbers become even more difficult to establish if persons are included who are referred to as nationals of a country, but who are threatened with becoming stateless or whose legal status is disputed.¹⁶⁶

¹⁶² IRPR, s-ss. 244(c), 247(1).

¹⁶³ Citizenship and Immigration Canada, *Immigration Manual: Enforcement*, Chapter ENF 20: Detention, Ottawa: CIC, 2002, s. 5.8 at 14.

¹⁶⁴ All statistics in this section provided by Citizenship and Immigration Canada except as otherwise indicated.

¹⁶⁵ UNHCR Statistical Yearbook 2001 (Geneva: UNHCR, Oct. 2002).

The Canadian Census includes “stateless” among the possible designations under “nationality”; however, the figure for stateless persons is not reported on the Statistics Canada Census website. Even if the figure were available, however, it would not necessarily be reliable, since the designation is self-reported, the term undefined, and there is no provision for distinguishing *de jure* from *de facto* statelessness.

Within the Canadian immigration system, gaps and inaccuracies with respect to statistics on stateless persons mirror broader challenges in data collection. Some of the specific gaps with respect to stateless persons are examined below.

Refugee determination data

Canadian refugee determination statistics clearly demonstrate some of the problems in current data collection procedures. According to recent statistics from Citizenship and Immigration Canada (CIC), 341 stateless persons made refugee or protected person claims in 2002. A further 96 claims were made by persons whose nationality was entered as “unknown.” Yet statistics provided by the Immigration and Refugee Board (IRB) for the same period indicate that of the 39,498 refugee claims referred to it by CIC during that year, not a single one concerned a stateless person.¹⁶⁷

The discrepancy appears to be caused by the Immigration and Refugee Board’s case management system, which currently does not collect data relating to statelessness. The reason for this can be traced to the Personal Information Form (PIF), which asylum-seekers are required to complete and submit in order to make a claim. The PIF contains all the relevant biographical data and the narrative outlining the basis for the feared persecution, torture, or cruel and unusual treatment or punishment. The PIF requires claimants to name their country of birth along with their country or countries of present and past citizenship or of last habitual residence. Although asylum-seekers may identify themselves as stateless, the country of reference for the IRB’s case management system is the country in respect of which the person is claiming protection.

Another way to ascertain the number of stateless claims brought before the IRB would be through examination of reported decisions. This approach is problematic as well, however. To begin with, only written decisions may be reported, and the IRB’s Refugee Protection Division need only provide written reasons when it renders a negative decision, or if written reasons for a positive decision are requested by the parties or for inclusion in the record to the Federal Court for judicial review. Moreover, references to statelessness in reported decisions may be incorrect, reached by assumption rather than through examination.

¹⁶⁶ Ibid., at 23.

¹⁶⁷ Statistics provided by the Immigration and Refugee Board.

Albert's story

Albert was born in Sierra Leone. At the time of his birth, Sierra Leone was a British colony. His parents were of Lebanese origin and did not register his birth with any Lebanese officials, either in Lebanon or in Sierra Leone. He obtained a British overseas citizen's passport based on his birth in Sierra Leone, however, this status did not give him the right to citizenship or abode in the United Kingdom. When Sierra Leone became independent in 1961, he was not entitled to Sierra Leone citizenship. In

1992, following the overthrow of the Momoh government, he fled to Canada and applied for refugee status. The Immigration and Refugee Board found that he was a stateless person who would have a well-founded fear of persecution in his country of former habitual residence, Sierra Leone.¹⁶⁸ In the records of CIC, Albert would be recorded as a stateless person; in those of the IRB, as a Sierra Leonean.

These data collection problems are recognized by CIC, which is currently working with the Department of Public Works and Government Services to develop a new Global Case Management System. Approved in January 2002, the new system is to be implemented over a five-year period beginning in October 2003.

Resettlement data

There are also problems with respect to data on the nationality of refugees selected by Canada overseas for resettlement. CIC's statistics for 2002, for instance, report that of the 7,347 refugees admitted for permanent residence under Canada's government-sponsored resettlement program, 341 or 4.6% were stateless. Similarly, the 2002 statistics report that of the 3,045 refugees resettled under the private sponsorship program, 85 or 2.8% were stateless.

