



LITIGATING THE RIGHT TO A NATIONALITY: A GUIDE FOR PRACTITIONERS

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DISCLAIMER

This guide aims to assist lawyers and their clients to plan strategies and tactics for litigation in relation to statelessness, lack of recognition of nationality and issue of identity documents before national or international jurisdictions, and to find and interpret the relevant law. It does not constitute professional legal advice. Lawyers and potential litigants using the guide must read the original instruments, laws and judgments referred to in order to consider their application and relevance in their own context.

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Litigation has unlocked a major barrier—we have used reports, a film documentary, lobbying, we threw everything at the problems—but the importance of litigation is that the government is forced to respond. They must come to court and provide information that otherwise you cannot get —and that information informs our other advocacy.

-- Yussuf Bashir, *Haki na Sheria*, Kenya

These are deep-seated problems. Exclusion is not created by lack of knowledge of the problems by the authorities, but a way of thinking that is ingrained, and that is very difficult to change by awareness-raising or general advocacy. The most powerful tool is the judiciary, and the court room is the only place where we are equal. We are involved in all sorts of other advocacy, but the only tangible glimpse of impact is in the courts.

-- Valeria Ilareva, *Foundation for Access to Rights*, Bulgaria

FOREWORD

Statelessness is one of the most acute human rights challenges of our time, affecting millions of people around the world. The denial of nationality leaves individuals without legal identity, deprived of basic rights and recognition. It is an injustice that exacerbates vulnerability, fuels marginalization, and undermines human dignity.

The United Nations High Commissioner (UNHCR), entrusted with the mandate to prevent and reduce statelessness and to protect stateless persons, has long recognized the critical role of strategic litigation in addressing this issue. The Open Society Justice Initiative (OSJI) has over 17 years of experience litigating statelessness globally, across different courts and countries, through paradigmatic cases to highlight the problem of statelessness and secure concrete legal remedies for stateless persons.

Legal action, when combined with advocacy and policy reform, can be a powerful tool for ensuring that states fulfill their obligations to protect the right to nationality. This guide is designed to support legal practitioners in advancing that goal. It reflects the collective experience of a dedicated community of practitioners who are committed to challenging statelessness through the courts.

In June 2024, UNHCR and OSJI convened a Strategic Litigation Roundtable in Geneva, to discuss a draft of this guide, developed by Dr. Bronwen Manby, a leading authority on nationality law and statelessness. Experts from organizations working on statelessness and related matters around the world participated in the roundtable. They shared insights on how litigation can be used not only to secure nationality for individuals but also to push for systemic change. The discussions highlighted the potential for legal challenges to reshape national and international norms, address discriminatory laws, and transform the lives of stateless people.

This guide draws upon those discussions, offering practical strategies for litigating nationality cases and emphasizing the need to align legal arguments with both national and international human rights standards. It acknowledges the complexities of navigating political sensitivities and entrenched exclusion, with the aim of helping practitioners stay resilient in their pursuit of justice.

In October 2024, UNHCR launched the Global Alliance to End Statelessness which unites governments, civil society, and international actors to ensure that no one remains stateless. This guide supports that mission, equipping legal professionals with tools for effective litigation and fostering collaboration toward a world where the right to nationality is upheld for all.

Strategic litigation provides the opportunity to challenge laws and practices that perpetuate statelessness, hold States accountable, and ultimately contribute to ending statelessness for good. UNHCR and OSJI remain committed to supporting practitioners as they confront these challenges and work to ensure that every individual's right to a nationality is recognized.

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EXECUTIVE SUMMARY

Statelessness affects millions of people globally. Many of them are denied access to basic rights and services. Although the international human rights treaties establish that most human rights are for “everyone”, the right to a nationality is in practice often the foundation for enjoyment of other rights. Ending statelessness is thus a priority for the realisation of human rights for all and to fulfil the objective of the Sustainable Development Goals to “leave no one behind”.

Achieving an end to statelessness will require many different strategies, not only legal ones. However, since the rules and procedures for recognition and grant of nationality are established by law, legal strategies are among those necessary for resolution of the status of stateless persons. Litigation has been an important tool to advance the interpretation of states’ international legal obligations to respect every person’s right to a nationality and to prevent and reduce statelessness. Litigation has not only assisted particular individuals and communities to gain recognition of their right to nationality or protection as stateless persons. It has also helped to develop national, regional, and international normative frameworks that have moved nationality from a legal status that is recognised by states at their discretion, into the sphere of human rights and the rule of law.

This Guide provides resources for practitioners—especially lawyers, but including stateless people and others advocating on their behalf—to develop strategies to use litigation to achieve progress towards the realisation of the right to a nationality for all. The Guide both considers the design and management of a case and provides a compilation of legal arguments drawn from jurisprudence in international and regional human rights courts and treaty-bodies, and apex courts at national level. While the Guide has a particular focus on litigation conceived of as strategic—that is, consciously aimed at achieving changes in law, policy, practice, or public awareness above and beyond relief for the named complainants—the objective is to support any litigation on these issues, especially since cases often take on a “strategic” character only after they are initiated.

The impacts of litigation

Litigation on the right to a nationality may have material impacts for the complainants, such as the grant or recognition of nationality to an individual or a category of persons, or compensation for harm suffered. It may also have instrumental impacts benefiting a wider category of people, including reforms to nationality law or to procedures for issuance of identity documents. Litigation may also have immaterial impacts, such as validation of a cause or changes to public and official perceptions and discourse. The impacts of litigation may be felt at national level, across borders (especially in countries with similar legal systems), or in the development of international norms. This Guide provides examples of such impact across many different countries of the world.

Developing a litigation strategy

Litigation has unique power to create certain types of change, but it is not suited to all contexts and problems. A litigation strategy must be set within a wider ecosystem of advocacy, if it is to have the positive impact desired. Litigation for the right to nationality and identity documents raises particular opportunities and risks that should be considered from the start, especially where broader impacts are envisaged beyond assisting the individual complainant.

Assessment of the national context is therefore essential, in order to consider if litigation is even the right tool. Considering the political and legal environment, risk assessment and consideration of what could go wrong are important parts of planning litigation. A litigation strategy will have to consider the resources needed not only to launch a legal challenge but also to see it all the way through to a conclusion—potentially through several layers of appeal.

Building coalitions

The impact of litigation is always greater if it is combined with a range of other advocacy tools. Litigation should be planned and conducted as part of a much wider advocacy ecosystem in which there is close cooperation among litigators, their individual clients, and the wider community of affected persons. Litigators need to build alliances with civil society groups working on related themes, with parliamentarians, with national human rights institutions, and (where possible) with sympathetic officials or ministers in different government departments. The building and maintenance of such networks must start before the case is launched and continue after a final judgment is issued.

Choice of forum and of parties to a case

When planning litigation on behalf of stateless persons there may be a choice of forum—of different court, tribunal or other adjudicatory body—to which a case may be brought. The most obvious one may not always be the best. In some

jurisdictions specific courts or tribunals are established for the adjudication of nationality matters; however, other courts may also have concurrent jurisdiction. For example, a children's court may be most suitable, where such courts exist, rather than the regular courts for nationality matters or for general contentious proceedings. There may also be the possibility of bringing a complaint to a national human rights institution on grounds of illegitimate discrimination, or to an ombuds office for administrative malpractice. Similarly, at supranational level, there may be a choice to bring different aspects of a case to different regional or international courts and treaty bodies.

There may also be a choice of complainants and of defendants to be named as the parties to the case, or to different cases in different fora; this choice also has strategic implications, as well as ethical ones. It is important to agree to the approach to the case with the affected individual or group that will be named as the complainant, and to ensure that there is mutual understanding among different parties; for example, between the potential complainants and those of an organisation seeking to set a precedent. Choice of defendant should include not only the government department responsible for nationality or identity documents, but might extend to other ministries. In some contexts it could also be possible to name a national human rights institution, to prompt them to intervene in a case. It may also be possible that non-state respondents could be defendants to litigation on the right to nationality.

Terminology and framing

Among the challenges in litigating statelessness and the right to a nationality are the different possible definitions of the terms used for these statuses, both at international and at national levels. The Guide sets out some of the debates around the terminology surrounding nationality and statelessness in national and international laws, in particular in relation to the interpretation of the definition of "stateless person".

Questions of framing are critical to the success of litigation. The framing of a case must be shaped both by the legal arguments available in the particular jurisdiction, and by the specific outcomes sought by the complainants. An early decision may indeed be whether to present the situation of a person or group excluded from recognition of nationality as one of "statelessness". The international law obligations in relation to the prevention and reduction of statelessness are especially likely to be helpful for those in a migratory context, and may also add weight to arguments on behalf of those who are not recognised as nationals in the country where they have the strongest connections. In some contexts, however, the label of stateless person may hinder efforts to claim recognition of nationality that is in principle already granted automatically, by operation of law. Presenting the case as related to non-discrimination, the right to a hearing and due process, or the right to birth registration, legal identity and recognition as a person before the law may be more effective. Practitioners must tailor their approach to the specific legal, factual, and political context.

Building the evidence

It can be challenging to build the evidence in cases relating to nationality and statelessness. Judges may need more information about the complexities of the interpretation of nationality law in transnational context and over what might be a long period of time. Expert opinion is often needed to supplement the experience of the litigator, including laws. Third-party interventions may also be of great use. The Guide outlines strategies for gathering and presenting evidence in these challenging cases.

If litigation is undertaken on behalf of a group disproportionately affected by exclusion from recognition as nationals, it may in addition be necessary to compile detailed documentation of the impact of the substantive law and procedural requirements on that group.

Designing remedies

The development of detailed requests for remedies is one of the most important elements of planning litigation, especially on behalf of a group of people who share some characteristics, but where the details of each case vary. A key part of planning litigation is to prioritise the legal remedies desired, and to think through the supporting evidence that must be presented to the court to justify a request for the particular solutions. It may be necessary to establish a list of categories of the affected persons, and the legal and procedural remedies desired for each category, and those that are common to all.

The most important remedy sought will usually be that a person or category of persons be declared to be nationals under the law and to be issued identity documents accordingly, or to be eligible to acquire nationality, whether as a stateless person or on some other ground. Direct remedies for individuals or groups could also include an order that the complainants be given access to other rights and services. In some cases, there may be the possibility not only of seeking individual compensation but also symbolic or punitive damages.

However, remedies requested may go beyond seeking individual relief for the complainants to call for systemic legal and procedural reforms. Practitioners should consider remedies that lead to procedural changes, broader legal reforms, and long-term solutions for those affected by statelessness, in order to benefit a wider group. A similar

consideration of specific remedies should also be brought into play in discussing terms of any settlement.

After a judgment

A court judgment is a unique opportunity to establish the basis for legal and procedural reforms that can allow the individual client or a wider group to resolve their situation. Nonetheless, in most cases, a court judgment will be only one component of an effort to remedy the situation of individuals or groups denied recognition of nationality; the need for a broad advocacy coalition continues after a judgment to ensure effective implementation or to consider an appeal. If a case is unsuccessful, it may still form the basis for further advocacy for the situation to be addressed, for example through necessary legislative reform. Thinking about the aftermath of a positive or negative result is an integral part of the planning of the litigation from the outset.

Legal arguments

The Guide sets out in detail the different legal arguments that may be available to litigators seeking realisation of the right to a nationality. The Guide places emphasis on the need to understand not only the national legal frameworks that govern statelessness and the right to a nationality, but also both comparative and international law, informing judges about solutions that otherwise would not be imagined based on existing national precedents. The Guide provides an analysis of the arguments for the right to a nationality, the eradication of statelessness and the protection of stateless persons, illustrated with examples from different decisions at national, regional and international level.

The themes addressed include the following:

The definition of stateless person and the determination that a person is stateless

A stateless person is defined by the 1954 Convention relating to the Status of Stateless Persons as a person who is “not considered as a national by any state under the operation of its law”. As observed in UNHCR’s Handbook on Protection of Stateless Persons, establishing whether a person fulfils this definition is “a mixed question of fact and law”. The Guide sets out the different inquiries that may be needed to determine a person’s nationality or whether that person is stateless and provides examples of court decisions in these cases.

It may be necessary to analyse not only the relevant nationality law, but also related laws such as those governing the family, civil registration, national identity cards and passports, migration and refugee status, or consular registration and the recognition of foreign civil status certificates. It will also be necessary to consider relevant secondary legislation (regulations or decrees), as well as internal departmental circulars, and documentation of administrative practice.

The right of every child to acquire a nationality

The right of every child to acquire a nationality is established by the international and regional human rights treaties and is also provided for in more detail by the 1961 Convention on the Reduction of Statelessness, and by specific treaties on nationality adopted by the Council of Europe and the African Union. The primary obligation is on the state in which the child is born to grant nationality if the child does not acquire another nationality at birth.

The Guide sets out the necessary legal provisions to respect the rights of children to nationality at national level. It also focuses on the procedures required to establish recognition of the child’s legal identity and nationality, especially in case of children of unknown parents or of parents who are stateless or of undetermined nationality; or children who were born out of wedlock, adopted, or born and registered in a different country from that of the nationality of the parents.

The Guide also notes jurisprudence—especially from the African human rights bodies—supporting a positive right to nationality in a country where a person has the closest connections, even in the absence of proof of statelessness. Litigation before the Court of Justice of the European Union and the European Court of Human Rights has also successfully challenged states that refuse to recognise the nationality rights of children born to same-sex parents, or through surrogacy or other assisted means of reproduction.

Discrimination based on sex and gender

The principle of equality of rights between the sexes in relation to nationality is clearly established in international law. However, nationality laws of 24 countries still do not allow women to confer nationality to their children on an equal basis with men, and even more countries do not grant women equal rights to acquire, change and retain their nationality, or confer nationality to their spouse. And even when discrimination based on sex has been removed from the substantive law, it is often still common in practice in civil registration and nationality procedures. The Guide provides examples where litigation challenging discrimination based on sex has been successful.

Discrimination based on race, religion or ethnicity

International law in relation to discrimination based on race, religion or ethnicity in grant or recognition of nationality has some ambiguities, given that nationality is frequently based on descent. Nonetheless, while preferential rules on acquisition of nationality may be permissible (within limits), deprivation or denial of nationality on discriminatory grounds is not permitted. The prohibition of racial discrimination is indeed widely recognised as a “peremptory norm” of international law.

Decisions of the Inter-American and African human rights systems have been particularly strong in their condemnation of both direct and indirect discrimination in relation to nationality law and administration.

Arbitrary denial or deprivation of nationality and the right to due process

The prohibition of arbitrary deprivation of nationality that is included within Article 15 of the Universal Declaration of Human Rights requires that states must respect the right to due process when deploying administrative measures to deprive a person of nationality that has previously been recognised. Litigation before human rights courts and treaty bodies, as well as resolutions of the UN Human Rights Council and other soft law, have also established that arbitrary deprivation of nationality includes arbitrary denial of recognition of nationality to a person who appears to be entitled to such recognition, or on discriminatory grounds. Deprivation on grounds of fraud or criminal offences should be subject to a rule of proportionality. While human rights courts have generally been more deferential to the executive in national security cases, they have nonetheless established limits to state discretion, including in relation to proportionality and the evidence that a person is in fact a threat to state security.

Acquisition of nationality based on habitual residence

International law does not require any state to provide a general right for long-term residents not born on its territory to acquire nationality. Nonetheless, there is a gradual strengthening of the principle that naturalisation should be at least made possible, and in particular that naturalisation should be facilitated for stateless persons (as provided in the 1954 Convention relating to the Status of Stateless Persons).

State succession

The transfer of sovereignty over a territory—known as succession of states in international law—is a frequent danger-point for the creation of stateless populations. Extensive guidance on the rules that should be applied is provided by Draft Articles on Nationality of Natural Persons in relation to the Succession of states, adopted by the International Law Commission in 1999. The European Convention on Statelessness in the Context of State Succession, and the Protocol to the African Charter on Human and Peoples’ Rights relating to the Right to a Nationality and the Eradication of Statelessness in Africa adopted in 2024 also provide normative frameworks that can help to shape litigation and remedies requested at national level.

Birth registration and legal identity

The right to birth registration for all children is well-established in international human rights law and has been repeatedly confirmed by international and regional treaty bodies and courts. Registration and recognition of other civil status events and legal identity more generally, including issue of necessary identity documents, does not have such an explicit foundation in the treaties. However, there is significant jurisprudence holding that registration and recognition of legal identity is a component of the right to dignity in the human rights treaties: the Guide provides examples of such cases before different courts and treaty bodies. Litigation is challenging aspects of new biometric identification systems in relation not only to data protection and privacy but also the potential discriminatory impacts of such systems.

Consequential violations

Statelessness or the arbitrary denial or deprivation of nationality often leads to violations of other human rights. The Guide provides examples of judgments and other sources of law in relation to freedom of movement and the right to enter and remain in one’s “own country”; the right to participation in public affairs; the right to family life; the right to remedies in the context of immigration detention and the impacts of precarious legal status in a country; and on the role of statelessness and lack of identity documents in accessing rights that may be restricted to nationals of a country, such as housing or health care. The choice to focus on these “consequential” violations, or on the lack of recognized nationality from which they arise, depends on the facts of the case and the legal arguments available in the specific forum, and should be a key element in strategy discussions for framing litigation.

1. INTRODUCTION

1.1. Nationality, statelessness, identity documents, and human rights

The right to a nationality is central to human rights, development, and democracy. As requirements to prove legal identity and nationality (or citizenship, the term also used in many national laws to cover the same concept) become increasingly pervasive, the possession of official identity documents—and the legal status recorded in those documents—has become ever more essential to a person’s ability to participate as a full member of society. Although international human rights treaties are stated to guarantee the rights established for “everyone”, with very limited exceptions where nationality is a pre-condition, legally recognised nationality is in practice foundational to the enjoyment of other human rights.

Those without recognised nationality of any state—those who are stateless—are among the most marginalised people on earth. Without state acknowledgement of their existence and legal status, they can be subject to criminalisation, harassment, and detention, and are often denied basic rights such as education, health care, freedom of movement, the right to vote and take part in political life, and even access to justice and a fair hearing. Lack of recognised nationality causes and exacerbates poverty and exclusion, in extreme cases, it is also a threat to national or international peace and security. Those affected are disproportionately members of minorities: rules on access to nationality often disguise racial, ethnic, and religious discrimination that would not be permitted in other spheres of law.

Statelessness may result from restrictive nationality laws, including those that are exclusively descent-based or discriminate on grounds of sex, race, ethnicity, or religion, or that do not comply with international law requirements to prevent statelessness based on a conflict of laws. It can result from discriminatory provisions or gaps in other related laws, particularly the laws on civil registration and those regulating marriage, adoption, and other statuses within the family. But statelessness can also stem from arbitrary or discriminatory application of laws that otherwise comply with international law; and simply from weak civil registration or identification systems, lack of access to consular assistance for migrants, or other administrative and practical barriers. Statelessness can also result from forced displacement and from conflicts that destroy archives and disperse communities that would provide evidence of a person’s connection to a place.

It is often those people who appear to have a claim to two or more nationalities who are most at risk of statelessness. Even if they are nationals under the law, and dual nationality is permitted in the state of residence, perceptions of foreignness make navigation of administrative barriers more difficult, with demands for additional forms of proof of connection to the state of claimed nationality from members of certain communities. Where many people have no documents, the difference between those who are at risk of statelessness and those who are not is often a perception among politicians, or generally the authorities competent to determine nationality, that members of a particular group have closer connections to another country—even if these connections are many generations back, and there is no associated documentation of a person’s origins. It is, however, not necessarily the case that stateless people lack identity documents: indeed, in some contexts stateless people are hyper-identified, repeatedly enrolled in different registers of state and other agencies—but always with the status of non-citizens. It is also common for a person’s status to be unclear: for example, a person may hold some identity documents that suggest recognition as a citizen (for example a voter registration card), but have been refused others (such as a national identity card or passport).

