

Expert Meeting

The Concept of Stateless Persons under International Law

Summary Conclusions

Expert meeting organized by the Office of the United Nations High Commissioner for Refugees, Prato, Italy, 27-28 May 2010

This was a first of a series of Expert Meetings convened by UNHCR in the context of the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness with the purpose of drafting guidelines under UNHCR's statelessness mandate on (i) the definition of a "stateless person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons; (ii) the concept of *de facto* statelessness; (iii) determination of whether a person is stateless; (iv) the status in national law to be granted to stateless persons and; (v) the prevention of statelessness among persons born on the territory or to nationals abroad.

The discussion was informed by two background papers. The first was "The definition of 'Stateless Person' in the 1954 Convention relating to the Status of Stateless Persons: Article 1(1) – The Inclusion Clause" which was drafted by a UNHCR consultant, Ms. Ruma Mandal. The second paper was entitled "UNHCR and *De Facto* Statelessness" and was authored by Hugh Massey of UNHCR. Professor Guy Goodwin-Gill of Oxford University also provided a written contribution, the conclusions of which were presented in summary form during the meeting. The twenty four participants came from 16 countries and included experts from governments, NGOs, academia, the judiciary, the legal profession and international organizations.

The meeting allowed for a wide-ranging discussion which focused on stateless persons as defined in Article 1(1) of the 1954 Convention (sometimes termed *de jure* stateless persons), before turning to the concept of *de facto* statelessness. The meeting reviewed principles of customary international law, general principles of international law and treaty standards, national legislation, administrative practice and judgments of national courts. It also took into account decisions of international tribunals and treaty monitoring bodies as well as scholarly writing.

The following summary conclusions do not represent the individual views of each participant or necessarily of UNHCR, but reflect broadly the understandings emerging from the discussion.

The meeting was funded by the European Commission



I. Stateless persons as defined in the 1954 Convention and international law

A) General considerations

1. In interpreting the statelessness definition in Article 1(1) of the 1954 Convention, it is essential to keep in mind the treaty's object and purpose: securing for stateless people the widest possible enjoyment of their human rights and regulating their status.
2. The International Law Commission has observed that the definition of a stateless person contained in Article 1(1) is now part of customary international law.
3. The issue under Article 1(1) is not whether or not the individual has a nationality that is effective, but whether or not the individual has a nationality at all. Although there may sometimes be a fine line between being recognized as a national but not being treated as such, and not being recognized as a national at all, the two problems are nevertheless conceptually distinct: the former problem is connected with the rights attached to nationality, whereas the latter problem is connected with the right to nationality itself.
4. The definition in Article 1(1) applies whether or not the person concerned has crossed an international border. That is, it applies to individuals who are both inside and outside the country of their habitual residence or origin.
5. Refugees (under the 1951 Convention relating to the Status of Refugees or the extended definitions in relevant regional instruments and under UNHCR's international protection mandate) may also, and frequently do, fall within Article 1(1). If a stateless person is simultaneously a refugee, he or she should be protected according to the higher standard which in most circumstances will be international refugee law, not least due to the protection from *refoulement* in Article 33 of the 1951 Convention.
6. While the definition of a "stateless person" should be interpreted and applied in a holistic manner, paying due regard to its ordinary meaning, it may also be helpful to examine its constituent elements.
7. When applying the definition it will often be prudent to look first at the question of "State" as further analysis of the individual's relationship with the entity under consideration is moot if that entity does not qualify as a "State". In situations where a State does not exist under international law, the persons are *ipso facto* considered to be stateless unless they possess another nationality.

B) Meaning of "not considered as a national...under the operation of its law"

8. "National" should be given its ordinary meaning of representing a legal link (nationality) between an individual and a particular State.
9. For the purposes of the 1954 Convention, "national" is to be understood by reference to whether the State in question regards holders of a particular status as persons over whom it has jurisdiction on the basis of a link of nationality. Several participants

were of the view that in practice it is difficult to differentiate between the possession of a nationality and its effects, including, at a minimum, the right to enter and reside in the State of nationality and to return to it from abroad, as well as the right of the State to exercise diplomatic protection. Otherwise, according to this view, nationality is emptied of any content.

