

# Statelessness

What Role for the National Judge?

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# How does statelessness occur?

- **Denial of citizenship** (e.g. Dominican Republic, Myanmar, Thailand)
- **State succession** (e.g. former Yugoslavia, USSR, Israel/Palestine)
- **Birth and marriage** (e.g. Middle East)
- **Migration** (everywhere)



# Main issue

Is the person before us a stateless person and does he, as a stateless person, need specific (international) protection?

**1954 UN Convention relating to the Status of Stateless Persons art. 1:**

«For the purpose of this Convention, the term “stateless person” means a person who is **not considered as a national by any State** under the **operation of its law.**»

-> includes both *de jure* and *de facto* statelessness (i.e. also in cases ineffective/merely theoretical or inaccessible citizenship)

# Questions arising in domestic proceedings

- Legal aspects of application of statelessness law:
  - What domestic legislation relating to statelessness /nationality (access to/loss) exists?
  - What are the international obligations and how to apply them: which instruments ratified? Any reservations?

## Problems of application

- Notions/concepts statelessness set out in international law instruments are often not incorporated in national law
  - Status of int. law is not always clear, no direct application
- and hence
  - we = judges and practicing lawyers alike are often reluctant to rely on and apply these international standards in domestic cases.

# Which variations of statelessness do we encounter in domestic proceedings?

- (Non-)recognition of statelessness -> denial of citizenship/protection of vulnerable (groups of ) persons, e.g. Rohingya, Fayli Kurds, “Haitian” Dominicans, (often) Roma
  - Need for introduction of effective statelessness determination procedures -> protection -> status -> citizenship
- Deprivation of citizenship -> leading to statelessness?

# Statelessness may play a role in proceedings relating to:

- Lack of (any) documentation
- If asylum claim is rejected: return where(?)
- Statelessness determination proceedings <-> in NL “unknown nationality”
- Right/access to citizenship of “host” state
- Immigration detention
- (Equal) access to basic rights

# Importance of nationality vs statelessness

Universal Declaration of Human Rights (1948), Art. 5.

- Universal right to a nationality.
- No arbitrary deprivation of nationality or right to change nationality.

- Genuine and effective link (International Court of Justice, Liechtenstein v. Guatemala (Nottebohm Case), Judgment of 6 April 1955):

“Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”

# Relevant international law I

## Statelessness – UN Conventions

### **Specific on nationality & statelessness**

- UN Convention Relating to the Status of Stateless Persons (1954), Art 1.
- Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930)
- Convention on the Reduction of Statelessness (1961) – Articles 1, 8(1), 8(2), and 9.

### General (non-exhaustive list)

- International Covenant on Civil and Political Rights (articles 23 and 24)
- International Convention on the Elimination of All Forms of Racial Discrimination (articles 1 and 5)
- Convention on the Elimination of All Forms of Discrimination Against Women (article 9)
- Convention on the Rights of the Child (articles 7 and 8)
- 1957 Convention on the Citizenship of Married Women

# Relevant international law II

## Regional Instruments

- American Convention of Human Rights (art 20 Right to nationality)
- African Charter on the Rights and Welfare of the Child
- African Charter on Human and People's Rights
- Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (art 18)
- European Convention on Nationality (art. 4 statelessness shall be avoided)
- European Convention on Human Rights (art 8 broad notion of right to private/ family life art. 14, prot. 12 prohibition of discrimination)
- European Convention on the Avoidance of Statelessness in relation to State Succession
- the Treaty on European Union and the Treaty on the Functioning of the European Union
- EU Charter of Fundamental Rights

# Soft Law

- *UNHCR Guidelines on Statelessness :*
- *The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons,*
- *Procedures for Determining whether an Individual is a Stateless Person*
- *The Status of Stateless Persons at the National Level*
- *Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness,*
- *Statelessness Determination Procedures and the Status of Stateless Persons (“Geneva Conclusions”)*
- *Various international bodies’ non-binding recommendations & resolutions*

# Regional HR bodies

Some case-law from:

- Inter-American Court of Human Rights
- African Committee of Experts on the Rights and Welfare of the Child
- European Court of Human Rights
- Court of Justice of the European Union