1.2. Objectives and focus of this Guide

Litigation has been an important tool in advancing the rights of stateless persons and creating systemic legal reforms. Successful cases have led to broader legal reforms, establishing international legal norms that constrain state discretion in nationality matters. By challenging state discretion in the grant of nationality, litigation has helped to shift the narrative, making real the human right to a nationality.

This Guide, a collaboration between UNHCR and the Open Society Justice Initiative, is designed to support legal practitioners in using litigation to realise the right to nationality and achieve an end to statelessness. The Guide focuses on the specific challenges and considerations in relation to litigation on nationality and statelessness. It frames litigation as part of an endeavour to address the structural and institutional barriers to recognition of nationality, on behalf of groups or entire communities as well as individuals.

The scope of the Guide is not restricted to litigation in favour of stateless persons but encompasses broader challenges in claiming the right to a nationality in the country where a person has the closest connections. It also addresses a person’s right to the documents necessary to show entitlement to nationality (notably birth and other civil status certificates), and the identity documents that are required to prove that a person is a national of a particular country (such as national identity cards, passports, and nationality certificates).

The main focus of the Guide is on people who are living in their “own country”, the place where they have the strongest connections, rather than those who are asylum-seekers, refugees or migrants living in a country where their connections may be weaker. However, the situation of stateless migrants and asylum-seekers is considered in relation to the interpretation of the definition of “stateless person”, as well as in the context of arbitrary deprivation of nationality as persecution, and indefinite immigration detention as cruel or inhuman treatment.

The Guide aims to show how recourse to courts and other adjudication bodies can advance a broad range of strategic goals, not limited to a positive decision in the case itself as a matter of law. Thus, the objectives are not only to support the development of legal arguments in such cases, but also to show how lawyers developing a litigation strategy should see their work as linked to and nested within work by a broad range of actors working in this field. These include national and international civil society groups, intergovernmental agencies (including but not limited to UNHCR), and community-based organisations—above all those led by people struggling to realise their right to nationality and identity documents, or those representing them.

Litigation has played a key role in the development of national and international legal norms for the right to nationality and the prevention of statelessness. It is litigation that has developed the very concept that nationality law is an area where “rights” are even relevant, where state discretion is constrained at all. Judgments of courts and treaty bodies have in turn informed the development of normative statements by UN and other agencies interpreting the principles for realisation of the right to a nationality set out in the Universal Declaration of Human Rights; and these general comments and guidelines have in turn informed judges as they consider what remedies may be awarded.

This Guide is a resource for anyone contemplating litigation on these themes, in whatever jurisdiction, whether national or international. It has a particular focus on litigation that is conceived of as strategic, at shifting national and international norms, and the considerations to bear in mind before embarking on such cases—including questions of framing, strategy, alliance building, legal arguments, specific remedies that may be sought, and follow up to any decision.

Among its key practical messages are that:

- Practitioners must have a strong grasp of international legal frameworks that govern statelessness. While states control nationality laws, international obligations place limits on this discretion. This Guide provides insights into navigating these frameworks, while also emphasising the importance of country-specific legal expertise.
- Successful litigation may require collaboration with civil society, lawmakers, affected communities, and sympathetic government officials. Building these alliances strengthens legal cases and increases the likelihood of achieving lasting reforms.
- Effective case framing is crucial. In some contexts, presenting a case as one of “statelessness” strengthens arguments; in others, focusing on issues like non-discrimination or legal identity may yield better outcomes. Practitioners must tailor their approach to the specific legal and political context.
- Litigation to resolve statelessness and realise the right to a nationality often involves analysis of the complex interaction among nationality laws from multiple jurisdictions. Strong evidence, expert testimony, and third-party interventions are essential for success. The Guide outlines strategies for gathering and presenting evidence in these challenging cases.
- Finally, remedies must go beyond individual relief to create systemic legal reforms. Practitioners should consider remedies that lead to procedural changes, broader legal reforms, and long-term solutions for those affected by statelessness.

1.3. The structure of this Guide

After this introduction, section 2 discusses the definitions of some of the different terms necessary to discuss nationality, statelessness and identification.

Section 3 considers strategic litigation as an advocacy strategy, and its specific usefulness in cases related to recognition or grant of nationality and access to the associated identity documents; and the types of impact that may be expected at national or international levels.

Section 4 sets out in more detail the issues to consider before strategic litigation is embarked upon—including the decision as to whether litigation is the best tool to use, and questions to consider in planning litigation on nationality and statelessness, with examples of where this has been done well in multiple jurisdictions around the world. Some of these questions are common to any human rights litigation; but other issues are particular to litigation on access to nationality and identity documents, and protection of stateless persons.

Section 5 moves on to the construction of a legal case, starting with the initial framing of the arguments, the different laws that may need to be consulted, the supporting evidence that must be marshalled, and the specific

remedies that may be relevant.

Section 6 provides a short a discussion of the follow-up to a case to ensure that a final judgment, favourable or unfavourable, is not the end of the matter.

Section 7 summarises the status of potential arguments from international law, with links to further resources, including case law.

Finally, Section 8 suggests other resources on statelessness and the right to a nationality in international and comparative law that may be useful to litigators, as well as a list of all the cases mentioned in this Guide, grouped by jurisdiction.

2. TERMINOLOGY

One of the challenges in litigating statelessness and the right to a nationality is the different possible definitions of the terms used, both at international and at national levels. This section sets out some of the debates and establishes the terminology to be used in this Guide.

2.1. Statelessness

A stateless person is defined by the 1954 Convention relating to the Status of Stateless persons as a person who is “not considered as a national by any state under the operation of its law”.¹ UNHCR has adopted extensive guidance on the interpretation of all elements of this definition. In relation to the wording “not considered as a national” the guidance states that:

Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual's case in practice and any review/appeal decisions that may have had an impact on the individual's status. This is a mixed question of fact and law.²

That is, individuals who are not treated as nationals by the competent authorities of any state—for example who are refused documents recognising their nationality by every state to which they have a relevant link—must be regarded as stateless even if the facts as narrated by the person concerned appear to indicate that they have a claim to nationality (► [section 5.1: Issue framing](#), and ► [section 7.1: The definition of stateless person and the determination that a person is stateless](#).)

Many refugees are also stateless. Indeed, deprivation and denial of nationality may be an element in the persecution that forces people to flee their country (for a brief discussion ► [section 7.5: Arbitrary denial or deprivation of nationality and the right to due process, subheading on Arbitrary deprivation of nationality as persecution](#)). However, most stateless people are living in the country of their birth and lifelong residence, what might be described as their ‘own country’.³ UNHCR refers to this group as stateless persons “in situ”. Only a minority of stateless persons are “in a migratory context”, ie, are forcibly displaced or themselves migrants.⁴ For the former group, the best resolution to their situation will almost always be recognition or acquisition of the nationality of the state of birth and residence. For the latter, the establishment of a statelessness determination procedure, coupled with the issue of an identity document confirming legal residence and access to other rights and services for stateless persons, may be a necessary step to provide protection before the nationality of a new country of residence can be acquired.

¹ Convention relating to the Status of Stateless Person, 1954, art 1. This definition is considered to be part of international customary law: see Articles on Diplomatic Protection with commentaries, International Law Commission, 2006, art 8 https://legal.un.org/ilc/texts/9_8.shtml. In French: “une personne qu’aucun État ne considère comme son ressortissant par application de sa législation.” Note, however, that the translation of the 1954 Convention into other languages often does not include the term operation/application, suggesting that only “law” is relevant. This includes the Spanish text, which is deemed equally authentic with the English and French: “toda persona que no sea considerada como nacional suyo por ningún Estado, conforme a su legislación.” Litigators in countries using versions of the text which are incorrectly translated who wish to rely on the discussion of the definition in the UNHCR *Handbook on Protection of Stateless Persons* may need to draw attention to these discrepancies. (See also Gabor Gyulai, “Should nationality have a ‘minimum content’? – Italian Supreme Court passes landmark decision” (blog post) European Network on Statelessness, 19 September 2014, <https://www.statelessness.eu/updates/blog/should-nationality-have-minimum-content-italian-supreme-court-passes-landmark-decision>.)

² UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons*, 2014, para. 23. <https://www.refworld.org/policy/legalguidance/unhcr/2014/en/122573>.

³ See the discussion of “own country” in UN Human Rights Committee, ‘General Comment No. 27: Article 12 (Freedom of Movement)’, CCPR/C/21/Rev.1/Add.9 (Geneva, 2 November 1999), <https://www.refworld.org/pdfid/45139c394.pdf>.

⁴ On this distinction, see *Handbook on Protection of Stateless Persons*, supra n 2, paras 1, & 58–59; Caia Vlieks, “Contexts of Statelessness: The Concepts ‘Statelessness in Situ’ and ‘Statelessness in the Migratory Context’” in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017).

A - Stateless persons and undocumented nationals: Avoiding the term “de facto stateless”

People who appear to be nationals of a country according to the letter of the law, but are not treated as such by the authorities, are sometimes described as “de facto stateless”. There is, however, no recognised definition of a “de facto stateless person”.⁵ In its Handbook on Protection of Stateless Persons, UNHCR refers simply to “stateless persons”, advising that statelessness is a “mixed question of fact and law”, and warning that using the term “de facto stateless” may lead to a person not receiving the protection that should be due.⁶

The lack of a definition of “de facto statelessness” makes the term especially likely to be problematic in litigation. If it is argued that a person is a national under the law of the state where litigation is being considered, then recognition of that nationality is the remedy, accompanied by the issue of the relevant identity documents. If the person is not a national of that state, and as a matter of law and fact nationality is not recognised by the authorities of any other relevant country, the person is simply “stateless”, and international law provides the right either to acquire the nationality of the state of birth, or to protection as a stateless person. If a child born in the country cannot acquire the nationality of either parent (or the parents are stateless or of unknown nationality), then grant of nationality of the country of birth is the required remedy under the 1961 Convention on the Reduction of Statelessness, the American Convention on Human Rights, the European Convention on nationality, the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights relating to the Specific Aspects of the Right to a nationality and the Eradication of Statelessness in Africa, and, arguably, customary international law (► [section 7.2: The right of every child to acquire a nationality](#)).

If a person outside the country of birth is not recognised by the state of birth (nor by any other country) as its national, and requires protection of the state of residence, then legal recognition of stateless person status is the remedy, or, if that does not exist in national law, some other form of legal residence permit; in both cases with a pathway to acquire nationality. If the stateless person is a child, it may be argued that immediate grant of nationality is in the child’s best interests.

The term “de facto statelessness” is also often not a helpful term in other advocacy. Although “de facto statelessness” may convey an idea of the lived reality of those affected, it blurs the question of responsibility to resolve the situation. On the one hand, it may confirm a prejudice that those affected are “really” foreigners, even if they should under the law be recognised as nationals or have a right to acquire nationality. On the other hand, for those who do not have a provable claim to nationality anywhere, it may obscure the recognition of their very real statelessness, and block their protection as stateless persons.⁷

2.2. Nationality

The Convention on Certain Questions Relating to the Conflict of nationality Laws adopted by the League of Nations in 1930 (hereafter the “1930 Convention on the Conflict of nationality Laws”) provides in its Article 1 that: “It is for each State to determine under its own law who are its nationals”. The Convention did not, however, define “nationality”.

The definition most commonly used today in international law (but not established by any UN treaty) is provided by the European Convention on nationality adopted in 1997: “nationality” means the legal bond between a person and a State and does not indicate the person’s ethnic origin”. This definition has been adopted by the Inter-American Court on Human Rights in its jurisprudence, and by the African Union in the Protocol to the African Charter on Human and Peoples’ Rights relating to the Specific Aspects of the Right to a nationality and the Eradication of Statelessness in Africa adopted in 2024 (hereafter “the Protocol to the African Charter on the Right to a nationality”).

⁵ The only mention of “de facto statelessness” in an international legal instrument is in the Final Act adopting the 1961 Convention on the Reduction of Statelessness, in which the conference adopting the treaty “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.” The original application of the term was in relation to those who are “outside the country of their nationality but cannot avail themselves of its protection” (and are thus in a similar position to refugees, except that they do not have a “well-founded fear of persecution”). This definition dates back to a 1949 “Study of Statelessness” adopted by an “Ad Hoc Committee on Refugees and Stateless Persons” established by the UN in the aftermath of World War II, <https://www.refworld.org/docid/3ae68c2d0.html>. The terminology was reviewed at a UNHCR Expert Meeting held in 2010. This led to the abandonment of the term “de facto stateless” in the Guidelines on Statelessness No. 1, on the definition of stateless person, adopted in 2012, and later incorporated into the *Handbook on Protection of Stateless Persons*, supra n 2. (For background, see the discussion paper for the meeting: Hugh Massey, “UNHCR and De Facto Statelessness”, UNHCR, April 2010; and its conclusions: “The Concept of Stateless Persons under International Law” (the “Prato Conclusions”), UNHCR, May 2010, <http://www.refworld.org/docid/4ca1ae002.html>).

⁶ *Handbook on Protection of Stateless Persons*, supra n 2, paras 7. and 23. UNHCR does still use the term “de facto stateless”, but in more limited contexts with reference to refugees, especially if there is no recognised refugee status in the state where they are resident, because they are outside their country of nationality and cannot avail themselves of protection of that state. The Handbook also uses the term “de facto” stateless persons in part 3, in relation to migrants who cannot return to a country of nationality; for example, because of a (temporary) lack of consular assistance: *Handbook on Protection of Stateless Persons*, supra n 2, para. 166.

⁷ Discussed in: Bronwen Manby, “Schrödinger’s Citizenship: What’s at Stake in the Terminology of Statelessness”, *Statelessness and Citizenship Review*, Vol.6, no. 1 (2024), pp. 5-37.

Also widely cited is the definition provided by the International Court of Justice (ICJ) in the 1955 *Nottebohm* case between Liechtenstein and Guatemala:

[N]ationality 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. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.⁸

The facts of the *Nottebohm* case were limited to a state's right to refuse to recognise an exercise of diplomatic protection by another state on behalf of an individual without sufficient connection to the other state. The definition has been heavily criticised for implying that such genuine connections are essential for recognition of a person's legal nationality, potentially providing grounds for loss or deprivation of nationality.⁹ However, it has also been referenced in support of the positive right to a nationality based on such connections (► [section 7.2](#)).

2.3. “Nationality” or “citizenship”?

In international law, nationality and citizenship are now used as synonyms; the terms can be used interchangeably in English, though “nationality” is more commonly used in international treaties. Neither term has any connotation of ethnic or racial content, but is simply the legal status that gives a person certain rights and obligations in relation to a particular state. At national level, either term may be used, according to the legal tradition of the particular country concerned. Litigators must pay attention both to the correct usage of the different terms in law in the relevant jurisdiction, and to the wider resonances of each term in the national context. “Citizenship” often carries connotations of participation and voice in society, while “nationality” may suggest an ethnic content. In international law, however, the terms do not have these different meanings.

This Guide uses the term nationality in relation to international law (unless referring to a text where citizenship is used) and the terms nationality or citizenship as they are used national level.

2.4. The modes of acquisition and loss of nationality

Most people obtain a nationality at birth, by operation of law. nationality attributed at birth by operation of law is generally termed “nationality of origin” in civil law countries; while in the common law countries the term used may be citizenship by birth (if born in the country) or citizenship by descent (if born outside the country). However, terminology is not consistent across countries (even in countries within the same general legal tradition), which can lead to confusion in understanding the different meanings of what appear to be the same terms in other languages or jurisdictions.

In determining the nationality of a child at birth, most states combine the two basic concepts known as *jus soli* (literally, law or right of the soil), whereby an individual obtains nationality based on birth in a particular country (or if both that person and one parent were born there); and *jus sanguinis* (law or right of blood), where nationality is based on descent from parents (or grandparents) who themselves are citizens.¹⁰

Another distinction is also often important, between nationality attributed at birth and nationality that is acquired later in life based on an application that is founded on a strong connection to the country (such as marriage to a national or long residence). In this context, national laws may distinguish between “attribution” of nationality (automatic, by operation of law, most often but not only at birth) or “acquisition” of nationality (based on an application, where the state may also have discretion to deny or reject nationality). In other legal traditions, however, “acquisition” is used to cover both attribution at birth and later acquisition based on an application.

Similarly, international law (the Convention on the Reduction of Statelessness of 1961) makes a distinction between “loss” of nationality (automatic, by operation of law), and “deprivation” of nationality (for which an administrative decision must be taken, whether by a court or the executive branch). This distinction may be made in national laws,

⁸ *Nottebohm Case (Liechtenstein v. Guatemala)* (second phase), ICJ Reports 4 (International Court of Justice 1955), p.23.

⁹ Robert D. Sloane, “Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality”, *Harvard International Law Journal* Vol. 50, no. 1 (2009), pp.1–60; Audrey Macklin, “Is It Time to Retire Nottebohm?”, *AJIL Unbound* 111 (2017), pp.492–97; Rayner Thwaites, “The Life and Times of the Genuine Link”, *Victoria University of Wellington Law Review* Vol. 49, no. 4 (2018), pp.645–70.

¹⁰ Comprehensive information on the multiple possible modes of acquisition and loss of nationality in all countries of the world are provided in datasets compiled by the GLOBALCIT project of the European University Institute. Maarten Vink, Luuk van der Baaren, Rainer Bauböck, Jelena Džankić, Iseult Honohan and Bronwen Manby (2023). GLOBALCIT Citizenship Law Dataset, v2.0, Country-Year-Mode Data ([Acquisition]/[Loss]). Global Citizenship Observatory, <https://globalcit.eu/databases/globalcit-citizenship-law-dataset/>.

but usage is not consistent.

This Guide uses the terms applied in the relevant national context, and in the international law context distinguishes between attribution and acquisition, and between loss and deprivation of nationality, as outlined in this section.

2.5. Civil registration, birth registration and legal identity

Civil registration does not have a definition established by treaty, but nonetheless has a longstanding and widely accepted definition in international policy as “the continuous, permanent, compulsory and universal recording of the occurrence and characteristics of vital events pertaining to the population, as provided through decree or regulation in accordance with the legal requirements in each country”.¹¹ Birth registration, by extension, is “the continuous, permanent and universal recording, within the civil registry, of the occurrence and characteristics of births, in accordance with the legal requirements of a country”.¹² The detailed content of civil registration and birth registration, including the specific “characteristics” to be recorded, has wide variation, as indicated by the proviso “in accordance with the legal requirements of a country”.¹³

Sustainable Development Goal (SDG) Target 16.9 establishes the target to “provide legal identity for all, including birth registration”. The term “legal identity” did not have a pre-existing definition, but since the adoption of the SDG Target, the UN has established an operational definition:

Legal identity is defined as the basic characteristics of an individual’s identity. e.g. name, sex, place and date of birth conferred through registration and the issuance of a certificate by an authorized civil registration authority following the occurrence of birth. In the absence of birth registration, legal identity may be conferred by a legally-recognized identification authority. This system should be linked to the civil registration system to ensure a holistic approach to legal identity from birth to death. Legal identity is retired by the issuance of a death certificate by the civil registration authority upon registration of death.¹⁴



Switzerland. Formerly stateless lawyer Neha Gurung. © UNHCR/Susan Hopper

¹¹ UN Statistics Division, “Principles and Recommendations for a Vital Statistics System, Revision 3” (2014), para. 279, <http://unstats.un.org/unsd/demograph-ic/standmeth/principles/M19Rev3en.pdf>.