10. Article 1(1) does not require a “genuine and effective link” with the State of nationality in order for a person to be considered as a “national”. The concept of “genuine and effective link” has been applied principally to determine whether a State may exercise diplomatic protection in favour of an individual with dual or multiple nationalities, or where nationality is contested. It is therefore possible to be a “national” even if the State of nationality is one in which the individual was neither born nor habitually resides. The relevant criterion is whether the State in question considers a person to be its national.
11. A State may have two or more categories of “national” not all necessarily enjoying the same rights. For the purposes of the definition in Article 1(1), these persons would still be regarded as nationals of the State and therefore not stateless.
12. Whether an individual actually is a national of a State under the operation of its law requires an assessment of the viewpoint of that State. This does not mean that the State must be asked in all cases for its views about whether the individual is its national in the context of statelessness determination procedures.
13. Rather, in assessing the State’s view it is necessary to identify which of its authorities are competent to establish/confirm nationality for the purposes of Article 1(1). This should be assessed on the basis of national law as well as practice in that State. In this context, a broad reading of “law” is justified, including for example customary rules and practices.
14. If, after having examined the nationality legislation and practice of States with which an individual enjoys a relevant link (in particular by birth on the territory, descent, marriage or habitual residence) – and/or after having checked as appropriate with those States – the individual concerned is not found to have the nationality of any of those States, then he or she should be considered to satisfy the definition of a stateless person in Article 1 (1) of the 1954 Statelessness Convention.¹
15. “Under the operation of its law” should not be confused with “by operation of law”, a term which refers to automatic (*ex lege*) acquisition of nationality.² Thus, in interpreting the term “under the operation of its law” in Article 1(1), consideration has to be given to non-automatic as well as automatic methods of acquiring and being deprived of nationality.
16. The Article 1(1) definition employs the present tense (“who is...”) and so the test is whether a person is considered as a national at the time the case is examined and not whether he or she might be able to acquire the nationality in the future.

¹ Foundlings are an exception. In the absence of proof to the contrary, foundlings should be presumed to have the nationality of the State in whose territory they are found as set out in Article 2 of the 1961 Convention on the Reduction of Statelessness.

² See, for example, 1961 Convention on the Reduction of Statelessness, Articles 1, 4 and 12.

17. In the case of non-automatic modes of acquisition, a person should not be treated as a “national” where the mechanism of acquisition has not been completed.
18. The ordinary meaning of Article 1(1) requires that a “stateless person” is a person who is not considered a national by a State regardless of the background to this situation. Thus, where a deprivation of nationality may be contrary to rules of international law, this illegality is not relevant in determining whether the person is a national for the purposes of Article 1(1) – rather, it is the position under domestic law that is relevant. The alternative approach would lead to outcomes contrary to the ordinary meaning of the terms of Article 1(1) interpreted in light of the Convention’s object and purpose. This does not, however, prejudice any obligation that States may have not to recognize such situations as legal where the illegality relates to a violation of *jus cogens* norms.³
19. There is no requirement for an individual to exhaust domestic remedies in relation to a refusal to grant nationality or a deprivation of his/her nationality before he or she can be considered as falling within Article 1(1).
20. The definition in Article 1(1) refers to a factual situation, not to the manner in which a person became stateless. Voluntary renunciation of nationality does not preclude an individual from satisfying the requirements of Article 1(1) as there is no basis for reading in such an implied condition to the definition of “stateless person”. Nonetheless, participants noted that diverging approaches have been adopted by States. It was also noted that the manner in which an individual became stateless may be relevant to his or her treatment following recognition and for determining the most appropriate solution.
21. The consequences of a finding of statelessness for a person who could acquire nationality through a mere formality are different from those for a person who cannot do so and a distinction should be drawn in the treatment such persons receive post-recognition. On the one hand, there are simple, accessible and purely formal procedures where the authorities do not have any discretion to refuse to take a given action, such as consular registration of a child born abroad. On the other hand, there are procedures in which the administration exercises discretion with regard to acquisition of nationality or where documentation and other requirements cannot reasonably be satisfied by the person concerned.