It is believed that these reports reflect misunderstandings on the part of personnel responsible for recording the data. Despite CIC's efforts, personnel in Canadian visa offices abroad sometimes record refugees as stateless persons in the data collection system. In 2003 CIC was preparing a new message for dissemination to staff, clarifying that not all refugees are stateless persons, and should not be coded as such unless they are *de jure* stateless.

Data on Humanitarian or Compassionate (H&C) landing applications

For reasons similar to those outlined above, it is impossible to ascertain with accuracy the number of stateless individuals who file applications for permanent residence on humanitarian or compassionate (H&C) grounds. Nor is it possible to obtain statistics on the outcome of H&C applications for landing made by stateless applicants.

H&C applications are assessed using a two-pronged test (first, whether the applicant should be exempted from the requirement to apply from outside Canada; second, whether the applicant meets admissibility and self-sufficiency criteria and should be landed). Ideally,

¹⁶⁸ CRDD No. 307, T95-07667, T95-07668, T95-07669, T95-07670 and T95-07671 (1996).

a statistical breakdown would include the number of exemptions granted to stateless persons, the number of such applications ultimately granted landing, the number rejected for various reasons, and the number abandoned. However, it would not be possible to determine whether an applicant's stateless status was the primary factor for granting permanent residence, or was a compelling reason to exempt him/her from the requirement to apply from outside Canada, unless such cases were judicially reviewed by the Federal Court and reasons provided. A search of various sources did not turn up any such cases. From a practical perspective, it is unlikely that an applicant or counsel would rest H&C considerations upon statelessness alone.

Detention data

Statistics about stateless persons held in immigration detention are difficult to obtain. It is hard to know how many stateless persons are held at any given time, how long they have been detained, what the reasons are for their detention, their age, gender, country of former habitual residence, etc. Yet this information is essential for monitoring purposes.

Though CIC is receptive to requests for such data, it is said to be limited by its current data management system and inability to generate the comprehensive statistics described above. Retrieval of information must be done manually, which CIC officials consider to be too labour intensive to justify on a regular basis. The reporting problems are compounded by the absence of co-ordination and uniform standards for the compilation of detention data generated from all regions of operation.

Currently, CIC National Headquarters reports each week to UNHCR and other interested agencies the total number of immigration detainees, broken down by region where they are detained. These "detention snapshots" reflect only the number of individuals detained on the day on which the report is generated. They do not provide details regarding the length of detention, basis for original detention decision, age, gender, nationality or stateless status, etc. Some regions have provided more detailed statistics, although not on a systematic basis.

Data on Removals

As indicated earlier, according to statistics provided by CIC, Canada removed 228 reportedly stateless individuals between 1997 and 2002. A further 152 persons whose nationality is listed as “unknown” were removed from Canada during this period. However, no information is available as to the countries to which they were removed.

Without further details, it is impossible to assess the appropriateness of the removals. Given that in most cases stateless persons have no right of entry to any country, the reported removal of 228 stateless persons gives rise to questions about the countries to which they were sent and their status there.

► *Recommendation:*

- xxiii. CIC and the IRB should review their data management and reporting systems to ensure the accurate and timely collection and reporting of statistics relating to stateless persons. In particular, accurate data should be collected with respect to:
- Refugee determination of stateless persons, including their country of former habitual residence, age, gender, and whether statelessness was a factor in the decision;
 - Humanitarian and compassionate cases, including the number of applications received from stateless persons, the number that are accepted, whether or not statelessness was considered as a positive factor, and the number of applications from stateless persons which were rejected. Data should be disaggregated by country of former habitual residence, age, and gender.
 - Detention under the IRPA of stateless persons, including country of former habitual residence, age, gender, length of detention, reason for detention and place of detention (i.e. whether in an immigration holding centre or a prison).
 - Removals of stateless persons, including country of former habitual residence, age, gender, and country to which the person was removed.

CONCLUSION

If there is one overarching conclusion to be drawn from this review of international and Canadian law and policy with respect to statelessness, it is that the stateless remain essentially invisible, *res nullius* as Paul Weis put it.¹⁶⁹ While Canada generally does an effective job of avoiding statelessness, Canada's laws and policies read as if statelessness does not exist outside the refugee context. Protection or provision of status to stateless persons *because* they are stateless is not available. Once a stateless person has been refused protection or permanent residence under existing programs, the focus is on removal, though this is by definition problematic.