¹² UNICEF, “A Passport to Protection: A Guide to Birth Registration Programming” (2013), <https://www.refworld.org/docid/52b2e2bd4.html>.

¹³ Discussed in Bronwen Manby, “Legal Identity for All’ and Statelessness: Opportunity and Threat at the Junction of Public and Private International Law”, *Statelessness & Citizenship Review*, Vol. 2, no. 2 (2020), pp. 248–71.

¹⁴ United Nations Legal Identity Agenda, <https://unstats.un.org/legal-identity-agenda/>.

3. LITIGATION AS AN ADVOCACY STRATEGY



KEY MESSAGES

- The impacts of litigation can be considered at different levels:
 - Material impacts, such as grant or recognition of nationality to individuals or a category of persons, or compensation for harm suffered;
 - Instrumental impacts, such as changes to law and policy, including reforms to nationality law or to procedures for birth registration or issuance of identity documents;
 - Immaterial impacts, such as validation of a cause or changes to public and official perceptions and discourse.
- Impacts may be felt at national level, across borders (especially in countries with similar legal systems), or in the development of international norms.

Statelessness and nationality are defined and created by national law—to a greater extent, perhaps, than any other question of rights—so legal remedies will almost always be needed for those excluded from recognition. Litigation has an important role in shaping those remedies.¹⁵ Strategic litigation—“legal action in a court that is consciously aimed at achieving rights-related changes in law, policy, practice, and/or public awareness above and beyond relief for the named plaintiff(s)”¹⁶—has a potentially game-changing role. A case before a high-level court can provide a fulcrum for wider advocacy for years to come, elevating the status of an issue in the eyes of the media, politicians and wider public, and shaping the narrative of what is happening. Litigation can make visible the particular viciousness of exclusion from nationality among disadvantaged groups generally ignored by wider society.

Litigation has been key to the crystallising of an international normative framework on nationality for a century—dating back to the 1923 *Tunis and Morocco Decrees* opinion of the Permanent Court of International Justice which first explored the scope and limits of state discretion in attributing nationality.¹⁷ In recent decades, litigation before regional courts in particular has clarified the idea of nationality as a right of individuals with corresponding duties for states, and not a matter that is solely within the discretion of states.

While this Guide has a particular focus on litigation conceived of as strategic, especially when heard before apex courts at national level, or brought in regional or international fora, the objective is to provide a resource for any litigation on these issues—especially since cases often take on a “strategic” character only after they are initiated. Litigation on a case-by-case basis may also be a critical tool to seek a remedy for individuals denied nationality and/or identity documents. Or litigation may simply be the most effective tool available to deploy in the interests of any individual—with no need for a broader impact to be considered effective. Any such case may end up in a superior court and establish an important precedent or endorse an interpretation of the law that unblocks resolution of a number of other cases. The best strategy may be to file numerous cases on the same issue, sensitising judges and building popular awareness over time rather than seeking from the outset to achieve a single landmark judgment (► [section 4: Developing a litigation strategy](#)).

Doing (taking offbeat cases with open-ended positive potential) is far more important than thinking (endlessly designing ‘perfect’ cases with outcomes any expert can predict). ...[S]trategic litigation means trying to secure legal judgments that:

- *the defendants (and those like them) were previously incapable of imagining;*
- *have an enormous impact outside the courtroom (e.g., by forcing someone to pay a lot of money or dismantle an entrenched system that affects many people);*
- *and seem explainable and predictable only in retrospect.*

That last point is so important: Roma (or whoever benefits from the litigation) need to be able to make these cases part of their emancipation story, so that litigation becomes part of the movement. Strategic cases are unforeseen for the oppressors and ‘retroactively inevitable’ for the liberated.¹⁸

¹⁵ Laura Bingham and Liliana Gamboa, “Litigating against Statelessness” in *Solving Statelessness*, ed. Laura van Waas and Melanie Khanna (Wolf Legal Publishers, 2017), pp.129–61; see also analysis in Neha Jain, “Manufacturing Statelessness”, *American Journal of International Law* Vol. 116, no. 2 (2022), pp. 237–88.

¹⁶ James A. Goldston and Erika Dailey, *Strategic Litigation Impacts: Insights from Global Experience* (New York: Open Society Justice Initiative, 2018), p.25, <https://www.justiceinitiative.org/publications/strategic-litigation-impacts-insights-global-experience>.

¹⁷ *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion No. 4, PCIJ, Ser. B, No. 4, 1923, Permanent Court of International Justice, 1923.

¹⁸ Adam Weiss, “What is Strategic Litigation?” (blog post), European Roma Rights Centre (ERRC), 1 June 2015, <http://www.errc.org/news/what-is-strategic-litigation>. The ERRC is a public interest law organisation working to combat racism and human rights abuse of Roma.

3.1. The impact of litigation

*The process of articulating claims and securing rulings, framed in the language of legal entitlement and legal obligation, invokes, reaffirms, and, at times, alters society's most considered and explicit promises to itself.*¹⁹

The potential impacts of strategic litigation to enforce rights were comprehensively analysed in a series of reports by the Open Society Justice Initiative published in 2018, arguing for the importance of litigation as “a distinctive form of advocacy”.²⁰ The synthesis report proposed that the impacts of litigation could be conceived of at three levels: material (direct benefit to the client), instrumental (changes in law or policy), and non-material (changes that are impossible to quantify, such as changes in public discourse or the empowerment of organisations representing an affected community).²¹

Taking this three part typology of impact, the potential impacts of litigation on the right to a nationality could perhaps be set out as follows:

- **Material impacts** include direct remedies secured by litigation, such as the recognition, restoration or grant of nationality, the issue of identity documents, and/or compensation for harm suffered.
- **Instrumental impacts** include reforms to nationality law, changes in identification policies in relation to proof of nationality, as well as development of international normative standards.
- **Non-material impacts** include the sense of validation of their cause felt by a particular person or individual group struggling for or deprived of nationality, or changes in public discourse in relation to stateless persons by policy makers and society in general.²²

These impacts may also be felt at national level, across borders, and in the international normative framework.

3.2. Impacts at national level

It may be hard to separate out the impact of litigation from other forms of advocacy. But the following cases are examples where litigation made an important contribution for the resolution of the situation of the individual(s) and/or to broader law and policy changes:

- **Australia:** In 2022, Australia's High Court (the highest national court) ruled unconstitutional the powers given to the Minister for Home Affairs under the Australian Citizenship Act to revoke citizenship on grounds that the person's acts demonstrated “repudiation of allegiance to Australia.” The court restored the Australian citizenship of the plaintiff in the case, which had been removed in 2017 on grounds that he had travelled to Syria to fight with Islamic State.²³ A newly-elected government accepted the reasoning of the court and indicated that it would not seek to reinstate a similar power.²⁴
- **Bangladesh:** In 2003 and 2008, Supreme Court of Bangladesh judgments ordered the government to recognise citizenship and issue the necessary identity documents to more than 300,000 stateless Urdu-speakers in Bangladesh, unrecognised since the separation of East and West Pakistan in 1971.²⁵ While the community continues to face discrimination and difficulties in accessing nationality documentation, the ruling changed many lives.²⁶ (► [focus box I](#))
- **Botswana:** In an important decision on the equality of men and women in the right to transmit nationality to their children, the Botswana Court of Appeal ruled in 1992, in the case brought by Unity Dow, that the provisions of the Citizenship Act preventing women from transmitting citizenship to their children with a foreign spouse were unconstitutional. The law was amended as a direct result of the judgment to remove discrimination based on sex

¹⁹ Goldston & Dailey, Strategic Litigation Impacts, supra n 16, p.34.

²⁰ *Ibid.* The report was based on a series of four thematic reports examining the effects of strategic human rights litigation on desegregation of Roma in European schools, on equal access to quality education, on indigenous peoples' land rights, and on ending torture in police custody.

²¹ *Ibid.*, pp. 43–44.

²² Bingham & Gamboa, “Litigating against Statelessness”, supra n 15.

²³ Alexander v. Minister for Home Affairs [2022] HCA 19, Judgment of 8 June 2022, S103/2021, <https://eresources.hcourt.gov.au/downloadPdf/2022/HCA/19>

²⁴ Rayner Thwaites, “Citizenship deprivation as banishment: The High Court of Australia in Alexander's case” (blogpost), GLOBALCIT, 11 July 2022, <https://globalcit.eu/citizenship-deprivation-as-banishment-the-high-court-of-australia-in-alexanders-case/>.

²⁵ Writ Petition No. 3831 of 2001, High Court of Bangladesh, Judgment of 5 May 2003; Writ Petition No 10129 of 2007, High Court of Bangladesh, Judgment of 18 May 2008. Both judgments available in: Namati and Council of Minorities, “Citizenship Rights of Urdu-Speaking Bangladeshis: The Milestone Judgements of the Bangladeshi High Court” (2015), <https://namati.org/resources/citizenship-rights-of-urdu-speaking-bangladeshis/>.

²⁶ “Good Practices Paper – Action 1: Resolving Existing Major Situations of Statelessness” (reissued), UNHCR, 2022, <https://www.refworld.org/docid/54e75a244.html>.

of the parent in transmission of citizenship to children.²⁷

- **Chile:** A case filed on behalf of children whose parents were recorded in the civil registry as “transient foreigners”, and who were therefore not recognised as Chilean nationals, led the Chilean Supreme Court to broker an amicable settlement, by which the government established the “Chile Reconoce” project, in conjunction with UNHCR, to resolve the situation of these children and recognise their Chilean nationality.²⁸
- **Colombia:** In January 2020, the Colombian Constitutional Court held that the National Civil Registry had “violated the rights to nationality of the applicants and legal personality of the children of the [children of Venezuelan refugees born in Colombia] by omitting to consider the risk of statelessness in which the children were at the time of birth.”²⁹ While the case was pending, both administrative and legislative measures addressed the status of Venezuelan children born in Colombia.³⁰ Although these measures were time-limited, it was estimated that more than 24,000 children immediately benefited from the grant of Colombian nationality.³¹ In 2021, a new migration policy was adopted that also provided for the recognition of stateless person status. (► [focus box H](#))
- **Denmark:** A refugee with documented psychosocial disability stemming from torture who was refused naturalisation for failure to satisfy the language requirements was eventually naturalised, as a result of advocacy including a case brought on his behalf before the European Court of Human Rights.³²
- **Hungary:** The Hungarian Constitutional Court declared unconstitutional the requirement that only a person with a regular migration status could initiate a statelessness determination procedure, unblocking the major barrier for protection of stateless persons in Hungary. The applicant was granted stateless status and regained entitlement to basic health care and employment, as well as identity documents enabling him to marry.³³
- **Italy:** Litigation before both national courts and the European Court of Human Rights assisted children born in Italy to acquire citizenship, and facilitated the grant of stateless status to stateless migrants, creating a pathway to acquire citizenship.³⁴
- **Kenya:** The African Committee of Experts on the Rights and Welfare of the Child and the African Commission on Human and Peoples’ Rights both adopted decisions condemning discrimination in Kenyan nationality administration, especially against children and adults of Nubian descent.³⁵ These cases formed part of a general campaign to bring recognition of the situation of the Nubians, most of whom are now recognised as Kenyan (though discriminatory practices remain). The decisions of the African regional human rights bodies have also been used in litigation on the impact of a new national identity number on the Nubians and other groups facing

²⁷ *Attorney-General v. Dow*, Court of Appeal, 3 July 1992, BLR 119 (CA) ; see also Lisa C. Stratton, “The Right to Have Rights: Gender Discrimination in Nationality Laws”, *Minnesota Law Review* Vol.77, no. 1 (1992), pp. 195–240.

²⁸ “Se presentaron los resultados de proyecto ‘Chile Reconoce’ Para dar nacionalidad chilena a hijos de extranjeros transeúntes”, Centro de Derechos Humanos UDP Clínica Jurídica de Migrantes y Refugiados, 9 January 2018, <https://www.udp.cl/se-presentaron-los-resultados-de-proyecto-chile-reconoce/>.

²⁹ “La entidad demandada vulneró los derechos de los accionantes a la nacionalidad y la personalidad jurídica de hijos de los accionantes al omitir considerar el riesgo de apatridia en el que se encontraban los niños en el momento del nacimiento.” *Sentencia T-006/20, Derecho a la nacionalidad de los niños y niñas hijos de extranjeros que se encuentran en riesgo de apatridia en Colombia*, Corte Constitucional, 17 January 2020, p. 50, <https://www.justiceinitiative.org/uploads/9b331832-404e-4d7d-8772-e98083aa9286/nationality-of-children-born-in-colombia-final-ruling-august-2020.pdf>. UNHCR also intervened in a similar case before the Constitutional Court: Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR), Colombia: Observaciones de la Oficina del Alto Comisionado de las Naciones Unidas para los Refugiados ante la Corte Constitucional de la República de Colombia en respuesta al Oficio OPTB – 1443/19, Expedientes T-7.206.829 y T-7.245.483 AC, Julio 2019, <https://www.refworld.org/es/jur/amicus/unhcr/2019/es/129655>.

³⁰ Registrador Nacional del Estado Civil, Resolución 8470 de 5 de agosto de 2019; Lei 1997 de 16 de setembro de 2019. See discussion in Miguel Ángel Rodríguez Vázquez, Flor María Ávila Hernández & Isidro de los Santos, ‘Reflexiones sobre nacionalidad, apatridia y derechos de los niños: Análisis comparado entre Colombia y República Dominicana’, *Novum Jus*, 14, no.2 (2020), 197–231.

³¹ “Colombia otorga nacionalidad a 24.000 niños y niñas nacidos de padres y madres venezolanos”, CEJIL, 5 August 2019, <https://cejil.org/comunicado-de-prensa/colombia-otorga-nacionalidad-a-24-000-ninos-y-ninas-nacidos-de-padres-y-madres-venezolanos/>.

³² *HP v. Denmark*, Application no. 55607/09, European Court of Human Rights (Second Section), Decision of 19 January 2017, <https://hudoc.echr.coe.int/eng?i=001-170625>; See case summary, <https://www.justiceinitiative.org/litigation/hp-v-denmark>.

³³ *Decision no.6/2015 of 25 February 2015*, Constitutional Court of Hungary, see Gábor Gyulai, “Hungarian Constitutional Court Declares that Lawful Stay Requirement in Statelessness Determination Breaches International Law” (blog post), European Network on Statelessness, 2 March 2015, <https://www.statelessness.eu/updates/blog/hungarian-constitutional-court-declares-lawful-stay-requirement-statelessness>; the European Court of Human Rights found violations of the right to private and family life on the same facts: *Sudita Keita v. Hungary* (application no. 42321/15), ECtHR judgment of 12 May 2020, <https://caselaw.statelessness.eu/caselaw/ecthr-sudita-keita-v-hungary>.

³⁴ See for example case summaries at the Open Society Justice Initiative website in the cases of *Izeni* (national courts), <https://www.justiceinitiative.org/litigation/iseni-v-italian-ministry-interior> and *Dabetić* (ECtHR), <https://www.justiceinitiative.org/litigation/dabeti-v-italy>, as well as the ENS caselaw database entries on Italy at https://caselaw.statelessness.eu/caselaw-search?caselaw%5B0%5D=state_party%3A512; and the judgment of the Court of Cassation, *Sentenza 4262/2015*, Corte Cassazione, 3 March 2015, <http://www.apolidia.org/index.php/giurisprudenza/44-corte-di-cassazione/100-cassazione-civile-sentenza-n-4262-del-03-03-2015>. Although the ECtHR deemed the *Dabetić* case inadmissible in November 2022 (European Court of Human Rights, *Dabetić v. Italy* (dec.), no. 31149/12, 18 October 2022), the application to the ECtHR had also formed part of the context in which national procedures were improved.

³⁵ *Institute for Human Rights and Development in Africa and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. Kenya*, Communication no. 02/2009, African Committee of Experts on the Rights and Welfare of the Child, decision of 22 March 2011 (*the Kenyan Nubian children’s case*), <https://www.acerwc.africa/en/communications/institute-human-rights-and-development-africa-ihra-and-open-society-justice>, *Nubian Community in Kenya v. Kenya*, Communication No. 317/06, African Commission on Human and Peoples’ Rights, decision of 28 February 2015, <https://achpr.au.int/en/decisions-communications/nubian-community-kenya-v-republic-kenya>.

discrimination under the existing systems.³⁶ The result of these efforts has been new legislation on identification and data protection that has improved on existing legal frameworks. (► [focus box D](#))

- **Netherlands:** In January 2021, the UN Human Rights Committee (HRC) called on the Netherlands to enact a framework for addressing statelessness, the first endorsement by a UN treaty body of the obligation of states to grant nationality to otherwise stateless children born in their territory.³⁷ Just over a year later, the Netherlands finally enacted a long-pending law to establish such a procedure—a major step forward, even though it would not resolve all the problems highlighted by the HRC.³⁸ (► [focus box C](#))
- **South Africa:** Litigation before the South African courts on behalf of the child of Cuban parents born in South Africa who could not acquire the nationality of her parents eventually resulted in a settlement in which the government agreed to an order declaring that she was a South African citizen by birth, in accordance with the provisions of the constitution and South African Citizenship Act, and in addition to adopt regulations to allow other stateless children to apply for citizenship.³⁹ A judgment in a similar case also ordered the government to adopt regulations.⁴⁰ (Although the individuals were assisted, the government did not, however, adopt the required regulations by the time of publication for this report.)
- **Spain:** In 2021, a Spanish court recognised as a Spanish national a child who was born in transit in Morocco, while her mother was on a journey from Cameroon to Spain. The birth was not registered. The court recognised that although the child appeared in law to be entitled to Cameroonian nationality, she could not acquire it in practice without a birth certificate and additional bureaucratic procedures. She—and potentially many other children in similar situation—was recognised as stateless, and therefore entitled to Spanish nationality. The government did not appeal the decision.⁴¹
- **Sudan:** Following the secession of South Sudan in 2011, Sudan adopted amendments to its nationality law stating that any person who had “de jure or de facto” acquired South Sudanese nationality would lose Sudanese nationality by operation of law. Although the Sudanese constitution provided for equal rights of women and men to transmit nationality to children, the Sudanese government began to apply these amendments to deny Sudanese nationality to children with one Sudanese parent and one parent (especially the father) considered to have acquired South Sudanese nationality. A representative case was brought before the African Committee of Experts on the Rights and Welfare of the Child which ruled Sudan in violation of the provisions of the African Charter on the Rights and Welfare of the Child.⁴² The Sudanese government then amended the law and recognised the nationality of many children of mixed parentage.⁴³ (► [sections 7.2](#) and [7.3](#).)

3.3. Impacts across borders

Strategic litigation may also have impacts across borders. This is most obviously the case for decisions of the regional and international courts and treaty bodies; indeed, in the most contested situations, the principles established by such cases may have more influence in another country than they do in their own.

Cases at national level, especially from similar legal systems, may also be persuasive in another country:

- The Indian Supreme Court decision on the Aadhaar identification system in India⁴⁴ has been cited by courts in

³⁶ Grace Mutung'u, “Digital Identity in Kenya: Case Study”, in *Towards the Evaluation of Digital ID Ecosystems in Africa: Findings from Ten Countries*, Research ICT Africa 2021, <https://researchictafrica.net/publication/digital-identity-in-kenya-case-study-conducted-as-part-of-a-ten-country-exploration-of-socio-digital-id-systems-in-parts-of-africa/>.

³⁷ *DZ v. The Netherlands*, CCPR/C/130/D/2918/2016, UN Human Rights Committee, 20 January 2021. See also Laura Bingham and Jelle Klaas, “A Victory for Human Rights in Zhao v. the Netherlands (the ‘Denny case’): Nationality from Birth, Without Exceptions” (blog post), European Network on Statelessness, 14 January 2021, <https://www.statelessness.eu/updates/blog/victory-human-rights-zhao-v-netherlands-denny-case-nationality-birth-without-exceptions>.