C) Meaning of “by any State”

22. Given that Article 1(1) is a negative definition, “by any State” could be read as requiring the possibility of nationality to be ruled out for every State in the world before Article 1(1) can be satisfied. However, the adoption of an appropriate standard of proof would limit the States that need to be considered to those with which the

³ A *jus cogens* norm (or a peremptory norm of general international law) is a rule of customary international law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. Examples of such norms are the prohibition on the use of force by states and the prohibition on racial discrimination.

person enjoys a relevant link (in particular by birth on the territory, descent, marriage or habitual residence).

23. The meaning of “State” should be based on the criteria generally considered necessary for a State to exist in international law. As such, relevant factors are those found in the Montevideo Convention on Rights and Duties of States (permanent population, defined territory, government and capacity to enter into relations with other States) coupled with other considerations that have subsequently emerged (effectiveness of the entity in question, right of self-determination and the consent of the State which previously exercised control over the territory in question).
24. Whether or not an entity has been recognised as a State by other States is indicative (rather than determinative) of whether it has achieved statehood.
25. Where an entity’s purported statehood appears to have arisen through the use of force, its treatment under Article 1(1) will raise issues regarding the obligations of third States with regard to breaches of *jus cogens* norms.
26. In keeping with the current state of international law, whilst an effective central government is critical for a new State to emerge, an existing State that no longer has such a government because of civil war or other instability can still be considered as a “State” for the purposes of Article 1(1).
27. The position of so-called “sinking island States” raises questions under Article 1(1), as the permanent disappearance of habitable physical territory, in all likelihood preceded by loss of population and government, may mean the “State” will no longer exist for the purposes of this provision. However, the situation is unprecedented and may necessitate progressive development of international law to deal with the preservation of the identity of the communities affected.

II. *De facto* stateless persons

The participants broadly agreed that some categories of persons hitherto regarded as *de facto* stateless are actually *de jure* stateless, and therefore particular care should be taken before concluding that a person is *de facto* stateless rather than *de jure* stateless. This is particularly important as there is an international treaty regime for the protection of stateless persons as defined in Article 1(1) of the 1954 Convention and to prevent and reduce statelessness (most notably the 1954 and 1961 Statelessness Conventions). However, there is no similar regime for *de facto* stateless persons. A number of participants referred to gaps in the existing international protection regime that affect *de facto* stateless persons in particular. On the other hand, some participants expressed the view that the concept of *de facto* stateless persons is problematic. Reference was made in particular to some extremely broad interpretations of the term.

A) Definition of “*de facto* statelessness”

1. *De facto* statelessness has traditionally been linked to the notion of effective nationality⁴ and some participants were of the view that a person’s nationality could be ineffective inside as well as outside of his or her country of nationality. Accordingly, a person could be *de facto* stateless even if inside his or her country of nationality. However, there was broad support from other participants for the approach set out in the discussion paper prepared for the meeting which defines a *de facto* stateless person on the basis of one the principal functions of nationality in international law, the provision of protection by a State to its nationals abroad.
2. The definition is as follows: *de facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality.
3. It was agreed that there are many *de facto* stateless persons who are not refugees, contrary to the presumption that was widely held in the past. While refugees who formally possess a nationality are *de facto* stateless, participants indicated that it was not useful to refer to them as such because this could create confusion.
4. It was also agreed that a person who is stateless in the sense of Article 1(1) of the 1954 Convention cannot be simultaneously *de facto* stateless.