As a member of the community of nations and a country that has committed itself to upholding the the *Universal Declaration of Human Rights*, Canada has recognized that every person has the right to a nationality. Where the state in which a person was born or previously resided fails to recognize that person as a citizen, it may be up to other countries to step in as surrogate. Canada's refugee program does just that for stateless persons who also meet the definition of refugee; however, no protection is provided for stateless persons who are not also refugees under the 1951 Refugee Convention definition, even if they cannot find effective protection in another country.

This paper has highlighted a number of areas in which changes could help to avoid creating statelessness and provide protection to stateless persons who are not refugees. It has recommended that Canada take steps in the areas of citizenship at birth, refugee protection, resettlement, permanent resident status, naturalization and detention and removal.

But the problem of statelessness requires more than domestic action. As Paul Weis observed, "Nationality, in the sense of membership of a State, presupposes the co-existence of States. Nationality is, therefore, a concept not only of municipal law but also of international law."¹⁷⁰ To date, Canada has not acceded to the 1954 *Convention relating to the Status of Stateless Persons*, at least partly out of apprehension that this would serve as a "pull factor", attracting stateless people to Canada. Yet there is no evidence that this has been the case in other countries which have ratified that instrument.

Ratification would not only benefit individual stateless persons, it would also have important international implications. As a party to both the 1954 and 1961 Conventions, Canada would have greater authority to advocate for further ratifications, in order to reduce statelessness and displacement around the world. As part of this effort on the international stage,

¹⁶⁹ P. Weis, "The United Nations Convention on the Reduction of Statelessness, 1961" 11 ICLQ 1073 (1962), in Batchelor, *supra* n. 3 at 235.

¹⁷⁰ *Ibid.*, at 239.

Canada might also consider promoting the establishment of a tribunal or arbitral body to adjudicate disputes and set clear international standards regarding nationality, as was proposed in the International Law Commission's early draft of the 1961 Convention. Both the 1954 and the 1961 Conventions were written with a view to expansion of the international legal framework over the years, in particular to improve the international community's capacity to avoid and reduce cases of statelessness. An independent international adjudicative body that would apply and interpret norms of international law on nationality in the light of Article 15 of the 1948 UDHR and the principle of *effective* state protection could make a major contribution to the avoidance and reduction of statelessness. While this would entail some limitations on state sovereignty, as Cordova observed,

Whereas formerly it was held that sovereignty was absolute, at present it is recognized that there are limitations to which the States must submit by reason of their being members of the international community and in order to make possible an orderly and peaceful society of nations.¹⁷¹

While the idea may have appeared radical in 1961, times have changed. States regularly submit to binding arbitration, for instance by international trade bodies, on a wide range of matters that have dramatic effects on their sovereign abilities to regulate everything from air quality to labour standards to softwood lumber.

Each state must do all it can to avoid creating statelessness and to ensure effective protection and durable solutions for stateless persons within its jurisdiction, but there is a limit to what any one state can do on its own. In the end, collaborative international action is the only way to ensure that all people may enjoy the right to a nationality. Canada is well placed to lead the way.

¹⁷¹ R. Cordova, *Report on the Elimination or Reduction of Statelessness*, UN Doc. A/CN.4/64 (1953) at 6, quoted in Batchelor, *supra* n. 3 at 236.

**APPENDIX A:
Main Provisions of the 1954 Convention relating to
the Status of Stateless Persons**

The 1954 *Convention relating to the Status of Stateless Persons* is the primary international instrument adopted to date to regulate and improve the legal status of stateless persons, and to ensure stateless persons enjoy fundamental rights and freedoms without discrimination. The Convention was adopted to cover those stateless persons who are not refugees and who are therefore not covered by the 1951 *Convention relating to the Status of Refugees*.

The 1954 Convention's provisions are not a substitute for granting nationality to those born and habitually resident in a State's territory. There are, in fact, international legal principles in the area of nationality which elaborate on this. The improvement of the rights and status of stateless persons under the provisions of this Convention does not diminish the necessity of acquiring nationality, nor does it alter the fact that the individual is stateless. ...There is no equivalent, however extensive the rights granted to a stateless person may be, to the acquisition of nationality itself.