³⁸ Caia Vlieks and Marlotte van Dael, “The Endless Waiting Has Destroyed Me—Will the Statelessness Bills Discussed in the Dutch Parliament This Week Bring a Solution for Stateless People in the Netherlands?” (blog post), European Network on Statelessness, 9 May 2022, <https://www.statelessness.eu/updates/blog/endless-waiting-has-destroyed-me-will-statelessness-bills-discussed-dutch-parliament>.

³⁹ *Minister of Home Affairs and others v. DGLR and another*. Case no. 1051/2015, Supreme Court of Appeal, South Africa, consent order dated 6 September 2016. Documents in the case, including the court order, <http://citizenshiprightsafrika.org/south-africa-dglr-and-another-vs-minister-of-home-affairs-and-others/>. See also *Khoza v Minister of Home Affairs and Another* [2023] ZAGPPHC 140; 6700/2022; [2023] 2 All SA 489 (GP) (27 February 2023), <https://www.saflii.org/za/cases/ZAGPPHC/2023/140.html>.

⁴⁰ *Minister of Home Affairs v Ali and Others* (1289/17) [2018] ZASCA 169; 2019 (2) SA 396 (SCA) (30 November 2018), <https://www.saflii.org/za/cases/ZASCA/2018/169.html>.

⁴¹ José Alberto Navarro, Laura Lozano, and Cristina Manzanedo. “Landmark Judgment from Spain: Court Grants Spanish Nationality to a Stateless Child Born En Route (a case of ‘invisible children’)”, European Network on Statelessness (blog), 7 July 2022, <https://www.statelessness.eu/updates/blog/landmark-judgment-spain-court-grants-spanish-nationality-stateless-child-born-en-route>.

⁴² *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) (on behalf of Iman Benjamin) v. Republic of Sudan*, Communication no. 005/Com/001/2015, African Committee of Experts on the Rights and Welfare of the Child, decision of 4 May 2018 (ACJPS & PLACE (Benjamin) v. Sudan).

⁴³ Mohamed Abdelsalam Babiker, *Report on Citizenship Law : Sudan* (European University Institute, 2022), <https://cadmus.eui.eu/handle/1814/74634>.

⁴⁴ *Justice KS Puttaswamy (Retd.) and Another v. Union of India and Others* Writ Petition (Civil) No. 494 of 2012, Supreme Court of India, Judgment of 26 September 2018, https://main.sci.gov.in/supremecourt/2012/35071/35071_2012_Judgement_26-Sep-2018.pdf.

both Jamaica⁴⁵ and Kenya.⁴⁶ The Kenyan decision was in turn drawn on by Jamaican civil society for submissions to parliament on proposed new legislation.⁴⁷ The decisions were also referenced in litigation in Uganda, challenging the exclusionary nature of the existing digital ID system.⁴⁸

- The Colombian Constitutional Court cited jurisprudence on interpretation of the law by the Supreme Court in Chile in its judgment on children of Venezuelan parents born in Colombia.⁴⁹
- In 1994, the Zimbabwe Supreme Court used the *Unity Dow* case from Botswana (► [section 3.2](#)), as well as the jurisprudence of the Human Rights Committee on the International Covenant on Civil and Political Rights to hold that the freedom of movement guaranteed by the Constitution of Zimbabwe entitled a female citizen of Zimbabwe married to a foreign citizen to reside permanently with her husband in Zimbabwe.⁵⁰

3.4. Impacts on the interpretation of international law

Litigation in different jurisdictions in recent years has created an interlocking web of normative statements in which courts have built on each other's advances, establishing the commonalities among rights violations in different factual situations, and the remedies required.⁵¹

Perhaps the most strongly established limits to state discretion are in the area of **due process and arbitrary denial of nationality and/or identity documents**; that is, the protection of those refused recognition of nationality to which they are entitled in law but are prevented from accessing because of insurmountable administrative obstacles. The judgment of the Inter-American Court of Human Rights in the case of the *Girls Yean and Bosico* against the Dominican Republic was the first to affirm the right to nationality so clearly at international level, and the constraints on state discretion in this regard (► [focus box B](#)).⁵² The judgment has been widely cited in national and other regional fora.

The interpretation of the **definition of "stateless person"** established by the 1954 Convention relating to the Status of Stateless Persons has also evolved to include consideration of the view of UNHCR that statelessness is a "mixed question of fact and law", moving away from an excessively legalistic analysis restricted to only the nationality law. In particular, it has been held that a theoretical right to another nationality does not relieve a state of its obligations to children born in its territory. In 2021, the **obligation of states to grant nationality to otherwise stateless children** born in their territory was finally affirmed by an international treaty body, in the views of the UN Human Rights Committee in the case of *DZ v. The Netherlands*.⁵³ (► [focus box C](#))

Several cases have addressed **discrimination on racial and ethnic grounds** in grant or recognition of nationality, establishing important limits to the language recognising state discretion in the Convention on the Elimination of all forms of Racial Discrimination. The *Yean and Bosico* judgment affirmed the obligation of states to avoid racial discrimination and ensure equal and effective protection of the law. The African Commission on Human and Peoples' Rights has added an emphasis on the avoidance of discrimination based on characteristics that can be attributed to the colonial era, including the drawing of borders and forced movement of labour. The General Comment of the African Committee of Experts on Article 6 of the African Charter on the Rights and Welfare of the Child also drew on its own decision in the *Kenyan Nubian Children's case*⁵⁴ as a foundation to expand the interpretation of the right to a nationality to a broader category of children born in the territory than only foundlings (those found as children in the territory of unknown parents) and those who are otherwise stateless.⁵⁵

⁴⁵ *Robinson v. Attorney General of Jamaica*, Case Number: 2018HCV01788, Supreme Court of Jamaica, Judgment of 12 April 2019 [2019] JMFC Full 04, para. 84, <https://supremecourt.gov.jm/content/robinson-julian-v-attorney-general-jamaica>.

⁴⁶ *Nubian Rights Forum & 2 others v. Attorney General and 6 others; Child Welfare Society and 9 others (Interested Parties)*, Petitions 56, 58 & 59 of 2019 (Consolidated), High Court of Kenya at Nairobi, Judgment of 30 January 2020 [2020] eKLR, <http://kenyalaw.org/caselaw/cases/view/189189/>.

⁴⁷ *Jamaicans for Justice and 11 others*, Submission to the Joint Select Committee of Parliament Reviewing the National Identification and Registration Act (2020), February 2021, <https://www.accessnow.org/cms/assets/uploads/2021/03/Jamaica-Digital-ID-NIDS-Coalition-Submission-Feb-2021.pdf>.

⁴⁸ Nita Bhalla, "Uganda Sued over Digital ID System that Excludes Millions", *Reuters*, 16 May 2022, <https://www.reuters.com/article/uganda-tech-biometrics-idUKL3N2X32RG>.

⁴⁹ *Sentencia T-006/20*, supra n 29, pp.22-23, 58.

⁵⁰ *Rattigan v. Chief Immigration Officer, Zimbabwe*, Supreme Court of Zimbabwe, 1995 (2) SA 182 (Zimb.).

⁵¹ Bingham & Gamboa, "Litigating against Statelessness", supra n 15.

⁵² *Case of the Girls Yean and Bosico* **Girls Yean and Bosico v. Dominican Republic**, Series C No. 130, Judgment of 8 September 2005, <https://www.refworld.org/jurisprudence/caselaw/iactrhr/2005/en/20987>. The Yean and Bosico case built on the Court's earlier Advisory Opinion OC-4/84 on Amendments to the Nationalisation Provisions of the Constitution of Costa Rica.

⁵³ *DZ v. The Netherlands*, CCPR/C/130/D/2918/2016, 20 January 2021, <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRi-CAqhKb7yhstmlouj%2F14z6o8l4G3YJPkxgZbjfVoFnUxDYNf5e2B5e%2BzpsOxE43guYFpKxUJGRB6fV0qixA4nVIZpg%2Btup1LygYiRxx7J256K6D9A3U7-xG6bSBDv9g4CwKwj6QZzVA%3D%3D>.

⁵⁴ Supra n 35.

⁵⁵ African Committee of Experts on the Rights and Welfare of the Child, General Comment No. 2: Right to a Name, Birth Registration and a Nationality (Art. 6), 2014, para. 100 (hereafter "ACERWC General Comment on Article 6"), <https://www.acerwc.africa/general-comments/>.

There are also important statements on the **positive right to a nationality**—even if statelessness is not proven—from the regional human rights treaty bodies, including in other cases against the Dominican Republic before the Inter-American Court of Human Rights, and against Côte d'Ivoire, Kenya, and Sudan before the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child.

These cases are analysed in greater detail in the sections that follow (especially ► [section 7: Legal arguments](#)).

4. DEVELOPING A LITIGATION STRATEGY

*Strategic human rights litigation is a process not a single legal intervention.*⁵⁶



KEY MESSAGES

- Assessment of the national context is essential, in order to consider if litigation is even the right tool, considering the political and legal environment.
- Risk assessment and consideration of what could go wrong is an important part of planning litigation.
- Litigation should be planned and conducted as part of a much wider advocacy ecosystem in which there is close cooperation among litigators, their individual clients, and the wider community of affected persons.
- A litigation strategy will have to consider the resources needed not only to launch a complaint but also to see it all the way through to a conclusion—potentially through several layers of appeal.
- There may be a choice of forum—of court or other jurisdiction—to which a case may be brought. The most obvious one may not always be the best.
- There may also be a choice of complainants and of defendants to be named as the parties to the case; this choice also has strategic implications.
- A key part of planning litigation is to prioritise the legal remedies desired, and to think through the evidence that must be presented to justify a request for the particular solutions.

Litigation before national, regional, and international courts and treaty bodies⁵⁷ is an important tool to defend and expand the right to a nationality. This includes both litigation that is planned as “strategic” and ordinary cases that seek only an immediate remedy—but may go on to provoke a change in law and policy. Litigation will, however, never be sufficient to secure all the changes that those litigating want to see in society, and there are potential downsides.

For the desired impacts to be realised, litigators must work closely with non-litigators, particularly with representatives of the community on whose behalf they are working, and embrace non-legal strategies that operate in parallel with the litigation. A multistakeholder strategy is needed, that plans for the long term, and sets out interim and alternative objectives as well as winning a case. Careful thought should be given to the specific purpose of the litigation itself, within this broader ecosystem.⁵⁸ Is it to seek a specific remedy from the courts for a single individual or group of affected persons? To prompt formal engagement with government and catalyse action beyond the court room on their behalf? Or is it to secure long-term law and policy changes? Litigators should consider the linkage between a positive outcome for an individual and the role that courts and tribunals have in shaping the progressive development of the law.

Before embarking on litigation, it is necessary first to consider the larger goal that motivates action: what are the most important challenges facing the individual or group on whose behalf litigation could be undertaken? And how do those challenges relate to nationality and/or identity documentation? The answers to these questions should inform the decision to litigate, and continue to inform the assessment of specific questions related to proposed litigation on access to nationality and identity papers. In addition, it is necessary to consider if the lawyers proposing to take on a case have the necessary expertise and time to devote to the case—and, if not, how can expertise and assistance be acquired. Thus, preliminary questions include:

⁵⁶ Goldston & Dailey, *Strategic Litigation Impacts*, supra n 20.

⁵⁷ Treaty bodies is used here as a term that includes all institutions with responsibility for oversight of human rights treaties at UN or regional levels.

⁵⁸ See also *Challenging Ethnic Profiling in Europe: A Guide for Campaigners and Organizers*, Open Society Justice Initiative, April 2021, chap. 6 “Using the Law” <https://www.justiceinitiative.org/publications/challenging-ethnic-profiling-in-europe-a-guide-for-campaigners-and-organizers>; *Litigation Toolkit on Statelessness for Legal Practitioners*, Volume 1, European Network on Statelessness and AIRE Centre, 2022, updated 2024 pp.8-10, <https://www.statelessness.eu/up-dates/publications/litigation-toolkit-statelessness-legal-practitioners>.

- Is litigation the right tool in the particular national context?
- What are the risks?
- What networks, alliances, and partnerships will be needed to make litigation successful?
- What resources are available to support the case?
- Before which forum should the case be lodged?
- Who should be the parties to the case—whether complainants or respondents?
- What remedies are required and possible to obtain?

This section will help to answer these questions.

4.1. Assessing the national context

“Context matters enormously” in the development of any strategic litigation strategy.⁵⁹ The first question may thus be whether litigation is the best tool to use to assist the potential complainants in a case. Who has the power to take a decision, or implement the remedies that could be ordered in a court judgment? Where there is political space, it may be more impactful to seek legal reform through the legislative process rather than the courts. Under a repressive regime, it can be hard to imagine how any outcomes might actually be achieved through the courts, interim or final.

There are preconditions to successful litigation that apply as much in cases related to nationality and identity documents as any other field:⁶⁰

- There is a need for a legal framework that provides at least one route to argue for the rights of those affected;
- There is a need for a sufficiently independent judiciary;
- There is a need for civil society organisations and lawyers that have the capacity to articulate the issues as rights violations and to litigate; and
- There is a need for the supporting network of organisations and activities to use the opportunities presented by litigation.

The context for litigation on nationality rights requires especial scrutiny. Long-standing minorities not recognised as citizens are usually amongst the most disfavoured groups in society, criminalised and/or seen as responsible for their own situation; while the rights of (people alleged to be) irregular migrants seldom receive broad public support. Denial of nationality or the issue of identity documents may be a tool to tip the balance of electoral power, creating high political stakes that could compromise a court case. These challenges are not reasons *not* to litigate, but they must be taken into account. Some landmark cases have been brought and won even within such contexts.

It may be hardest of all to build political, public, or judicial support for those deprived of nationality or denied identity documents on alleged national security grounds. In these cases, the international law principle that statelessness should be avoided may be the only argument available that both has purchase in law, and has a chance of garnering broader social support. But proof of the negative of statelessness can be difficult: almost everyone who is stateless is alleged by the authorities of the country of habitual residence to be “really” from somewhere else, where they could claim nationality (even in the face of substantial evidence that this is not the case, including direct denial by the authorities of that country).

The presentation of a case around recognition of nationality and issue of identity documents to the audience at national level (both the courts and the wider public) is therefore a critical consideration when setting out to litigate and construct a broader campaign. The framing chosen will depend not only on the arguments available in national law, but also on political concerns about the legal status of the complainants (► [section 5.1: Issue framing](#)).

4.2. Risks

Strategic litigation looks at the bigger picture by pursuing cases that have the potential to set important precedents, influence policy, and ensure that governments are carrying out their responsibilities. Yet, despite its potential, strategic litigation can be challenging for relatively under-resourced organisations. High-risk and resource-intensive, strategic cases require specific legal expertise and often span many years, with no guarantee of securing a positive outcome.⁶¹

⁵⁹ Goldston & Dailey, *Strategic Litigation Impacts*, supra n 20, p.33.

⁶⁰ Mónica Roa and Barbara Klugman “Considering Strategic Litigation as an Advocacy Tool: A Case Study of the Defence of Reproductive Rights in Colombia”, *Reproductive Health Matters*, Vol. 22, no. 44 (2014), pp.31–41.

⁶¹ Chris Nash, “Using Litigation to End Statelessness” (blog post), European Network on Statelessness, 16 July 2021, <https://www.statelessness.eu/updates/editorial/using-litigation-end-statelessness>.

Sometimes litigation is the obvious advocacy strategy to assist an individual or try to achieve systemic change. Sometimes going to court is the only option there is; worth trying despite the resource commitment and even if the transformational effect is doubted. But sometimes going to court may be the wrong choice, the risks outweighing the benefits. Any strategic litigation effort must therefore consider the potential risks.⁶²

The potential risks factors to consider include:

- **The lack of an independent judiciary.** If litigation is planned before national courts, the first question is the independence of the judges, at different levels, and their openness to rights-based arguments, especially on matters of statelessness and entitlement to nationality. Does discrimination against those perceived as outsiders mean that lack of sympathy for (alleged) non-nationals among the general public may also impact judges, if only to make them cautious to adopt a judgment challenging that perspective? In some national contexts, it may be that an interim court of appeal is more likely to be sympathetic than an apex constitutional or supreme court. If unsuccessful at first instance, what are the risks that a good appeal judgment will be appealed again by the government and definitively overturned—or might it be better to leave the situation at least somewhat ambiguous?
- **Potential negative consequences of a high-profile case.** Any litigation plan must analyse what the negative consequences might be of a high-profile case—even if it is successful. Litigation is by its nature confrontational and may close off negotiated solutions. If a case is controversial, for example because national security is invoked, is there a risk of creating a precedent that would have negative impacts on other less controversial situations? If litigation is undertaken too hastily, without full knowledge of the different aspects of national and international law, and without solid preparation of the case, there is a risk that an application may be dismissed without a full hearing of the arguments. The ruling of an international court or treaty body may be seen as illegitimate and provoke a nationalist response. What are the risks to clients: might there be a backlash against the individual applicants or the wider community? In any country, complainants and their representatives and partners may be exposed to unacceptable harassment because they are made more visible in the public eye. How can these consequences be mitigated?
- **Impact on solidarity among the different members of the group facing discrimination.** The need to distinguish among different categories of the excluded in order to advocate for specific remedies and prioritise solutions (► [section 4.7: Remedies I: Establishing the desired outcomes](#)) also has its risks in diminishing solidarity among the different members of the group facing discrimination. If only some can be helped, are hierarchies reinforced that are not helpful to an ultimate solution based in law reform that applies to all? At what point might the interests of different clients be in tension with each other, or with the broader strategic goal? Can these risks be mitigated by ensuring separate representation for individuals and groups whose interests may diverge? How can language barriers be bridged, imbalances of power between client and lawyer overcome, and trust be built?

Initial planning must think through these risks and how to mitigate them by reducing judicial anxiety at supporting the rights of those affected. For example, through **presentation of a case in a way that creates public sympathy and political support**, and also by **showing how a rights-supporting judgment flows from existing jurisprudence and social values**.



Uzbekistan. End statelessness for 50,000 people. © UNDP/Mirfozil Khasanov

⁶² See also discussion in *Litigation Toolkit on Statelessness for Legal Practitioners*, Volume 1, European Network on Statelessness and AIRE Centre, updated 2024, pp.10-12, <https://www.statelessness.eu/updates/publications/litigation-toolkit-statelessness-legal-practitioners>.

B - Case example: Contested impact of the Inter-American Court of Human Rights decisions concerning the Dominican Republic

The two states of the Dominican Republic and Haiti share the same Caribbean Island, and inter-twined histories. One of the strands of their relationship is the contested status of the children of Haitians who have migrated to work on sugar plantations in the Dominican Republic. Under the constitution in force until 2010, Dominican nationality was granted to “all persons born in the territory of the Republic, with the exception of legitimate children of foreigners resident in the country in diplomatic representation or in transit.” The “in transit” exception was legally applicable only to persons who were in the country for a period of 10 days or less. The births of the children of Haitian parents, however, were often not registered even if the parents were habitually resident in the Dominican Republic.

In 1998, a case was initiated against the Dominican Republic before the Inter-American human rights system by the International Human Rights Law Clinic at the University of California, Berkeley, in collaboration with the Center for Justice and International Law (CEJIL), Washington, DC, and the Movimiento de Mujeres Dominico-Haitianas (MUDHA). The case was brought in the name of Dilcia Yean and Violeta Bosico, two children born in the Dominican Republic, whose mothers had also been born in the Dominican Republic and had documents proving their Dominican nationality, but who were of Haitian descent. The mothers had been refused birth certificates for their children unless they produced a list of documents that were impossible to obtain.