B) Valid reasons for being unwilling to avail oneself of protection

5. The existing universal and regional refugee protection instruments reflect the current consensus of States on what constitute “valid reasons” for refusing the protection of one’s country of nationality.⁵ Persons who refuse the protection of the country of their nationality when it is available and who do not fall under one or more of the aforementioned instruments are not *de facto* stateless.
6. Persons who do fall within the scope of the aforementioned instruments should be granted the protection foreseen by those instruments, rather than any lesser form of protection that a particular State may decide to accord to *de facto* stateless persons generally.

⁴ The Final Act of the 1961 Convention links the two when 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”.

⁵ See, in particular, the 1951 Convention/1967 Protocol relating to the Status of Refugees, the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, the 1984 Cartagena Declaration on Refugees, and Council Directive 2004/83/EC of the European Union on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

C) Inability to avail oneself of protection

7. Being *unable* to avail oneself of protection implies circumstances that are beyond the will/control of the person concerned. Such inability may be caused either by the country of nationality refusing its protection, or by the country of nationality being unable to provide its protection because, for example, it is in a state of war and/or does not have diplomatic or consular relations with the host country.
8. Some persons who are unable to avail themselves of the protection of the country of their nationality may qualify for protection under the 1951 Refugee Convention/1967 Protocol⁶ or one of the three regional refugee or subsidiary protection instruments.⁷ However, there may also be situations where denial of protection does not constitute persecution.⁸
9. Inability to avail oneself of protection may be total or partial. Total inability to avail oneself of protection will always result in *de facto* statelessness. Persons who are unable to return to the country of their nationality will also always be *de facto* stateless even if they are otherwise able in part or in full to avail themselves of protection of their country of nationality while in the host country (i.e. diplomatic protection and assistance). On the other hand, persons who are able to return to their country of nationality are not *de facto* stateless, even if otherwise unable to avail themselves of any form of protection by their country of nationality in the host country.

D) Undocumented migrants

10. Irregular migrants who are without identity documentation may or may not be unable or unwilling to avail themselves of the protection of the country of their nationality. As a rule there should have been a request for, and a refusal of, protection before it can be established that a person is *de facto* stateless. For example, Country A may make a finding that a particular individual is a national of Country B, and may seek to return that individual to Country B. Whether or not the individual is *de facto* stateless may depend on whether or not Country B is willing to cooperate in the process of identifying the individual's nationality and/or permit his or her return. Thus, prolonged non-cooperation including where the country of nationality does not respond to the host country's communications can also be considered as a refusal of protection in this context.

⁶ For example, as stated in paragraph 98 of UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*, lack of protection may sometimes itself contribute to fear of persecution: "denial of protection [by the country of nationality] may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution."

⁷ See note 6, above.

⁸ As stated in paragraph 107 of UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* regarding applicants for refugee status who have dual nationality: "There will be cases where the applicant has the nationality of a country in regard to which he alleges no fear, but such nationality may be deemed to be ineffective as it does not entail the protection normally granted to nationals ... As a rule, there should have been a request for, and a refusal of, protection before it can be established that a given nationality is ineffective. If there is no explicit refusal of protection, absence of reply within reasonable time may be considered a refusal."

E) Treatment of *de facto* stateless persons

11. While *de facto* stateless persons are covered by international human rights law, there is no specific treaty regime addressing the international protection needs of those who do not fall within the universal and regional refugee protection instruments. Certain recommendations as to the treatment of *de facto* stateless persons have been made in the Final Acts of the 1954 and 1961 Statelessness Conventions⁹ and in Recommendation CM/Rec(2009)13 on the Nationality of Children adopted by the Committee of Ministers of the Council of Europe.¹⁰

F) *De facto* stateless persons and UNHCR's mandate

12. The extent to which *de facto* stateless persons who do not fall within its refugee mandate qualify for the Office's protection and assistance is largely determined by UNHCR's mandate to prevent statelessness. It was noted that unresolved situations of *de facto* statelessness, in particular over two or more generations, may lead to *de jure* statelessness.