# Inter-American Court of Human Rights: Yean and Bosico v. Dominican Republic

8 September 2005 – Art 20 ACHR Right to nationality

- Two girls of **Haitian ancestry, born in the Dominican Republic** were considered as “**in transit**” and **refused access to their birth certificates and subsequently denied recognition of their previous citizenship status effectively rendering them stateless** affecting their **ability to exercise most basic rights**.
- The IACHR:
  - affirmed the human right to nationality as the prerequisite to the equal enjoyment of all rights as civic members of a state;
  - the principle of *jus soli* was enshrined in the Dominican constitution and could not be further restricted;
  - the discriminatory application of nationality and birth registration laws rendered children of Haitian-descent stateless. This violated the recognition of their juridical personality, and was an affront to their dignity.
- In addition to damages and an apology, the IACHR ordered that the Dominican Republic change its regulations to be non-discriminatory and to ensure judicial review of process.

# African Committee of Experts on the Rights and Welfare of the Child, 22 March 2011

## Children of Nubian Descent in Kenya v. Kenya

- As a result of their historical treatment as foreigners, **their continued uncertain citizenship status, the failure to recognize their nationality** at birth, and the discrimination against them, **Nubian children are consigned to live without secure property rights** in enclaves such as Kibera, the only ancestral homeland that they have.
- Kenya's vetting system unlawfully **discriminates** against Nubian children in violation of Article 3, **leaving them stateless or at risk of statelessness with no legitimate hope of gaining recognition of their citizenship**. As a result, Nubian children **lack access to adequate healthcare and education**, in violation of Kenya's obligations to provide the highest attainable standard of health and education to all children (Articles 14(2)(a)-(c), (g) and Article 11(3), respectively of the African Charter on the Right and Welfare of the Child

# ECtHR Karassev v Finland, no. 31414/96, 12.1.1999

## denial of citizenship to child -> statelessness

- Decided under ECHR art 8. Protection of **private and family life**:
  - ▣ Refugee child born in Finland, initially considered to hold Russian citizenship, which it did not.
- ECtHR: no right to a nationality under the ECHR, however:
  - ▣ “Article 8 protects a right to personal development, and the right to **establish and develop relationship with other human beings and the outside world.**”
  - ▣ the Court does **not exclude** that an **arbitrary denial of citizenship might** in **certain circumstances** raise an issue under Article 8 of the Convention because of the **impact of such a denial** on the **private life** of the individual”

**ECtHR** Kuric et al v Slovenia no 26828/06, 13.7.2010

## Deprivation/denial of citizenship -> statelessness

Again, under Article 8 ECHR private/family life:

- ❑ “erasure” of mainly non-Slovenian citizens originally from other parts of Yugoslavia from the population registry;
- ❑ the repercussions of the “erasure” and the **prolonged refusal** of the Slovenian authorities to comprehensively **regulate the applicants’ situation** constituted an **interference with the exercise** of their **rights** under Article 8 of the Convention, **in particular in cases of statelessness”**



# ECtHR Kim v The Russian Federation

## 17.7.2014 immigration detention

The applicant spent the entire two-year period, that is, the maximum period the Russian law stipulates for the enforcement of an expulsion order, in detention. [...]The Court is concerned about **the applicant's particularly vulnerable situation**. As a **stateless person**, he was **unable to benefit from consular assistance and advice**, which would normally be extended by **diplomatic staff of an incarcerated individual's country of nationality**. Furthermore, he appears to **have no financial resources** or **family connections** in Russia and he must have experienced considerable **difficulties** in contacting and retaining a **legal representative**.

[i]t is incumbent upon the Russian Government to **avail itself of the necessary tools and procedures** in order to **prevent the applicant from being re-arrested and put in detention** for the offences **resulting from his status of a stateless person**.

## Court of Justice of the EU: Rottmann v Freistaat Bayern, 2 March 2010 Case C-135/08

- Rottmann obtained German citizenship through fraud and had relinquished his Austrian citizenship. The German authorities wanted to withdraw his newly acquired citizenship.

The CJEU:

- The **conditions for the acquisition and loss of nationality come within the competence of each Member State, and yet come within the ambit of European Union law.**
- Need for a **proportionality review of the measure by national judge.**
- Withdrawing naturalisation because of deception may correspond to a reason relating to the public interest. The national judge must weigh in relation to the gravity of the offence committed, to the lapse of time between the naturalisation decision and the withdrawal decision and **whether it is possible for that person to recover his original nationality.**
- No express decision as to whether rendering Rottmann stateless would contravene EU law, since no final decision to strip him of his German citizenship has been made and there is no decision yet whether Austria will grant him his Austrian citizenship.