In 2005, the Inter-American Court of Human Rights issued a ground-breaking judgment in the case, in which it affirmed the right to a nationality under the American Convention and in international law generally. The Court stated, more clearly than any other international human rights court or treaty body at that time, that discriminatory denial of nationality based solely on a parent’s migration status violates human rights. The *Yean and Bosico* judgment is widely cited across jurisdictions in relation to the right to a nationality, and represented a real step forward in international law and condemning practices in the Dominican Republic.

There was, however, also a backlash; both to the litigation itself and surrounding advocacy, and especially once the judgment was issued. In 2004, a new migration law was passed that expanded the definition of “in transit” to include all “non-residents”, a broad category which included undocumented migrants as well as people who could not prove their lawful residency in the country. According to this law, children of “non-residents” were not eligible for Dominican nationality. Dominican authorities soon began to invoke the new migration law to retroactively revoke the nationality even of Dominicans of Haitian descent who had previously held identity documents recognising nationality. In 2007, a new circular instructed the civil registry not to issue copies of identity documents when the applicants are children of “foreign parents.” The situation of Dominicans of Haitian descent deteriorated, with widespread refusal to recognise or renew existing birth certificates or identity documents.

Finally, in 2013, the Dominican Constitutional Court issued a judgment (*Sentencia TC 168-13*) which extended the denial of nationality to all those born in the Dominican Republic dating back to 1929, who could not prove that their parents had a regular immigration status.

This judgment itself provoked international outrage. In response, and providing a partial remedy, the Dominican Congress adopted a “special naturalisation law” the next year (*ley 169-14*) that provided a route to recognition of nationality for some of those affected by the retroactive denial of rights. This legislation separated the persons affected by the Constitutional Court judgment (*los afectados*) into two groups: Group A, who had a birth certificate, and Group B, whose births had never been registered. Several tens of thousands of people who had previously held birth certificates and identity documents were able to benefit from the law and recover their Dominican nationality; although several tens of thousands of others had no remedy other than applying for “naturalisation”, despite the strong arguments that the procedural lack of birth registration should not affect a substantive right to nationality.

In order to achieve this partial solution to the exclusion of people of Haitian descent born or resident in the Dominican Republic, there had been a need to shift the analytical framework from general racial discrimination and violations of the rights of sugar plantation workers, to consider the rights of different groups: those who were themselves migrants (born in Haiti, even if very long-term residents in the Dominican Republic); those who had been born in the Dominican Republic, but had no paperwork of any kind to prove it; those who had birth registration (only); and those who had, or whose parents had (previously) also held a national identity card (*cédula*) and/or passport. These distinctions enabled advocacy for the specific remedies necessary to resolve each type of case. An emphasis on the assault on the rule of law—represented by the arbitrary denial of nationality to people whose nationality had previously been recognised and documented—undermined arguments from the Dominican government and political elite that nationality is a matter of state sovereignty not subject to international constraint.

There is disagreement over the impact of litigation on denial of nationality in the Dominican Republic.⁶³ The *Yean and Bosico* case and the subsequent decision on the arbitrary expulsion of Dominicans and Haitians⁶⁴ clearly created a backlash. The ultimate identification of different groups of *afectados* arguably reduced solidarity among those of Haitian descent.

However, many of those involved consider that the overall impact was positive, in the context of a very difficult national environment of racism towards Haitian immigrants and people of Haitian descent. The Inter-American Court of Human Rights decisions gave the issue a visibility and undeniability that was new. The collaboration between national organisations and international partners took time to establish the best framing, but ultimately was successful in presenting the denationalisation of people of Haitian descent as a question of recognised rights and due process of law, providing the basis for wider social support among other Dominicans. The Dominican government was repeatedly challenged on the situation in international fora; and the fact that the decision was from the Inter-American Court made its findings more difficult to discredit than if it had come from the UN. The detailed arguments of judgment are also cited across many other jurisdictions, becoming the foundation for much litigation on the right to a nationality.

For the denationalised Dominicans of Haitian descent, the judgment validated their claims and strengthened transnational networks of solidarity. Reforms to national laws and procedure clearly responded to this pressure.

4.3. What makes an effective advocacy ecosystem?

Litigation is a useful tool, but it rarely achieves results beyond the individual case unless it is set within an ecosystem of other activities. Litigation should be guided by research into the priorities of the affected communities, a mapping of where the law needs to go, an assessment of what logical steps are needed to get there, and the contribution litigation may make.⁶⁵

Most importantly, litigators must **build alliances** with others working in the space. The story of a case conceived of as strategic, and the reasons why it is important, must reach a much wider audience than only a judge and the lawyers who advise the government on its strategy. Each stage of case preparation must therefore consider not only the legal arguments but the narrative surrounding the facts and law, and the different constituencies who might need to be persuaded of the need to resolve the situation of those arbitrarily denied or deprived of nationality or issue of identity documents (► [section 5.1: Issue framing](#)). In some cases, of course, publicity around a case will not be desired; but alliances will be required also in these contexts, to decide on the strategy and the narrative if the case attracts media or political interest.

The other actors with whom litigators should work include:

- the individuals and communities who are their clients, including the community organisations that are led by and work with the affected people;
- established human rights organisations and policy think tanks;
- members of parliament and parliamentary committees, as well as political parties;
- national human rights commissions and similar bodies;
- government agencies that interact with those affected by statelessness and lack of nationality documents; and
- relevant UN and other international agencies—especially UNHCR.

A communications and media strategy will be needed, to build relationships with journalists and craft easily understood summaries of the issues for a broader public at different stages of the case. On the other hand, there may sometimes be a preference to avoid publicity, especially to protect complainants from the adverse impacts of media attention. Can different roles and messages be agreed on and coordinated? Maintaining coordination requires investment of **human and financial resources**: who can support this effort? (► [section 4.4: Resources](#).)

⁶³ Bingham & Gamboa, "Litigating against Statelessness", supra n 15; Amelia Hintzen, "Historical Forgetting and the Dominican Constitutional Tribunal", *Journal of Haitian Studies*, Vol. 20, no. 1 (2014), pp. 108–116; Leiv Marsteintredet, "Mobilisation against International Human Rights: Re-Domesticating the Dominican Citizenship Regime", *Iberoamericana: Nordic Journal of Latin American and Caribbean Studies*, Vol. XLIV, no. 1–2 (2014), pp. 73–98; Jennifer L. Shoaff, "The Right to a Haitian Name and a Dominican Nationality: 'La Sentencia' (TC 168–13) and the Politics of Recognition and Belonging", *Journal of Haitian Studies*, Vol. 22, no. 2 (2016), pp. 58–82; Patricia Palacios Zuloaga, "Judging Inter-American Human Rights: The Riddle of Compliance with the Inter-American Court of Human Rights", *Human Rights Quarterly*, Vol. 42 no. 2 (2020), pp. 392–433; Bridget Wooding, "Supra-National Jurisprudence: Necessary but Insufficient to Contest Statelessness in the Dominican Republic" in Tendayi Bloom and Lindsey N Kingston (eds), *Statelessness, Governance, and the Problem of Citizenship* (Manchester University Press 2021).

⁶⁴ *Expelled Dominicans and Haitians v. Dominican Republic*, Series C No. 282, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Judgment of 28 August 2014, https://corteidh.or.cr/docs/casos/articulos/seriec_282_ing.pdf.

⁶⁵ See also *Challenging Ethnic Profiling in Europe*, Open Society Justice Initiative, 2021.

Advocacy encompassing strategic litigation also needs a **long project cycle**. It may take a decade or more for a case to reach a superior court at national level, and then a regional or international body. For the effort to shepherd a case through all these stages to be worth it, there is a need to **plan for interim objectives**.⁶⁶ These could include strengthened organisational capacity (especially for grassroots groups); a broader base of support among politicians or the public generally; strengthened alliances among lawyers and organisations previously working separately; submissions to and statements by different international treaty bodies or special rapporteurs; and increased data and analysis of the barriers to acquisition of identity documents and nationality. Funders will need to be persuaded of the value of both the ultimate objective and these interim milestones.

Advocacy does not end with a favourable judgment. There is a need for detailed follow-up to ensure that judgments (especially of regional or international bodies, which may not be directly binding) are implemented. It is also important to plan for a case to fail in court. In some instances, litigation may even be brought in the knowledge that it is not likely to succeed—but can still be a tool to start to raise awareness of the problem and the people affected (► [section 6: After a judgment](#)).

4.4. Resources

Fundraising for litigation to address statelessness is challenging. In general, fundraising for litigation is difficult, and those considered stateless may be ineligible for legal assistance provided by national authorities. Cases on statelessness are typically complex, and the time required is unlikely to be compensated in full by legal aid, where it is available. Independent funders with an interest in statelessness, moreover, may prefer to finance humanitarian rather than legal support. Fundraising opportunities are also quite context-specific and likely to be time-bound.

One useful resource for community-based organisations is a guide for paralegals on strategies for documenting citizenship and other forms of legal identity, published by the Open Society Justice Initiative and Namati, which includes a chapter on fundraising and budgeting.⁶⁷ For litigation, it may also be possible to seek pro bono support from law firms that have an interest in the area; but care must be taken that they have the necessary expertise for the work required.

There are also other non-financial resources, including peer support groups, mailing lists, and trainings. The Institute on Statelessness and Inclusion and the regional civil society networks on statelessness and nationality are good starting points to find out what current resources may exist. UNHCR may also be able to support identification of potential funding sources.

4.5. Choosing a Forum

Perhaps the most important determinant of the framing of a case, the choice of parties, the legal arguments, and the remedies sought is, of course, the jurisdiction in which a case is litigated, and the substantive law that is available to be invoked in that jurisdiction. The desired framing and remedies may also influence the choice of jurisdiction, especially at the international level.

Most strategic litigation starts at the national level, since it is national courts that have the power to issue orders that are directly enforceable against the government or other actors. Even if the ambition is to reach an international forum, it is usually a requirement that domestic remedies must first be exhausted. In some contexts, however, it is possible to argue that an international forum should hear a case even if technically pending at national level, if the delays have been such that the domestic route is practically exhausted even if not in law.⁶⁸

National courts: Already at the national level there may be different options of forum to hear a complaint about access to nationality and identity documents, in light of the different court structures and rules of procedure. The civil law jurisdictions may offer a choice between administrative and judicial courts. In common law countries, the formal process of judicial review before the High Court often sets a high bar for success in overturning an executive decision; but there may be specific tribunals handling particular matters (for example, in immigration cases) that could provide

⁶⁶ Barbara Klugman, "Is the Policy Win All? A Framework for Effective Social-Justice Advocacy", *Foundation Review* Vol. 2, no. 3 (2010) pp. 94-107, <http://scholarworks.gvsu.edu/tfr/vol2/iss3/>.

⁶⁷ *A Community-Based Practitioner's Guide: Documenting Citizenship and Other Forms of Legal Identity*, Open Society Foundations and Namati, 2018, chap.3, <https://www.justiceinitiative.org/uploads/286c1989-73db-4a17-b5a8-79706ccce5e4/a-community-based-practitioners-guide-documenting-citizenship-and-other-forms-of-legal-identity-20180627.pdf>.

⁶⁸ A few international fora allow direct access, even without exhausting domestic remedies—this is the case, for example, for the courts of the Economic Community of West African States (ECOWAS) and of the East African Community (EAC), as well as the European Committee on Social Rights (for those states that have acceded to the additional protocol allowing collective complaints).

a forum for an argument to be developed. Many countries have specialised family or children's courts, which are likely to be a more sympathetic forum for cases concerning the best interests of children in relation to nationality. In some countries, there is the possibility of a direct petition to a constitutional court.

National nonjudicial bodies: There may also be the possibility to bring a complaint to nonjudicial bodies such as national human rights commissions or ombuds offices; in addition to the value of a favourable ruling in its own right, the findings of such bodies may also be relied on as evidence in subsequent litigation.

- The European Roma Rights Centre (ERRC) has followed this strategy in North Macedonia in relation to discrimination in registration of births, supporting complaints to the national ombuds office, and then using these findings in submissions to the UN Human Rights Committee.⁶⁹

The **available options should be discussed** with the potential complainants and others, rather than just taking the first and most obvious option. In some cases it may be possible to run separate complaints in parallel, dealing with different aspects of the case (for example, before an administrative forum or family court on access to birth registration and in the general courts on gender discrimination in nationality law). Similarly, it may be possible to bring cases relating to the same facts in multiple jurisdictions. The openness of different courts to different arguments will always be a factor in these decisions.

- In Kenya, the introduction of a new identification system has been litigated both before the Kenyan courts and in a case brought in France against the private company involved (► [section 4.6: Parties to the case: identifying complainants and respondents](#)).

International courts and other treaty bodies do not have the same enforcement powers as those at national level. But their decisions have much greater normative force, across multiple jurisdictions.⁷⁰ While there has been no judgment of the International Court of Justice that has considered the right to nationality since the *Nottebohm* case of 1955, non-recognition of nationality has been relevant in several cases.

- The inter-state case brought by The Gambia against Myanmar before the International Court of Justice specifically raised the deprivation of Myanmar citizenship in the context of the allegation of genocide of the Rohingya. Among the requests made by The Gambia were that the court should declare that Myanmar must allow the “safe and dignified return of forcibly displaced Rohingya and respect for their full citizenship and human rights and protection against discrimination, persecution, and other related acts”.⁷¹

In the countries making up the Council of Europe, the Organisation of American States, or the African Union there may be the possibility of litigating a case before a regional human rights court. Even though they may not have direct effect, these regional decisions can then be referenced in national courts, enabling judges (if the national context is favourable) to be bolder in their interpretation of the law. Within the European Union, the Court of Justice of the European Union (CJEU)—whose judgments are binding on all EU member states—may also have jurisdiction if the rights of European citizens are affected by decisions relating to nationality.⁷²

Both the Inter-American and African human rights systems have treaties that provide for a complaint based on the right to a nationality, and the failure of the state to grant nationality to a child born in the territory who had not acquired another nationality at birth. Particularly important decisions, with resonance in many other jurisdictions, have been those adopted in cases brought against the Dominican Republic and Kenya, which have significantly moved forward the international understanding of state obligations.⁷³

Thus, it may also be possible at the international level to split a situation of denial of nationality into separate aspects and bring different cases challenging different elements of law and practice.

- In litigation on behalf of Kenyans of Nubian descent, cases were brought before both the African Commission on

⁶⁹ Joint submission to the Human Rights Committee on North Macedonia, The Macedonian Young Lawyers Association, Bairska Svetlina (Centre for Development of the Roma Community), AVAJA, the European Network on Statelessness, and the Institute on Statelessness and Inclusion, 16 August 2021, <https://www.statelessness.eu/updates/publications/joint-submission-human-rights-committee-north-macedonia>, North Macedonia: ERRC & MYLA Sue Authorities for Discrimination of Roma & Other Unregistered Persons, ERRC, 08 December 2022, <http://www.errc.org/press-releases/north-macedonia-errc--myla-sue-authorities-for-discrimination-of-roma--other-unregistered-persons>.

⁷⁰ On the strengths and limitations of different forms of UN advocacy see, *Leveraging UN Human Rights Mechanisms to Achieve Gender-Equal Nationality Laws: Key Points for Civil Society*, Global Campaign for Equal Nationality Rights (2022), <https://www.equalnationalityrights.org/resources/leveraging-un-human-rights-mechanisms-to-achieve-gender-equal-nationality-laws/>.

⁷¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 7 States intervening)*, International Court of Justice, Application instituting proceedings and Request for the indication of provisional measures, Republic of The Gambia, 11 November 2019, para. 112, <https://icj-cij.org/case/178>.

⁷² Choice of forum among European courts and UN treaty bodies is discussed in the *Litigation Toolkit on Statelessness for Legal Practitioners; Volume 1: Impact Litigation and Judicial Mechanisms to Effect Change*, European Network on Statelessness and AIRE Centre, (updated 2024), <https://www.statelessness.eu/updates/publications/litigation-toolkit-statelessness-legal-practitioners>.

⁷³ In particular: *Case of the Girls Yean and Bosico*, supra n 52; *Expelled Dominicans and Haitians*, supra n 64; *Kenyan Nubian Children's Case*, supra n 35; *Kenyan Nubian Children's Case*, supra n 35.

Human and Peoples' Rights (focusing on discrimination and the right to legal status)⁷⁴ and the African Committee of Experts on the Rights and Welfare of the Child (focusing on birth registration, statelessness and the right to a nationality).⁷⁵

- In North Macedonia, the European Roma Rights Centre brought a successful case to the committee responsible for oversight of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on behalf of six pregnant Roma women evicted from their homes in which lack of identity documents had exacerbated their vulnerability,⁷⁶ while also bringing a separate case related to similar facts before the European Court of Human Rights.⁷⁷

C - Case example: DZ v. The Netherlands

Denny Zhao was born stateless in the Netherlands, to a mother of Chinese origin, who herself was without recognition of Chinese nationality. The Public Interest Law Project, part of the Dutch section of the International Commission of Jurists, litigated his case before the national courts, both on his behalf and seeking to help many other stateless people born in the Netherlands but unable to access legal protections against statelessness because their parents lacked a regular migration status.

The relevant apex court in the Netherlands (the Council of State) refused to order that Denny Zhao should be granted Dutch nationality. The Council of State noted that the lack of a status determination procedure meant that individuals, among them many children, entitled to protection under international treaties to which the Netherlands is a party—including the statelessness conventions—did not receive that protection. However, the court found that “it goes beyond the law-making task of the judiciary to fill in this gap.”

Although the Council of Europe has adopted a Convention on nationality, the European Court of Human Rights has no jurisdiction over this treaty. A case relating to nationality and identification must generally be framed as falling within Article 8 of the European Convention on Human Rights and Fundamental Freedoms (hereafter, “the European Convention on Human Rights”), on the right to family life. A decision of the European Court of Human Rights would have stronger direct legal effect in the Netherlands, but it is very hard to get cases heard, there is a tight time limit to lodge a case, and its jurisprudence is weak on nationality.

For this reason, the decision was made by the Public Interest Law Project, in collaboration with the Open Society Justice Initiative, to take the case to the UN Human Rights Committee rather than the European Court of Human Rights. They were supported by an “(inter)national team of lawyers, legal scholars, experts, activists and children’s rights, human rights and statelessness NGOs”. They also engaged with Dutch parliamentarians who asked the government for a response when the case was launched. Following the lodging of the case, the Dutch Advisory Committee on Migration Affairs issued a report urging the government to create a procedure to resolve the status of stateless persons.

The Human Rights Committee found that the Netherlands had violated Denny Zhao’s right to acquire a nationality under Article 24 of the International Covenant on Civil and Political Rights. The Committee quoted the findings of the Council of State in its views.⁷⁸ Following the judgment, Zhao was paid compensation of €3,000 for the violation of his rights and reimbursement of costs incurred as a result of bringing the complaint before the Committee. Just over a year later, the Netherlands finally enacted a law to establish a statelessness determination procedure, which addressed many—though not all—of the gaps in protection of the right to acquire a nationality.⁷⁹

⁷⁴ *Kenyan Nubian Children's Case*, supra n 35.

⁷⁵ *Ibid.*

⁷⁶ “North Macedonia Ordered to Pay Compensation for Evicting Pregnant Roma” (Press Release), ERRC, 23 March 2020, <http://www.errc.org/press-releases/north-macedonia-ordered-to-pay-compensation-for-evicting-pregnant-roma>.

⁷⁷ *Bekir and others v. North Macedonia* (pending before the UN Committee on the Elimination of All Forms of Discrimination Against Women), Case summary, ERRC, 8 November 2016, <http://www.errc.org/cikk.php?cikk=4531>.