⁹ The Final Act of the 1961 Convention “*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”. Note that the Recommendation in the Final Act of the 1954 Convention does not apply to all *de facto* stateless persons, but only to those persons who are *de facto* stateless because they are considered as having valid reasons for renouncing the protection of the State of which they are a national.

¹⁰ The Recommendation reads as follows “With a view to reducing statelessness of children, facilitating their access to a nationality and ensuring their right to a nationality, member states should: [...] 7. treat children who are factually (*de facto*) stateless, as far as possible, as legally stateless (*de jure*) with respect to the acquisition of nationality.

Expert Meeting on the Concept of Stateless Persons in International Law

Monash University Prato Centre
27 and 28 May 2010

Agenda*

Thursday, 27 May 2010

- 09:00 – 09:30 Registration
- 09:30 – 10:00 Opening remarks
UNHCR will briefly outline why it is focusing on development of guidance on the definition of stateless persons as contained in article 1(1) of the 1954 Convention relating to the Status of Stateless Persons and on the concept of de facto stateless persons. UNHCR will, in particular, set out why a common understanding of the meaning of statelessness in international law is central to the Office’s mandate to prevent and reduce statelessness and to protect stateless persons.
- 10:00 – 11:00 Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons
- **National**
- 11:00 – 11:30 Break
- 11:30 – 12:15 Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons
- **National** (cont.)
- 12:15 – 13:00 Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons
- **State**
- 13:00 – 14:15 Lunch break
- 14:15 – 16:30 Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons
- **“Not considered as...under the operation of its law”**
- 16:30 – 17:00 Break
- 17:00 – 18:00 Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons
- **“Not considered as...under the operation of its law”** (cont.)

* Timing is indicative and subject to modification based on progress in discussions.

Expert Meeting on the Concept of Stateless Persons in International Law

Friday, 28 May 2010

- 09:00 – 11:00 *De facto* statelessness
- **What is the basis for establishing *de facto* statelessness?**
 - Persons who do not enjoy the rights attached to their nationality
 - Persons devoid of protection and whether they can be inside their State
- 11:00 – 11:30 *Break*
- 11:30 – 13:00 *De facto* statelessness
- **Persons unable to establish their nationality or of undetermined nationality**
- 13:00 – 14:15 *Lunch break*
- 14:15 – 16:00 *De facto* statelessness
- **Persons unable to establish their nationality or of undetermined nationality (cont.)**
- 16:00 – 16:30 *Break*
- 16:30 – 17:00 Concluding remarks and closure of the meeting

ANNEX 2

List of participants*

Kohki Abe, Kanagawa University, Yokohama, Japan
David Baluarte, American University, Washington DC, United States
Amal de Chickera, Equal Rights Trust, United Kingdom
Ryszard Cholewinski, International Organisation for Migration
Alice Edwards, University of Oxford, United Kingdom
Lois Figg, Immigration and Refugee Board of Canada
Laurie Fransman, Legal Practitioner, United Kingdom
Stefanie Grant, Legal Practitioner, United Kingdom
Gerard-René de Groot, Maastricht University, Netherlands
Gábor Gyulai, Hungarian Helsinki Committee, Hungary
Sebastian Köhn, Open Society Justice Initiative, United Kingdom
Ivanka Kostic, Praxis, Serbia
Reinhard Marx, Legal Practitioner, Frankfurt/Main, Germany
Jane McAdam, University of New South Wales, Sydney, Australia
Benoît Meslin, Office français de protection des réfugiés et apatrides, France
Tamás Molnár, Ministry of Justice, Hungary
Judge Susana Salvador, Civil registry, Madrid, Spain
Oscar Solera, Office of the High Commissioner for Human Rights
Stefan Talmon, University of Oxford, United Kingdom
For UNHCR, Ruma Mandal, Mark Manly, Hugh Massey, Volker Türk and Laura van Waas

*Institutional affiliation given for identification purposes only.