The main provisions of the 1954 Convention can be summarised as follows:

a. Definition of a Stateless Person

Article 1 states: "For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law." This is a strictly legal definition. It does not address the quality of nationality, or the manner in which nationality is ascribed, or access to a nationality. The definition is one simply of legal fact, an operation of law by which the State's legislation defines *ex lege*, or automatically, who has nationality. There are, however, principles involved in the acquisition, bestowal, loss and renunciation of nationality which are important in the determination of who should have access to nationality even in cases where, by operation of law, they do not acquire it.

b. Persons Excluded from the 1954 Convention

The Convention does not apply to:

- i. those who, at the time the Convention came into force, were receiving assistance from United Nations agencies with the exception of UNHCR;
- ii. persons who already have the rights and obligations attached to the possession of nationality in the country in which they reside. In other words, where the individual has already attained the maximum legal status possible (status equivalent to that of nationals), the accession of that State to the Convention with provisions less extensive than those already granted to stateless persons under national law, will not jeopardise those rights. The importance of nationality itself must, however, be borne in mind;

iii. persons with respect to whom there is serious reason for considering that:

- they have committed a crime against peace, a war crime, or a crime against humanity;
- they have committed a serious non-political crime outside the country of their residence prior to their admission to that country;
- they have been guilty of acts contrary to the purpose and principles of the United Nations.

c. Eligibility

The decision as to whether a person is entitled to the benefits of this Convention is taken by each State party in accordance with its own established procedures and may be made subject to the grant of lawful residence. UNHCR is available to play an advisory role in these procedures if requested, in view of the Office's experience with issues relating to statelessness and nationality.

d. Provisions relating to the Status of Stateless Persons

The Convention contains provisions regarding the stateless person's rights and obligations pertaining to their legal status in the country of residence. These rights include access to courts, property rights and freedom to practice one's religion. Obligations include conforming to the laws and regulations of the country. The Convention further addresses a variety of matters that have an important effect on day-to-day life such as gainful employment, public education, public relief, labour legislation and social security. Contracting States are encouraged to accord stateless persons lawfully resident on their territory a standard of treatment comparable, in some instances, to that accorded to nationals of the State and, in other instances, to that accorded to nationals of a foreign country or aliens generally in the same circumstances.

e. Identity and Travel Documents

The Convention stipulates that an individual recognised as a stateless person under the terms of the Convention should be issued an identity and travel document by the Contracting State. The issuance of a travel document does not imply a grant of nationality, does not alter the status of the individual, and does not grant a right to national protection or confer a duty of protection on the authorities. The documents are, however, particularly important to stateless persons in facilitating travel to other countries for, *inter alia*, purposes of study, employment, health or immigration. In accordance with the Schedule to the Convention, each Contracting State undertakes to recognise the validity of travel documents issued by other States parties. UNHCR is ready to offer technical advice on the issuance of such documents.

f. Expulsion

Stateless persons are not to be expelled save on grounds of national security or public order. Expulsions are subject to due process of law unless there are compelling reasons of national security. The Final Act indicates that non-refoulement in relation to danger of persecution is a generally accepted principle. The drafters, therefore, did not feel it necessary to enshrine this in the articles of a Convention geared toward regulating the status of *de jure* stateless persons.

g. Naturalisation

The Contracting State shall as far as possible facilitate the assimilation and naturalisation of stateless persons. The State shall in particular make every effort to expedite naturalisation proceedings including reduction of charges and costs wherever possible.

h. Dispute Settlement

Disputes between States parties which cannot be settled by other means may be referred to the International Court of Justice at the request of a party to the dispute.

i. Reservations

In acknowledgement of special conditions prevailing in their respective States at the time of ratification or accession, the Convention allows Contracting States to make reservations to certain of the provisions. Reservations may be made with respect to any of the Convention's provisions with the exception of those which the drafters determined to be of a fundamental nature. No reservations may be made, therefore, to Articles 1 (definition/exclusion), 3 (non-discrimination), 4 (freedom of religion), 16(1) (free access to courts), and 33 to 42 (Final Clauses).

j. Final Act

The Final Act recommends that each Contracting State, when it recognises as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to the person the treatment which the Convention accords to stateless persons. This recommendation was included on behalf of *de facto* stateless persons who, technically, still hold a nationality but do not receive any of the benefits generally associated with nationality, such as national protection.

SOURCE: UNHCR (Division of International Protection), *Information and Accession Package: The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness*, (Geneva: UNHCR, June 1996; Rev. Jan. 1999), pp. 10-13.