# National jurisdictions

## 2 examples:

- **Amsterdam Regional Court** (23.11.2017) re statelessness of a Fayli Kurd (born in Iraq, having moved to Iran when he was a few months old):

"The general position of the Government that Fayli-Kurds can **reobtain** the Iraqi nationality still stands. The Government's policy that that Fayli-Kurds have Iraqi nationality and therefore are not stateless is not unreasonable. The Government has based itself on the *de jure* Iraqi nationality of the applicant. In order to effectuate this nationality *de facto* the applicant has to address the Iraqi authorities"

- **UK IAC** (21.10.2015), R (on the application of Sameda) v Secretary of State for the Home Department:

"In every case where a statelessness decision is to be made under the operative provisions of the Immigration Rules the crucial question for the decision maker is, in the language of Article 1(1) of the 1954 Convention, whether the person is *"considered as a national by any state under the operation of its law"*. **Both the international legal rules and their domestic counterparts require a determination of the recognition issue in the present.** This we consider to be clear from the language used. **Future forecasts are alien to this exercise. However, the main ground upon which the Applicant's [MF: "un undocumented Kuwaiti Bidoon"] application was refused was the assessment that he was considered to have "a claim to" Libyan nationality.** We consider that the decision maker misdirected himself in law. The question which should have been addressed, and answered, was **whether the Libyan government recognised the Applicant as one of its nationals at the time when the decision was made.** The decision maker, in our judgment, failed to pose and answer this key question"

## **PERMANENT COURT OF INTERNATIONAL JUSTICE**

- **Nationality Decrees Issued in Tunis and Morocco**, Advisory Opinion No. 4, Ser. B., 7 February 1923.

## **INTERNATIONAL COURT OF JUSTICE**

- **Nottebohm Case** (Liechtenstein v. Guatemala), 6 April 1955.

## **UNITED NATIONS HUMAN RIGHTS COMMITTEE**

**Pending: Zhao v The Netherlands: Art 24.3 ICCPR every child has the right to acquire a nationality**

## **AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD**

- **Case of the Nubian Children v. Kenya**, Series C No.130,

## **AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

- **The Nubian Community in Kenya vs The Republic of Kenya. Communication nr. 317/06**

## **EUROPEAN COURT OF HUMAN RIGHTS**

- **Kim v The Russian Federation**, Application no. 44260/1,3 17 July 2014
- **Amie v. Bulgaria**, Application no. 58149/08, 4 October 2013
- **Kuric and Others v. Slovenia**, Application no 26828/06, 13 July 2010
- **Andrejeva v. Latvia**, Application no. 55707/00, 18 February 2009
- **Konstatinov v. The Netherlands**, Application no. 16351/03, 26 April 2007
- **Katishvili v. Russia**, Application no. 1509/02, 22 February 2007
- **Sisojeva and Others v. Latvia**, Application no. 60654/00, 15 January 2007
- **Mogos v. Romania**, Application no. 20420/02, 13 October 2005
- **Dragan and Others v Germany**, Application no. 33743/03, 7 October 2004
- **Ghiban v Germany**, Application no. 11103/03, 16 September 2004
- **Mogos and Krifka v Germany**, Application no. 78084/01, 27 March 2003
- **Okonkwo v. Austria**, Application no. 35117/97, 22 May 2001
- **Slavov v. Sweden**, Application no. 44828/98, 29 June 1999
- **Karassev and family v. Finland**, Application no. 31414/96, 12 January 1999

## **COURT OF JUSTICE OF THE EUROPEAN UNION**

- **Rottman v Freistaat Bayern 2 March 2010 Case C-135/08**

## **INTER-AMERICAN COURT OF HUMAN RIGHTS**

- **Case of the Yean and Bosico Children v. Dominican Republic**, Series C No.130, 8 September 2005
- **Case of Ivcher-Bronstein v. Perú**, Series C No. 74, 6 February 2001
- **Case of Castillo-Petruzzi et al. v. Perú**, Series C No. 52, 30 May 1999
- **Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica**, Advisory Opinion OC-4/84 of 19 January 1984, Series A No. 4