⁷⁸ *DZ v. The Netherlands*, supra n 53. See also case summary at the website of the Open Society Justice Initiative: <https://www.justiceinitiative.org/litigation/zhao-v-netherlands>.

⁷⁹ Laura Bingham and Jelle Klaas, “A Victory for Human Rights in Zhao v. the Netherlands (the ‘Denny case’): Nationality from Birth, Without Exceptions” (blog post), European Network on Statelessness, 14 January 2021, <https://www.statelessness.eu/updates/blog/victory-human-rights-zhao-v-netherlands-denny-case-nationality-birth-without-exceptions>; Caia Vlieks and Marlotte van Dael, “‘The Endless Waiting Has Destroyed Me’—Will the Statelessness Bills Discussed in the Dutch Parliament This Week Bring a Solution for Stateless People in the Netherlands?” (blog post), European Network on Statelessness, 9 May 2022, <https://www.statelessness.eu/updates/blog/endless-waiting-has-destroyed-me-will-statelessness-bills-discussed-dutch-parliament>.

4.6. Parties to the case: identifying complainants and respondents

Complainants

Stateless people and people at risk of statelessness are partners in litigation. They are clients ... but also rights-bearers and co-actors.⁸⁰

People labelled as non-citizens or without identity documents are a hard client group. Among the most marginalised in society, they exist in great precarity, without legal status in the country, and with no incentive to come forward as complainants in a case and thereby become visible to the state which does not recognise their membership. They have good reason not to trust any authority figure, including a lawyer or human rights group claiming to want to help. If a person does not have identity documents and legal status in the country it may be impossible even to file a case in court, or grant a power of attorney to a lawyer to act on the complainant's behalf. Even in immigration proceedings, where protection as a stateless person may be a viable route to regularising status and legal aid may potentially be available, it is often preferable to seek protection as a refugee in the first instance, if that claim is arguable, because of the difficulty of proving statelessness and also because of the wider protection that a refugee status often provides.

Even more than in any litigation, therefore, it is important to consider the meaning of the case for the affected individual or group, and the ethical questions about the overlapping of the potential plaintiffs' objectives and those of an organisation seeking to set a precedent.

The considerations for a litigator are somewhat different if the primary focus is to assist an individual or a larger group. In the case of an individual who does not form part of a group of people affected by similar problems, the purpose of the litigation in most cases must primarily be to seek a remedy for that person before national courts—with potential precedent-setting effect, but as a secondary purpose. If the authorities offer to settle the case with the issue of papers confirming nationality or other desired status, then this should almost always be accepted, in the interests of the individual—even if it will (as the government intends) remove the opportunity for a court to issue a ruling of more general impact.

If a remedy is sought for a group of people affected by similar issues, then the primary purpose of the litigation may be to achieve broader normative advances, with the ambition to reach an apex national court or regional or international forum. In some jurisdictions, it will be possible to bring a case in the name of an organisation rather than an individual, or a class action without naming individual complainants; in others, only named individuals have standing to bring a case. In any event, there will be a need for the case to tell the stories of particular individuals—whether themselves complainants or as witnesses—that represent particular challenges in the law, and that tell the story of its impact, enabling a court to understand why the law needs to change. In either case, it is equally important to build the foundation for the case in close consultation with the affected populations. What are the priorities for that person or group—rather than (or in addition to) the most interesting legal arguments to advance national and international law, or to change policy or practice in a particular way? What is the legitimacy of intermediary organisations that may sponsor the case? Which named complainants have the most compelling stories and can also take on the exposure that involvement in a court case will bring? How can expectations be managed about what may be achieved?

Where many members of the same community face difficulties in gaining access to documents recognising nationality, a good approach may be to combine individual legal or paralegal assistance with the ambition to bring a case with wider importance. If as many individuals as possible can be accompanied through the process of seeking identity documents, this provides immediate practical assistance to those affected, builds trust with the community, and may also bring to the surface a case that can indeed set the precedent that unblocks more systemic reform.⁸¹

- Dominican Republic: The Open Society Justice Initiative discussed potential litigation before the Inter-American Court on Human Rights with several individuals in whose name a case could be brought to challenge the Dominican Republic's deprivation of nationality from Dominicans of Haitian descent. The litigation was ultimately filed in the name of Emildo Bueno Oguis, representative of the category of people who had previously held all the documents required as evidence of his Dominican nationality, only to be denied renewal of a passport after he had moved to the United States.⁸²
- Malaysia: The organisation Family Frontiers, established by women affected by discrimination in Malaysia's citizenship law, issued a public call for potential plaintiffs in a case to challenge the inability of Malaysian women to transmit citizenship to children born outside of the country. Six women were picked to illustrate particular

⁸⁰ "Litigation Strategy - 2015-2018", European Network on Statelessness, 2014.

⁸¹ *Community-Based Practitioner's Guide*, supra n 67.

⁸² Case summary: <https://www.justiceinitiative.org/litigation/bueno-v-dominican-republic>.

situations and the negative impact of discrimination on the children and families concerned. (► [focus box K](#))

- North Macedonia: Most stateless persons in North Macedonia are stateless Roma refugees from Kosovo, who are often perceived as a security threat. The European Roma Rights Centre has sought to bring cases on behalf of a more mixed group of plaintiffs, to challenge perceptions based on national security.⁸³

In some situations, however, there is no escaping the fact that a potential complainant is not an attractive figure for litigation: for example, in the case of individuals deprived of nationality on national security grounds, or stateless persons held in immigration detention because the state wishes to deport them to another country on the grounds of criminal activity.⁸⁴

Respondents

The choice of target(s) in litigation—the defendants or respondents—is also a key strategic decision. In turn, this will depend on the most important remedies sought (► [section 4.7 Remedies I: Establishing the desired outcomes](#) and ► [section 5.6: Remedies II: The detailed requests](#)). It is important to be sure that those state agencies that are responsible for implementing these remedies are named as respondents to the case. These may extend beyond the ministries or departments responsible for nationality and/or identity documents and civil registration, to encompass ministries for police, employment, education, health care or housing—and any other state service where consequential harm results from the lack of identity documents. At the regional or international level, the respondent is of course the state.

Another strategy that may be employed where rules of procedure allow, is to name oversight bodies such as national human rights institutions as parties to the suit (in addition to the possibility of separately filing a complaint directly with such bodies), to ensure they have the opportunity to make submissions in the case.

It is worthwhile considering whether a non-state respondent may also be relevant. State services are increasingly privatised, including the delivery of identity documents. It is often even more difficult to find out the reasons for rejection of an application for official identity documents by a private sector provider than it is from a government agency. New types of exclusion are also created by the technological design and architecture of digital identification systems, the failure of technology such as biometric registration devices; as well as new issues of privacy and data protection, and the risk of misuse of data about marginalised groups and non-citizens. Very often the corporations supplying and managing these systems are multinational and headquartered in another country, sometimes making them difficult to target through litigation—although not impossible. Thus, in building the case, it may be worth considering opportunities (and roadblocks) for simultaneous litigation in different jurisdictions. Such efforts can be costly and difficult to coordinate. There may also be other forms of pressure that could be applied—including public campaigning and shareholder activism—to ensure that those corporations supporting and implementing these new identification systems respect human rights principles.

- In 2022, a case was launched in France against the biometrics and security company IDEMIA, asserting that the company had sold technology to Kenya without conducting proper due diligence on human rights risks as required under French law.⁸⁵ A year later, the plaintiffs agreed to a settlement with IDEMIA in which the company would take measures to provide for stronger safeguards against adverse impacts of the use of its products by governments.⁸⁶

Early on in the case planning, thought should also be given to potential third party intervenors or expert witnesses, and what specific additional value they could bring to the arguments before court (► [section 5.3: Building the evidence](#) and ► [section 5.5: Third-party interventions](#)).

⁸³ For example, the ERRC filed a case before the civil courts in North Macedonia on behalf of both Roma and non-Roma people affected by non-registration of births. "North Macedonia: ERRC & MYLA Sue Authorities for Discrimination of Roma & Other Unregistered Persons", 08 December 2022, <https://www.errc.org/press-releases/north-macedonia-errc-myla-sue-authorities-for-discrimination-of-roma-other-unregistered-persons>.

⁸⁴ *NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs & Anor*, Case No. S28/2023, High Court of Australia, Judgment of 28 November 2023, https://www.hcourt.gov.au/cases/case_s28-2023.

⁸⁵ "NGO Data Rights Files Case Against Biometric Tech Giant IDEMIA in France for Failure to Consider Human Rights Risks" (Press Release), Data Rights, 29 July 2022, <https://datarights.ngo/news/2022-07-29-kenya-due-diligence-biometric-id-case/>.

⁸⁶ "NGOs and IDEMIA agree to Vigilance Plan Improvements in Settlement over Kenyan Digital ID Human Rights Challenge" (Press Release), Data Rights, 24 July 2023, <https://datarights.ngo/news/2023-07-24-ngos-and-idemia-agree-to-vigilance-plan-improvements/>.

4.7. Remedies I: Establishing the desired outcomes

A key part of planning strategic litigation is to prioritise the legal remedies desired, which helps to define how rights claims are constructed—and may also affect the choice of forum. In cases related to nationality and identity documents, it can be difficult to determine the appropriate claims and remedies. Typically, such cases involve many different issues and the consequential human rights violations that flow from lack of nationality and identity documents may be extensive—including repeated arrest and harassment by public authorities, indefinite detention, or deprivation of property and livelihoods; as well as exclusion from democratic rights, and access to public services including education and health care, housing and formal sector employment. It may be that framing the case about one of these consequential violations is the approach most likely to have traction in a particular forum. However, if the underlying causes of the consequential violations are nationality law and practice, then remedies that address these causes should be the priority for the legal case, where possible, as a part of a wider strategy for redress and reform.

A detailed discussion of remedies will be needed as the legal arguments are constructed (► [section 5.6: Remedies II: The detailed requests](#)). But the planning process must also identify the desired—and possible—remedies, or much valuable time may be wasted, and initial submissions to the court may need to be complemented or corrected by later documents.

Among the key considerations are:

- **Understanding and agreeing on the desired outcomes:** The first priority is to understand what is the outcome that the clients want. However, the way clients express their desired result may not always align with the most effective legal argument. Moreover, while clients may highlight immediate concerns like lack of access to services or police harassment, the deeper issue could be the gaps in the law leading to the lack of recognition of their nationality. The connection between the remedies sought and the clients' priorities must be clear to all concerned.
- **The decision to focus on law reform or policy change:** Is it essential—or possible—to advocate for reform of the nationality law or related legislation, or would it be more realistic and sufficient to seek policy changes that can be achieved by the executive acting alone? In some cases, high-level legal reforms—such as gender equality in nationality transmission—can be the central goal of both litigation and wider advocacy. However, where such reforms are not required as a solution or not realistically possible to achieve through litigation, courts can be requested to order policy reforms such as improving access to civil registration procedures.
- **The best framing for the case:** The narrative of the case is crucial as much inside as outside the courtroom (► [section 5.1: Issue framing](#)). What presentation of the problem is most likely to be persuasive for the court to order the proposed remedies? The selection of complainants also plays a role here (► [section 4.6](#)), in order to illustrate the specific impacts of the law or policy that are being challenged. The court cannot order a remedy if the relevant facts showing why it is needed are not presented together with the legal arguments.
- Whether the case is on behalf of an individual or group.
- The nature of the remedies to be requested from the court may also depend on whether the case is on behalf of an individual facing a specific legal issue or a broader group affected by systematic discrimination. In the former case, remedies can be tailored narrowly (which may also avoid political pressures on the outcome of the case); in the latter, there may be the need to seek amendments to a discriminatory legal framework, or a general reform of apparently neutral administrative procedures that have disproportionate impacts on certain groups.
- Strategies to develop remedies to address group discrimination.
- Often a group of people who face challenges with recognition of nationality also face general discrimination, for example in access to services, whether or not they have a recognised nationality and the necessary identity documents. The worst impacts of such discrimination are, however, felt by those who do not have identity documents recognising nationality. For litigation to assist their situation, there is a need to specify exactly which provisions of the law and its implementation in practice are causing problems, and for which categories of people—and therefore what changes are needed in each case. There may be the need to proceed pragmatically, first seeking resolution of cases that are relatively uncontroversial, or legally much more certain; and then moving on to a broader category of clients.
 - How can litigation be sequenced, so that a likely success in securing remedies in an “easier” case will provide the foundation for those in more challenging legal circumstances? It may be necessary or helpful to divide a group of potential plaintiffs into sub-groups: even if all members of the larger group face discrimination on the same grounds (for example, race, ethnicity or religion), different categories may require different remedies.
 - There can be risks to such an approach (► [focus box B](#)), but also the possibility of unblocking solutions in an incremental way. These choices must also be discussed with the groups affected, to consider how to avoid undermining solidarity among all those affected by discrimination in access to identity documents might by highlighting the distinctions among the broader group based on their existing documentation.

D - Case example: Litigating citizenship in Kenya: strategy, targets, evidence and remedies

Recognition of citizenship and access to identity documents has been a longstanding challenge for certain minority groups in Kenya considered to have origins outside the country. This includes members of the Nubian community (descendants of Sudanese recruited as soldiers by the British and settled in Kenya); descendants of Mozambican, Rwandan and other migrant workers brought to tea and sisal plantations during the colonial era; a group of followers of a missionary who moved to Kenya in the early years after independence, mainly of Zimbabwean origin and Shona ethnicity; the Pemba community in the coastal zone on the border with Tanzania, with links to the offshore island of Pemba, part of the Zanzibar archipelago; Kenyans of Somali ethnicity; and some members of the Kenyan Asian community who were not able to acquire citizenship under the transitional rules in operation at independence in 1963.⁸⁷

Civil society representatives from these communities—supported by national human rights NGOs, the Kenya National Commission on Human Rights, UNHCR, and others—have campaigned for the recognition of citizenship over many years. Litigation has been an important element of a multi-pronged strategy involving research and report-writing, street marches, parliamentary petitions and inquiries, public campaigns, individual case work, and direct advocacy with officials.

The Nubian Rights Forum first litigated the denial of citizenship documents at national level, and, when that was unsuccessful brought complaints to the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child—first lodged in 2006 and 2009, though decided in 2015 and 2011 respectively.⁸⁸ The decisions of the continental human rights bodies have been foundational to subsequent advocacy in Kenya for the resolution of the status not only of the Nubians but also of similarly affected groups.

The new constitution adopted in 2010, followed by a new Citizenship and Immigration Act in 2011, established provisions that addressed some aspects of past discrimination, including by enabling the registration as Kenyan citizens of stateless persons resident in the country since independence. The constitution and new law also provided the opportunity for further litigation. Cases were brought in the High Court on behalf of Kenyan citizens who had been denied recognition of Kenyan citizenship despite their entitlement in law. These included Kenyans who had also been registered as children in the database of refugees (referred to as the “double registered” Kenyans), often in order to gain access to the services available in refugee camps that were not accessible in surrounding areas, as well as the children of one Kenyan and one refugee parent.⁸⁹

One strategy supported by the Open Society Justice Initiative in partnership with Namati was the training and ongoing capacity-building of what has become an impressive national network of paralegals able to help individuals to apply for identity documents of any type. Similar paralegal networks have also played an important role in Nepal and Bangladesh (► [focus box B](#)). This type of legal empowerment work not only helps the individuals concerned but can generate knowledge about patterns of discrimination in identity document administration to support an application to court, while facilitating communication between lawyers and their clients. A key aspect of any litigation strategy is to document the harms suffered by the affected individuals or groups and to develop an understanding of the remedies required for those harms that can be requested from the court. Paralegal networks can also build on the foundation laid by successful strategic litigation by monitoring the implementation of judgments through their advice work.

In Kenya, the Open Society Justice Initiative also supported one of the first efforts to conduct a quantitative survey on the impacts of statelessness among the Nubians.⁹⁰ A later study by UNHCR and the World Bank demonstrated the disadvantaged situation of the Shona community.⁹¹

While not directly presented as a result of the specific court judgments, the Kenyan government is notable among African states for the different initiatives it has taken to resolve the stateless status of several long-standing stateless groups, including the Makonde, Shona and Pemba—with pledges to take further action and to address the question of discriminatory “vetting” procedures for some groups applying for identity documents.⁹² The situation of the Nubian community—of which only some members had been stateless, completely unable to obtain recognition of Kenyan

⁸⁷ Bronwen Manby, “Citizenship and Statelessness in the East African Community”, UNHCR, 2018, <https://www.refworld.org/reference/research/unhcr/2018/en/122374>.

⁸⁸ *Kenyan Nubian Children's Case; Nubian Community v. Kenya*, both *supra* n 35.

⁸⁹ Petitions in the cases available at <http://citizenshiprightsafrika.org/kenya-haki-na-sheria-initiative-and-others-v-cabinet-secretary-ministry-of-interior-and-coordination-of-government-and-others-refugee-spouses/> and <http://citizenshiprightsafrika.org/kenya-haki-na-sheria-initiative-v-cabinet-secretary-ministry-of-interior-and-coordination-of-government-and-others/>.

⁹⁰ Ben Oppenheim and Brenna Marea Powell, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya* (New York: Open Society Justice Initiative, October 2015), <https://www.justiceinitiative.org/publications/legal-identity-2030-agenda-sustainable-development-lessons-kibera-kenya>.

⁹¹ UNHCR and World Bank, ‘Understanding the Socioeconomic Conditions of the Stateless Shona Community in Kenya: Results from the 2019 Socioeconomic Survey’, 2020, <https://reliefweb.int/report/kenya/understanding-socioeconomic-conditions-stateless-shona-community-kenya>.

⁹² See the documents at the Kenya page of the Citizenship Rights Africa Initiative website: <https://citizenshiprightsafrika.org/east-africa/kenya/>.

citizenship—has also improved, although members remain subject to discriminatory procedures in processing their applications.

A particular focus of litigation in Kenya has been an effort to slow down the roll-out of schemes to digitalise identity systems so that appropriate safeguards can be first put in place for data protection and privacy and against further exclusion. Once again, a case was brought by the Nubian Rights Forum in cooperation with other affected groups. In 2020, the Kenyan High Court held that the newly instituted National Integrated Identity Management System (NIIMS), known as the *huduma namba* (service number) should proceed only if subject to the prior adoption of an appropriate regulatory framework.⁹³ Key elements in the presentation of this case were expert opinions provided by the NGO Privacy international and by Anand Venkatanarayanan, an Indian cybersecurity and privacy researcher.⁹⁴ Litigation in France, against the biometrics and security company IDEMIA, asserting that the company had sold technology to Kenya without conducting proper due diligence on human rights risks as required under French law led to a settlement in which IDEMIA agreed to stronger safeguards.⁹⁵ A new government in Kenya relaunched the digitalisation initiative under the name *maisha namba*. Once again NGOs went to court in Kenya, obtaining pauses in the roll-out of the scheme, although not a definitive halt.

5. CONSTRUCTING A CASE



KEY MESSAGES

- An important part of planning for litigating the right to a nationality and/or issue of identity documents is the choice of “framing” for the complaint: for example, to present the case as relating to statelessness, arbitrary deprivation or denial of nationality, to discrimination based on sex or race, or to a failure to ensure the right of all children to birth registration.
- Cases relating to nationality and identity documents can involve a very wide range of sources of law both at national level, and—because so often it is asserted by the state of residence that a person denied nationality is in fact the national of another country—in the laws of other countries.
- Comparative and international law can provide important guidance on best practice and international norms, informing judges about solutions that otherwise would not be imagined based on existing national precedents.
- It can be a painstaking task to build up the necessary evidence to show that affected persons are not in fact nationals of another country, to demonstrate a pattern of discrimination, and to show what solutions are required. This could involve detailed compilation of case law, expert opinions, and third-party interventions from interested parties.
- The development of detailed requests for remedies is one of the most important elements of planning litigation, especially on behalf of a group of people who share some characteristics, but where the details of each case vary. It may be necessary to establish a list of categories of the affected persons, and the legal and procedural remedies desired for each category, and those that are common to all.
- Remedies may include individual relief, legal and procedural reform, symbolic or punitive damages, or terms of settlement to avoid the need to take a case all the way to trial.