APPENDIX B:
Main Provisions of the 1961 Convention on
the Reduction of Statelessness

The primary international legal instrument addressing the problem of statelessness is the 1961 *Convention on the Reduction of Statelessness*. The essential purpose of the Convention is to provide for the acquisition of nationality by those who would otherwise be stateless and who have an appropriate link with the State through birth on the territory or through descent from nationals, and for the retention of nationality for those who would be made stateless should they inadvertently lose the State's nationality.

The basic provisions contained in the 1961 Convention can be summarised as follows:

a. Grant of Nationality

Nationality shall be granted to those who would otherwise be stateless, and who have an effective link with the State through either birth or descent. The fact that the person concerned will otherwise be stateless is a precondition to all modes of acquisition of nationality under the terms of the 1961 Convention, which is concerned not with nationality in general but specifically with the problem of statelessness. Nationality shall be granted:

- i. at birth, by operation of law, to a person born in the State's territory;
- ii. by operation of law at a fixed age, to a person born in the State's territory, subject to conditions of national law;
- iii. upon application, to a person born in the State's territory (may be made subject to one or more of the following: a fixed time-frame in which the application may be lodged, specified residency requirements, no criminal convictions of a prescribed nature, and that the person has always been stateless);
- iv. at birth, to a legitimate child whose mother has the nationality of the State in which the child is born;
- v. by descent, should the individual be unable to acquire nationality of the Contracting State in whose territory s/he was born due to age or residency requirements (may be made subject to one or more of the following: a fixed time-frame in which the application may be lodged, specified residency requirements, and that the person has always been stateless);
- vi. to foundlings found in the territory of a Contracting State;
- vii. at birth, by operation of law, to a person born elsewhere if the nationality of one of the parents at the time of the birth was that of the Contracting State;

- viii. upon application, as prescribed by national law, to a person born elsewhere if the nationality of one of the parents at the time of the birth was that of the Contracting State (may be made subject to one or more of the following: a fixed period in which the application may be lodged, specified residency requirements, no convictions of an offence against national security, and that the person has always been stateless).

b. Loss/Renunciation of Nationality

Loss or renunciation of nationality should be conditional upon the prior possession or assurance of acquiring another nationality. An exception may be made in the case of naturalised persons who, despite notification of formalities and time-limits, reside abroad for a fixed number of years and fail to express an intention to retain nationality. In this specific context, a naturalised person refers only to a person who has acquired nationality upon an application which the Contracting State concerned, in its discretion, could have refused. Loss of nationality may take place only in accordance with law and accompanied by full procedural guarantees, such as the right to a fair hearing by a court or other independent body.

c. Deprivation of Nationality

The basic principle is that no deprivation of nationality should take place if it will result in statelessness. The following exceptions are made:

- i. nationality obtained by misrepresentation or fraud;
- ii. acts inconsistent with a duty of loyalty either in violation of an express prohibition or by personal conduct seriously prejudicial to the vital interests of the State;
- iii. oath or formal declaration of allegiance to another State or repudiation of allegiance to the Contracting State;
- iv. loss of effective link by naturalised citizens who, despite notification, fail to express an intention to retain nationality (see b. above).

Deprivation must be in accordance with law and accompanied by full procedural guarantees, such as the right to a fair hearing. A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.

d. Transfer of Territory

Treaties shall ensure that statelessness does not occur as a result of a transfer of territory. Where no treaty is signed, the State shall confer its nationality on those who would otherwise become stateless as a result of the transfer or acquisition of territory.

e. International Agency

Provision was made for the establishment, within the framework of the United Nations, of a body to which a person claiming the benefit of the Convention may apply for the examination of his/her claim and for assistance in presenting it to the appropriate authority. UNHCR has been requested, by the United Nations General Assembly, to fulfil this function.

f. Disputes

Disputes between Contracting States concerning the interpretation or application of the Convention, which have not been resolved by other means, may be submitted to the International Court of Justice (ICJ) at the request of anyone of the parties to the dispute.

g. Reservations

Reservation may be made, at the time of signature, ratification or accession, in respect only of Articles 11 (Agency), 14 (Referral of disputes to ICJ) or 15 (territories for which the Contracting State is responsible).

h. Final Act

Delineates definitions of words used in the Convention, as well as duties of the Contracting States. It recommends that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality.

SOURCE: UNHCR (Division of International Protection), *Information and Accession Package: The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness*, (Geneva: UNHCR, June 1996; Rev. Jan. 1999), pp. 13-15.

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