⁹³ *Nubian Rights Forum and Others v. Attorney General and Others*, Consolidated Petitions No. 56, 58 & 59 of 2019, Kenya High Court, Nairobi, Judgment of 30 January 2020 <http://kenyalaw.org/caselaw/cases/view/189189/>; see also *Republic v. Joe Mucheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 others; ex parte Katiba Institute & Yash Pal Ghai*, Judicial Review Application E1138 of 2020, High Court of Kenya (Nairobi), judgment of 14 October 2021 [2021] KEHC 122, <http://kenyalaw.org/caselaw/cases/view/220495/index.html>.

⁹⁴ Frank Hersey “‘Prone to hacking’: expert witness in Kenya’s Huduma Namba hearings first round”, Biometric Update, 26 September 2019, <https://www.biometricupdate.com/201909/prone-to-hacking-expert-witness-in-kenyas-huduma-namba-hearings-first-round>.

⁹⁵ “NGO Data Rights Files Case Against Biometric Tech Giant IDEMIA in France for Failure to Consider Human Rights Risks” (Press Release), Data Rights, 29 July 2022, <https://datarights.ngo/news/2022-07-29-kenya-due-diligence-biometric-id-case/>; NGOs and IDEMIA agree to Vigilance Plan Improvements in Settlement over Kenyan Digital ID Human Rights Challenge (Press Release), Data Rights, 24 July 2023, <https://datarights.ngo/news/2023-07-24-ngos-and-idemia-agree-to-vigilance-plan-improvements/>.

The most important challenge in litigating the right to a nationality, compared to other rights, is the degree to which states continue to assert that recognition and grant of nationality is a matter of sovereign discretion. Inroads have been made into this claim of a reserved domain at both national and international level, but the extent of the constraints continues to be hard-fought.

Courts may be hesitant to challenge state decisions in administration of nationality; or explicitly restricted from doing so in national law. Compared, for example, to the prohibition on torture or the right to education, human rights bodies have a much less extensive body of case law defining the limits of state discretion and the nature of state obligations when it comes to acquisition, proof, and deprivation of nationality. National judges are likely to be unaware of the constraints that do exist in international law and need educating on recent normative developments, as well as on the use that may be made of international standards in domestic courts.

Where the state argues that its sovereign discretion cannot be challenged, litigation must show either that the government is breaking its own laws, or that the impact of the law is unconstitutional in some way (for example because it is discriminatory on the basis of prohibited grounds such as sex, race or religion). In some jurisdictions there may be the possibility of invoking international norms directly before national courts.

This section sets out some of the arguments that may be available to address these challenges.

5.1. Issue framing

The choice of framing for a case should be part of a discussion on the place of litigation within a broader strategy and “theory of change”—a plan for how the changes desired are going to be brought about. The framing depends partly on the legal arguments that are available at the national and international level, partly on the political context, and partly on the wishes of the client.

Litigation should be framed in a way that seeks to alleviate the anxieties that are always present about the boundaries of belonging. Can it be argued that the population excluded from recognition of nationality are “our” stateless persons, who lack identity documents only because of administrative failures or discrimination? Is the assertion of national security risk and punishment by the authorities back-to-front, meaning that the greater risk is that those excluded from nationality rights may take to crime or to rebellion; or that deprivation of nationality means that those affected will never be prosecuted and punished for their crimes? Alternatively, is there need for a statelessness determination procedure to resolve the situation of those who are in indefinite immigration proceedings—including detention—because there is no country to which they can be deported, meaning that they become a burden on society because they cannot regularise their status? Is naming the problem as statelessness helpful, or likely to further stigmatise an individual or group? Is it better to refer rather to the recognition of nationality for existing nationals who, as a matter of fact, lack documents to which they are legally entitled? Or is it better to focus on securing access to public services such as health care, education, or housing, with issuance of documents recognising legal identity and/or nationality as a necessary step?

The issues are considered in greater detail, with citations to relevant cases and other sources, in ► [section 7: Legal arguments](#).

Statelessness

The ERRC has long worked to tackle the issue of undocumented Roma and their limited access to birth registration and identity documents. In 2017, we chose to call the problem by its true name—statelessness—rather than merely an administrative issue of lacking identity documents. By framing it as statelessness and highlighting its roots in discrimination, we shifted the responsibility onto the state to resolve the issue, instead of blaming individuals for not having the necessary documents or failing to register births ⁹⁶

In many cases, the first choice is whether to describe the situation of a particular individual or group without recognition of nationality as “statelessness.”

The advantage of framing a situation as statelessness is the stronger international law normative framework, whether the complainant has strong connections that should bring recognition or grant of nationality by a particular state, or requires protection as a stateless person. If it is accepted that a person is stateless, there are rights in international law that are not accorded to other non-citizens. In those countries where a statelessness determination procedure exists, an argument based on the statelessness of the applicant may also be the most effective route to a secure residence

⁹⁶ Senada Sali, ERRC, February 2022.

status and ultimate acquisition of nationality.

In the case of individuals or groups not recognised as nationals of their state of birth and life-long residence—especially where there is a multigenerational connection to that country—then naming their situation as statelessness may create more political urgency for resolution of the problem, as well as engaging any legal protections that exist against statelessness in national law. The formal label of “stateless person” may also be the first stage towards protection of an individual not born in the country, including asylum-seekers and refugees; perhaps especially in case of failed asylum-seekers who cannot be deported. If the person does not have an arguable claim under national law to existing nationality of the state of residence, then recognition and registration as a stateless person is likely to be a necessary step on a pathway towards acquisition of nationality. An argument based on statelessness may also ensure recognition of the particular vulnerability of stateless persons (compared to other non-citizens).

In other contexts, however, especially in national courts, it may be counterproductive to refer to a person or group denied nationality documents as “stateless”, since to do so may imply a confirmation of the official view that people with this profile are indeed not nationals. This is especially the case where many residents of the state concerned lack identity documents, including those whose nationality is not contested. It may be more helpful to describe those in this situation as “undocumented nationals”, of whom some are additionally “at risk of statelessness”. The solution, therefore, is for their nationality to be confirmed and documents issued accordingly. (► [section 2.1: Statelessness](#) and ► [section 7.1: The definition of stateless person and the determination that a person is stateless](#)).

The right to a nationality

One challenge in using the international legal framework on statelessness is the requirement to prove a negative, that a person does not have a nationality elsewhere. The provisions of international human rights law on the right to a nationality, especially for children, allow for a more positive framing, focused on the arbitrariness of refusing nationality to a person whose strongest connection is to the country of birth and/or long term residence, even if there may be some theoretical possibility of acquiring recognition of nationality in another country.

The argument that recognition of nationality reflects a social reality that a person is “more closely connected with the population of the State conferring nationality than with that of any other State” elaborated in the decision of the International Court of Justice in the *Nottebohm* case (► [section 2.2](#)), and used there to justify non-recognition of a state’s right to exercise diplomatic protection on behalf of an individual, has increasingly been applied in a broader, positive sense, to establish the right to a nationality even in the absence of proof of statelessness. There may be scope to explore such propositional arguments especially in the context of multigenerational statelessness, inherited from parent to child. (► [section 7.2](#), ► [section 7.5](#) and ► [section 7.6](#))

Arbitrary deprivation of nationality and the right to due process

In the most egregious cases of nonrecognition of nationality, where people who were previously documented as nationals have had that recognition withdrawn, the appropriate framing of litigation is most likely to be about arbitrary deprivation of nationality and the lack of respect for norms of due process and a fair hearing. This may be the best approach in cases of deprivation of nationality on grounds of national security; but is even more likely to be the best framing if the formal deprivation provisions in the nationality law were not invoked, but documents were simply cancelled or not renewed. Examples of retroactive denial of nationality of this type, that amounts to arbitrary deprivation, include many of the Rohingya of Myanmar and Dominicans of Haitian descent in the Dominican Republic. There are less widely reported smaller groups and individual cases scattered all over the world. In many—perhaps most—such cases, denial of nationality is based on discriminatory laws or practice. (► [section 7.5](#).)

Discrimination based on sex

Equal nationality rights are central to an idea of equal citizenship, more broadly conceived. In those states where nationality law—or procedures for civil registration—discriminate on the basis of sex of a parent or spouse, litigation may be a powerful tool to argue for gender equality, especially if this is supported by a constitutional bill of rights. Depending on national context, it may be easier to make a general discrimination argument than one based on statelessness and the right to nationality. This is perhaps especially true where women cannot transmit nationality to their children, leaving children of foreign, stateless or absent fathers vulnerable to statelessness; or where women, elderly or disabled people are disproportionately likely not to have access to identity documents. There is often more case law at the national level on which to base such an argument. Even before courts that do not have strong constitutional jurisprudence, litigation framed in terms of gender equality can create a focus for media attention and public support. UN treaty bodies have strongly endorsed gender equality in nationality rights. (► [section 7.3](#).)

Discrimination based on race, religion, ethnicity or similar protected characteristics

In many contexts, the most immediate concern may be discrimination against certain population groups in access to education, health care, housing or other economic and social rights, but this discrimination is caused or exacerbated by denial of nationality or lack of identity documents recognising nationality. It can be hard to challenge discrimination in nationality law and administration based on race, ethnicity, or religion, especially in countries where the framing of nationality is closely tied up with the idea of a nation as a cultural unit. Nonetheless, the fact that a prohibition on racial discrimination is widely recognised as *jus cogens*—a “peremptory norm” of international law—can provide a powerful argument. At the same time, if the core problem is the complainants’ lack of identity documents and/or recognition of nationality, then a focus on discrimination in access to other rights (only) may risk missing the opportunity to make this deeper case about statelessness and the right to nationality and legal identity, and/or to propose specific remedies for the lack of identity documents that would in turn unlock a broader access to rights. (► [section 7.4.](#))

Birth registration, juridical personality, legal identity, and the right to family life

In a very large number of cases one starting point to resolve a person’s lack of documents and recognition of nationality will be to remedy the lack of timely birth registration. The advantage of this framing is that the remedy sought can be argued to be administrative, without challenging the top-level legal framework for nationality; it may therefore also be less politically controversial. The right to birth registration is included within a wide range of UN and regional human rights instruments and in many national laws. The disadvantage is that a focus (solely) on birth registration may reinforce the impression that the victims of state discrimination are themselves responsible for their lack of documents, and for failing to ensure that the births of their children are registered.

Article 8 of the Convention on the Rights of the Child makes clear that the obligation is on a state to re-establish identity if a child is illegally deprived of some or all the elements of his or her identity, including nationality. Moreover, the right to recognition as a person before the law—to recognition of juridical personality or legal identity—is a foundational concept for much litigation on recognition of legal status in a country. It is a concept protected (with some variations in wording) under Article 6 of the Universal Declaration of Human Rights, Article 16 of the International Covenant on Civil and Political Rights, Article 3 of the American Convention on Human Rights, and Article 5 of the African Charter on Human and Peoples’ Rights, among other instruments.

Among those states that are party to the European Convention on Human Rights, a central pillar of a case relating to recognition of nationality and issue of documents is likely to be Article 8 of the Convention establishing the right to respect for private and family life. Although the Council of Europe has adopted two free-standing conventions on nationality (European Convention on nationality, 1997, and European Convention on the Avoidance of Statelessness in the Context of State Succession, 2006), the European Convention on Human Rights does not itself include the right to a nationality. The Court has, however, recognised that a violation of Article 8 of the ECHR may occur in some cases of nationality deprivation or denial, if a person is denied the right to register a birth, or to transmit nationality to a child or spouse, and in case of stateless people denied the possibility to regularise their residence. (► [sections 7.8](#) and [7.9.](#))

Arbitrary detention as cruel, inhuman, and degrading treatment

The Inter-American and African human rights treaty bodies have found that the consequences of arbitrary deprivation of nationality may constitute inhuman treatment. If a stateless person is kept in immigration detention, despite the impossibility of any removal from the country, that may itself constitute inhuman and degrading treatment. Deportation of a stateless person to another country where they previously held some form of legal status, but were subjected to ill treatment may also be in violation of norms of non-refoulement. (► [section 7.9](#))

Dignity

The centrality of recognition of nationality and legal identity to human dignity has been recognised by many different courts. Whatever the detailed framing of a case, the right to human dignity may be a foundational argument. The close linkage of recognition of legal status with dignity is reflected in the inclusion of both concepts within the same article of the African Charter on Human and Peoples’ Rights (Article 5).

5.2. Sources of law

Once the overall framing is decided, litigators need to build their detailed legal case, including legal arguments, supporting evidence, and the remedies requested. Statelessness and nationality are created by the intersecting application of different laws.

- There will usually be the need to examine a number of **other national laws beyond the nationality code and constitution** in order to construct a legal argument that establishes the routes by which an individual or group has become stateless, and to make recommendations for specific remedies.
- Cases involving contested nationality often require analysis of the **laws of another country**, to show that, as a matter of fact and law, the complainants do not have the nationality of the other country. Building this evidence can be particularly demanding.
- There also is a need to grasp the **evolving international law principles** on nationality and statelessness, if there is even the possibility of seeking relief in a regional or international court, and to make sure that the relevant factors are explored at national level and placed on the record for an appeal.
- **Comparative jurisprudence** is also a valuable resource to demonstrate to constitutional or other apex courts that the arguments being made are—even if novel in the national setting—accepted in other jurisdictions and part of a mainstream trend and not an extravagant leap in legal reasoning.

To build a solid case for strategic litigation, a team should be made up of both experienced litigators and experts on nationality and statelessness in national and international law. Any judgment will be as good as the arguments made before the judge. It is worth the investment to make sure the arguments are as good as they can be.

E - Resources to find international law, comparative jurisprudence and other materials

UNHCR

Essential resources to assist in building a legal argument drawing on international law are the UNHCR *Guidelines on Statelessness*, that consider the interpretation of the 1954 and 1961 statelessness conventions in light of contemporary human rights law. Guidelines No.1–3, on the definition of stateless person, on statelessness determination procedures, and the status of stateless persons at national level, are consolidated in the *Handbook on Protection of Stateless Persons*.⁹⁷ They are supplemented by the Guidelines on Statelessness No. 4 on the right of children to acquire a nationality⁹⁸; and the Guidelines on Statelessness No. 5 on loss and deprivation of nationality.⁹⁹

These and other UNHCR resources, including “good practices” papers on addressing statelessness, are available at the Refworld page on statelessness: <https://www.refworld.org/thematic-area/statelessness>.

The Refworld database also includes a collection of caselaw: <https://www.refworld.org/cases.html>

Institute on Statelessness and Inclusion

The Institute on Statelessness and Inclusion (ISI) hosts a database on Statelessness and Human Rights, which brings together information from the international human rights monitoring systems, including all the UN treaty bodies and recommendations made by the Universal Periodic Review of the Human Rights Council: <https://database.institutesi.org/>

In addition, ISI has established the “stateless hub” which collates information & resources on statelessness and the right to a nationality, searchable by country, region or theme. <https://www.statelesshub.org/>

⁹⁷ *Handbook on Protection of Stateless Persons*, supra n 2.

⁹⁸ UNHCR, Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness (Geneva: United Nations, December 2012), <https://www.refworld.org/policy/legalguidance/unhcr/2012/en/105120>.

⁹⁹ UNHCR, Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Arts 5-9 of the 1961 Convention on the Reduction of Statelessness (Geneva: United Nations, May 2020), <https://www.refworld.org/policy/legalguidance/unhcr/2020/en/123216>.

GLOBALCIT

The Global Citizenship Observatory (GLOBALCIT), hosted by the European University Institute, has prepared reports on nationality law in most countries in the world, maintains a dataset enabling comparison of provisions across different nationality laws, and also has a database of court judgments relating to nationality law. <https://globalcit.eu/>

The European Network on Statelessness

The European Network on Statelessness (ENS) has developed a **Statelessness Case Law Database** as a free online resource containing national and regional case law covering Europe, as well as international jurisprudence addressing statelessness. The database covers jurisprudence from any jurisdiction in Europe, the European Court of Human Rights, the Court of Justice of the European Union and UN human rights treaty bodies. The database is searchable by country, legal instruments, key aspects and by keywords, and includes case summaries. <https://caselaw.statelessness.eu/>

ENS has also worked with its partners to compile a **Statelessness Index** for 30 European states. The index is a comparative tool that assesses European countries' law, policy, and practice on the protection of stateless people and the prevention and reduction of statelessness, against international norms and good practice. <https://index.statelessness.eu/>

In addition, the European Network on Statelessness and the AIRE Centre published a two-volume *Litigation Toolkit on Statelessness for Legal Practitioners* published by the European Network on Statelessness and the AIRE Centre in 2022, updated in 2024.¹⁰⁰

Citizenship Rights Africa Initiative

The Citizenship Rights Africa website contains a wealth of information on nationality, statelessness and identity documents from around the African continent, including the relevant African standards and a collection of judgments in national and regional courts, searchable by country, theme, date, and type of document. <https://citizenshiprightsafrika.org/advanced-search/>

Other resources are set out in ► [section 8](#).

National law

The relevant law at national level for the determination of a person's right to nationality is likely to include, in addition to relevant constitutional provisions, the primary and secondary legislation (and jurisprudence interpreting these laws) governing:

- Nationality/citizenship;
- Children's rights;
- Birth registration and civil registration generally, including the laws governing marriage, divorce, adoption, and legal recognition of parentage (*filiation*);
- Identity documents, including national ID cards and passports;
- Immigration and border control;
- Voter registration and elections;
- Functional registration systems important in the national context, such as drivers' licenses, health care and social security documents, tax records, or local authority confirmation of residence and/or identity;
- Religious and customary certification of identity (including baptismal records).

An analysis of the application of the nationality code to the particular person's circumstances of place and date of birth and parentage, according to their own account, is obviously the starting point. But very often in these cases some or all of the relevant facts are contested: Is it possible to prove that the person was born in a particular place? Is the legal connection of the child to the parent holding nationality established? Does the parent have documents recognising nationality? Did the birth take place at a date when the relevant provisions of the law were in force? Or, for those not born in the country, when did the person (or his or her parent) enter the country and with what status?

¹⁰⁰ *Litigation Toolkit on Statelessness for Legal Practitioners; Volume 1: Impact Litigation and Judicial Mechanisms to Effect Change; Volume 2: Jurisprudence*, European Network on Statelessness and AIRE Centre, October 2022, updated June 2024, <https://www.statelessness.eu/updates/publications/litigation-toolkit-statelessness-legal-practitioners>.

Can they prove legal residence throughout the requisite period?

For these facts to be legally accepted, civil registration documents will almost always be necessary; and if the birth of the child or marriage of the parents—or death of a parent, if relevant—took place in another country, then it will often be necessary to obtain a certificate from that country, and also have it legally recognised in the country where nationality is claimed (see next sub-heading). If the most important identity documents or proof of residence are missing for recognition of nationality of the state of residence, it may in some contexts—especially in those countries where many people do not have identity documents—be possible to adduce evidence based on voter registration (usually an acknowledgement that the person is a national), or registration in other functional registers. Immigration and other documents about existing legal status in the country, and the treatment of the person in practice by relevant authorities, will often be critical.

Private international law

In statelessness cases, the complexity of the necessary arguments is often increased by the need to also consider the nationality (and related) laws of other countries, and the questions of private international law (conflicts of law) by which they should be interpreted in the relevant jurisdictions.¹⁰¹

If a civil status event—birth, adoption, marriage, divorce, death—takes place in a different country from the one where nationality is being claimed, it is often necessary to acquire official copies of civil status documents from the other country and submit them in a form accepted by the authorities of the country of nationality, usually by transcription into its national civil status records. If the events were not registered in the other country, national law may or may not provide for their late registration or substitution by other procedures. Moreover, a finding of an error at any stage in these processes can sometimes result in the retroactive loss of nationality apparently legitimately held over many years.¹⁰² In some contexts, if it is being argued that a person should receive recognition of nationality or protection as a stateless person in the country of residence, it may be a requirement to prove a negative through the same processes—that the person concerned is not “considered as a national” by any other country (the definition of stateless person in international law).¹⁰³

To make these arguments, it will very often be necessary to secure expert evidence about the law of the other country or countries to which the person has a connection, and its interpretation by the authorities and courts of that country. The identification of relevant experts should start early in the litigation process (► [section 5.4: Expert opinions](#)).

Comparative law

Arguments from comparative law are not always welcomed in national courts. However, at minimum, a case decided by an apex court in another country may be used to show how a particular interpretation of the law has been found outmoded elsewhere, or to suggest a remedy, or simply to demonstrate that what the complainants are calling for is reasonable and accepted in other jurisdictions.

This type of argument is perhaps more likely to be accepted in the common law jurisdictions, where case law plays a stronger role—and it is particularly powerful among those countries that were former British territories and shared the nearly standardised legal regime for citizenship that was negotiated with all these states on gaining independence. For example, the *Unity Dow* case from Botswana, in which the Court of Appeal found that discrimination on the basis of sex in transmission of citizenship to children and spouses was unconstitutional,¹⁰⁴ has been extensively cited in other courts¹⁰⁵; and was used in the arguments made by plaintiffs in a case before the Malaysian courts challenging discrimination against women in transmission of citizenship to their children born outside the country.¹⁰⁶ Even in the civil law context, however, such precedents are useful: the Chilean Supreme Court was cited by the Colombian Constitutional Court in a case concerning the nationality of children of Venezuelan refugees born in Colombia.¹⁰⁷

Public international law

It is very common for governments to assert the statement in Article 1 of the 1930 Convention on the Conflict of

¹⁰¹ Bronwen Manby, “Legal Identity for All’ and Statelessness: Opportunity and Threat at the Junction of Public and Private International Law”, *Statelessness and Citizenship Review* vol. 2, no. 2 (2020), pp.248–71.

¹⁰² Gerard-René de Groot and David de Groot, “Recognition of Civil Status (Certificates), with Special Attention to Secondary Recognition of Documents Already Recognised in Another Member State”, in *Researches in European Private Law and Beyond-Contributions in Honour of Reiner Schulze’s Seventieth Birthday*, ed. André Janssen and Hans Schulte-Nölke (Baden-Baden: Nomos, 2020).

¹⁰³ Convention Relating to the Status of Stateless Persons, 1954, art. 1(1).

¹⁰⁴ *Attorney-General v. Dow*, Botswana Court of Appeal, Judgment of 3 July 1992, 1992 BLR 119 (CA).

¹⁰⁵ Discussed in Karen Knop and Christine Chinkin, “Remembering Chrystal MacMillan: Women’s Equality and Nationality in International Law”, *Michigan Journal of International Law* Vol.22, no. 4 (2001) pp. 523–86, at pp. 533–534 & p. 554.

¹⁰⁶ Family Frontiers, interview for evaluation of OSJI support for litigation on access to citizenship and identity documents, February 2022.

¹⁰⁷ *Sentencia T-006/20*, supra n 29, pp. 22-23, 58.

nationality Laws that “It is for each State to determine under its own law who are its nationals”, and therefore that courts have no jurisdiction over the recognition or grant of nationality. However, Article 1 goes on to state that “This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”

The “international conventions, customs, and principles of law” governing states’ obligations in relation to recognition or grant of nationality have greatly evolved since the adoption of the 1930 Convention. Article 15 of the Universal Declaration of Human Rights adopted in 1948 provides that “[E]veryone has a right to a nationality” and that “[N]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”¹⁰⁸ The status of this article as customary international law has been accepted by the African Court on Human and Peoples’ Rights.¹⁰⁹ The right to a nationality has been restated in many of the international and regional human rights treaties—perhaps most significantly including the Convention on the Rights of the Child, to which every country in the world except for the United States is a party (► [section 7.2: The right of every child to acquire a nationality](#)).

In its 1984 advisory opinion on naturalisation provisions in Costa Rica, requested by the government of Costa Rica itself, the Inter-American Court of Human Rights stated that:

[D]espite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.¹¹⁰

Thirty years later, in the *Yean and Bosico* case, the Inter-American Court further developed this statement:

Although the determination of who is a national of a particular state continues to fall within the ambit of state sovereignty, states’ discretion must be limited by international human rights that exist to protect individuals against arbitrary state actions. States are particularly limited in their discretion ... by their obligations to guarantee equal protection before the law and to prevent, avoid, and reduce statelessness.¹¹¹

This principle has been endorsed by the African Committee of Experts on the Rights and Welfare of the Child in cases against both Kenya and Sudan.¹¹²

One ambition of strategic litigation may be to ensure that these limits are recognised by the national authorities—as well as to contribute to the evolution of the norms. Most often in contention are the obligations of a *particular* state to ensure that the right to nationality is respected, by recognising or granting nationality to a person with a connection to that state.

The relevance of international law in litigation before national courts is more obvious in those civil law countries following the “monist” tradition by which international treaties have direct effect once ratified in accordance with national law. It is also common for nationality codes in these countries to include a provision confirming that international laws treaties apply; most laws in Africa modelled on the French code of 1945 for example, include a statement that the provisions of treaties are applicable even if they are different from those in national law.¹¹³ Although it is still not common for international treaties to be directly invoked before the courts in these jurisdictions, these laws explicitly envisage that they will be.

In the common law countries following the “dualist” tradition, by which international treaties only have domestic effect once enacted in national law, it may be more difficult to persuade a judge to accept arguments based on international law principles. Nonetheless, on matters such as the definition of stateless person, courts in common law jurisdictions have accepted the international definition set out in the Convention relating to the Status of Stateless Persons, and UNHCR’s guidance on interpreting this definition. In some countries where new constitutions have been adopted since independence, there may also be greater openings to use international law imaginatively before

¹⁰⁸ See discussion in Mirna Adjami and Julia Harrington, “The Scope and Content of Article 15 of the Universal Declaration of Human Rights”, *Refugee Survey Quarterly* Vol. 27, no. 3 (2008), pp. 93–109, <https://doi.org/10.1093/rsq/hdn047>.

¹⁰⁹ *Anudo Ochieng Anudo v. United Republic of Tanzania*, Communication No. 012/2015, African Court on Human and Peoples’ Rights, 22 March 2018, <https://www.african-court.org/cpmt/details-case/0122015>; see also Bronwen Manby, “Case Note: *Anudo Ochieng Anudo v Tanzania*” (Judgment), African Court on Human and Peoples’ Rights, App. No. 012/2015, 22 March 2018, *Statelessness and Citizenship Review* Vol. 1, no. 1 (2019), pp. 170–76.

¹¹⁰ *Advisory Opinion on Amendments to the Naturalisation Provisions of the Constitution of Costa Rica*, Inter-American Court of Human Rights, No. OC-4/84, Inter-American Court of Human Rights, 19 January 1984.

¹¹¹ *Case of the Girls Yean and Bosico*, supra n 52.

¹¹² *Kenyan Nubian children’s case*, supra n 35; *ACJPS & PLACE (Benjamin) v. Sudan*, supra n 42, para. 35.

¹¹³ For example, according to article 6 of the Mauritanian nationality code (Loi No. 1961-112, as modified): « Les dispositions relatives à la nationalité contenues dans les traités ou accords internationaux dûment ratifiés et publiés s’appliquent, même si elles sont contraires aux dispositions de la législation interne mauritanienne. » (“The provisions relating to nationality contained in duly ratified and published international treaties and agreements are applied even if they are contrary to the provisions of Mauritanian national legislation”).

the national courts.¹¹⁴ At minimum, international jurisprudence—like comparative jurisprudence—may encourage or empower judges to accept arguments that are not yet commonly taught in national law schools and argued before national courts.

The decisions and the soft law documents of treaty bodies and UN agencies have been quite widely incorporated into national law or cited in decisions of national courts. For example:

- **UK Supreme Court:** The judgment in the case of *Al Jedda* challenging deprivation of nationality on national security grounds referred to the UNHCR interpretation in the *Handbook of Stateless Persons* of the definition of stateless person in the 1954 Convention, which had been incorporated into guidance issued by the British Home Office on applications to remain in the UK as a stateless person.¹¹⁵
- **Hungarian Constitutional Court:** In a case concerning the requirement to prove lawful residence in Hungary before stateless status could be granted, the Constitutional Court considered the obligations imposed by the 1954 Convention relating to the Status of Stateless Persons, and concluded that the lawful residence requirement unlawfully narrows the definition of “stateless person”. In reaching this conclusion, the court also relied on interpretations of state obligations under the 1954 Convention in the UNHCR *Handbook on Protection of Stateless Persons*.¹¹⁶ In a more recent decision, the **Hungarian Supreme Court (Kúria)** also drew on the UNHCR *Handbook* to confirm that it is not required that statelessness should always be a consequence of explicit gaps in legislation, but that “statelessness that is rooted in practice also corresponds to the definition of statelessness”.¹¹⁷
- **High Court of Kenya:** The High Court judgment in the case brought by the Nubian Rights Forum to challenge the introduction of a new National Integrated Identity Management System (the Huduma Namba) extensively cited submissions relying on the cases brought on behalf of the Nubian community of Kenya before the African Commission and Committee of Experts (although the court ultimately declined to find that the Huduma Namba in itself created discrimination or exclusion).¹¹⁸
- **Colombia Constitutional Court:** The Constitutional Court relied heavily on the *Yean and Bosico* case against the Dominican Republic, in its decision that the civil registry had violated the rights to nationality and legal personality by omitting to consider the risk of statelessness when the births of children of Venezuelan refugees were registered.¹¹⁹

The requirements of international law in relation to nationality and statelessness are explored further below in [section 7: Legal arguments](#).

5.3. Building the evidence for systemic change

It is very often the case that a particular individual may be assisted to gain recognition of nationality, and issue of the necessary documents, once legal assistance is obtained and an application supported by an advice centre/clinic, advocacy organisation or lawyer.¹²⁰ Nonetheless, this can be impossible in some cases, even if a person appears to be entitled to nationality in law: for example, if a birth was not registered and the parents also do not have identity documents, and the state argues that it is a reasonable requirement for applicants to produce such evidence of entitlement before nationality is recognised.

Moreover, case-by-case assistance is time consuming and never likely to reach all those who need assistance. For litigation to achieve systemic changes that remove risks of statelessness, it is important to match a focus on immediate remedies with arguments that structural problems must also be addressed through law and procedural reforms that will have long-term effect.

¹¹⁴ Kenya's 2010 constitution, for example, provides in article 2 that: “(5) The general rules of international law shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.” The courts have referenced international law in cases to recognise the right of movement for refugees: see *Kituo Cha Sheria and 8 others v. Attorney General* Petitions Nos. 19 and 115 of 2013, High Court, judgment of 26 July 2013, <http://kenyalaw.org/caselaw/cases/view/84157>; *Attorney General v. Kituo Cha Sheria and 7 others*, Civil Appeal 108 of 2014, Court of Appeal, 17 February 2017 (affirming the judgment of the High Court), <http://kenyalaw.org/caselaw/cases/view/131951/>.

¹¹⁵ *Secretary of State for the Home Department (Appellant) v Al-Jedda (AP) (Respondent)*, U.K. Supreme Court, judgment of 9 October 2013, [2013] UKSC 62, para. 34, <https://www.supremecourt.uk/cases/uksc-2012-0129.html>.

¹¹⁶ Decision no.6/2015 of 25 February 2015 of the Constitutional Court of Hungary, see Gábor Gyulai, “Hungarian Constitutional Court Declares that Lawful Stay Requirement in Statelessness Determination Breaches International Law” (blog post), European Network on Statelessness, 2 March 2015, <https://www.statelessness.eu/updates/blog/hungarian-constitutional-court-declares-lawful-stay-requirement-statelessness>.

¹¹⁷ Judgment no. Kfv.II.37.715/2021/6 of 25 May 2022 of the Supreme Court of Hungary (Kúria); see ENS caselaw database summary available at <https://case-law.statelessness.eu/caselaw/hungary-applicant-v-national-directorate-general-alien-police-budapest-and-pest-county>.

¹¹⁸ *Nubian Rights Forum and 2 others v. Attorney General & 6 others*; *Child Welfare Society and 9 others (Interested Parties)*, Petitions 56, 58 and 59 of 2019 (Consolidated), High Court of Kenya at Nairobi, Judgment of 30 January 2020, eKLR, <http://kenyalaw.org/caselaw/cases/view/189189/>.

¹¹⁹ *Sentencia T-006/20*, supra n 29, pp.17-18, 40-41, 58-59.

¹²⁰ For an important resource for such work, see the *Community-Based Practitioner's Guide*, supra n 67.

To establish the underlying problems and the appropriate remedies, it will almost always be necessary to find out which identity/civil documents are held by people of different backgrounds in the relevant jurisdiction(s), and the common or different characteristics among each category. These distinctions can be complex to unravel, and apparently similar problems may be based on different underlying factors: ► [focus box F below for typical profiles of groups at risk of statelessness](#). The aggregation of details from many different cases will help to establish the profiles of those excluded, the reasons why they are excluded, and—most importantly—the specific remedies required in terms of reform of substantive law or administrative procedures (► [section 5.6: Remedies II: The detailed requests](#)).

Very often, procedural barriers to recognition or acquisition of nationality disguise discrimination based on race, ethnicity, religion or similar characteristics. The reasons for administrative decisions are often not fully transparent to those affected. To demonstrate that the impact of a particular requirement is in practice discriminatory on grounds prohibited in national or international law, it may be necessary to build up evidence through multiple testimonies showing a consistent pattern in the way the law is administered. In jurisdictions that allow for an “access to information” request, it can be helpful to seek official data from government departments as a way of illustrating patterns and building evidence.

F - Typical groups at risk of statelessness

- children of parents who do not themselves have (currently valid/expired) identity documents indicating that they are citizens of the country of the child's birth;
- children of parents who do not have (currently valid/expired) identity documents indicating that they have nationality in any country;
- children of parents who have (currently valid/expired) identity documents recognising nationality of another state, but do not have legal residence in the country of the child's birth;
- children of refugees or former refugees who have only a (currently valid/expired) refugee identity document indicating nationality of the country of origin;
- children born to foreign fathers, where the law of the country of birth discriminates on the basis of sex in transmission of nationality to children by mothers, or onerous procedural requirements apply in relation to establishing the parental link for children born out of wedlock;
- children whose parents hold the nationality of a country where transmission of nationality is restricted in relation to children born outside the territory;
- children born from international surrogacy arrangements, where national laws conflict and do not provide a right to nationality for the child;
- people born before or after a particular date when nationality rules changed;
- the descendants of people who were resident in a territory before a transfer of sovereignty on succession of states—when a territory gains independence, or a state ceases to exist or is created by the merger of different territories, or territory is transferred between states—but whose nationality of the new state was never recognised;
- border-dwelling, nomadic and indigenous people with (perceived) connections to two or more states, but unrecognised as nationals by any state;
- refugees or asylum-seekers who are also stateless, but whose statelessness has never been considered or recorded in the refugee status determination procedure;
- people caught up in immigration proceedings, where the state of residence wishes to deport the person as a failed asylum-seeker, an immigrant without a legal status, or on the basis of criminal convictions, and the state of alleged origin does not accept that the person is a national;
- people for whom recognition of nationality depends on prior recognition by a formally appointed or informally recognised gatekeeper, such as a prominent community figure who can verify identity and origins, and this recognition is not forthcoming.

5.4. Expert opinions

Expert opinions may often be an important resource, to explain the laws in other jurisdictions and help to unravel the extremely complex relationships of private international law, as well as providing evidence on how the law is implemented in practice in another country. This will especially be the case if it is alleged that a person denied nationality has the nationality of another country and does not therefore require protection or grant of nationality as a stateless person. Examples of cases where information from another country has been critical include:

- In a complaint brought to the African Commission on Human and Peoples' Rights on denial of recognition of Ivorian nationals, the Open Society Justice Initiative (OSJI) submitted an expert opinion on the situation in the country by a leading Ivorian human rights activist, showing the impact of discriminatory application of nationality law on particular population groups. In advance of a hearing on remedies in the same case, OSJI submitted an expert opinion on Ivorian nationality law in comparative context, and on the specific legal and procedural reforms required to address the situation of those affected by provisions of the existing law that were not in compliance with African and international standards.¹²¹
- An immigration case in UK concerned a person born in Mauritania, of parents he believed were also born in the same town, but who had grown up in Senegal, working in servitude. He held no identity documents of any kind. He arrived in the UK by irregular means, and was convicted of possessing a false document. An asylum claim was refused and the Home Office sought to deport him. However, based on expert evidence of the nationality law of Mauritania and Senegal an immigration tribunal accepted that he was stateless, even though he appeared to be Mauritanian through his parents. An appeal by the Home Office was unsuccessful.¹²²

Even if there is no formal expert evidence submitted, it is worth reaching out to litigators in other countries through the various networks that exist. In many countries, there is no developed body of case law around access to nationality—by comparison to other rights issues. However, whatever specific form discrimination in issue of identification documents takes, it often raises a similar set of issues, and it can be rewarding to see how others have argued similar cases—especially, but not only, if the system of law is similar.

It is also important to seek comparative advice when the government itself proposes a remedy for the situation of those affected by lack of identity documents: Is the remedy proposed in fact a solution, compliant with international law, or does it still discriminate against the affected group in some way? Seeking the views of those in other countries can help to avoid such traps.

Increasingly, expertise may also be needed on digital identification, the risks that the implementation and architecture of new identification management systems replicate patterns of exclusion in existing identification systems, and the means to avoid this outcome. If there is already a focus in public advocacy on questions of data protection and privacy around digital identity, advocates and litigators focused on nationality can equally bring their expertise to inform the broader debate—bringing a focus not only on the rights of recognised citizens, but also those at the margins who are most likely to face problems with a new system. The creation of new identification systems is a notorious danger point for the creation of stateless populations.

5.5. Third-party interventions

The complexity of cases turning on the question of nationality, and the different types of legal expertise required, means that it will often be helpful to seek out third party interventions to bring new insights and expertise to the case, especially on international or comparative law. Third party interventions bring additional weight and advocacy support going beyond the specific legal arguments put forward.

¹²¹ OSJI Expert Opinion in *People v. Côte d'Ivoire*, African Commission on Human and People's Rights, <https://www.justiceinitiative.org/litigation/people-v-cote-divoire>.

¹²² *Secretary of State for the Home Department (Appellant) v. C B S (Respondent)* Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: PA/03859/2019, decision of 10 January 2020, <https://tribunalsdecisions.service.gov.uk/utiac/pa-03859-2019>.

G - Third party interventions by UN agencies

UNHCR is the UN agency with the mandate to prevent and reduce statelessness, as well as to protect the rights of stateless people, giving it the authority to intervene in cases raising issues of statelessness.¹²³ This mandate has continued to evolve as Conclusions of UNHCR's Executive Committee (ExCom)¹²⁴ have been endorsed by the UN General Assembly.¹²⁵

Over time, UNHCR has developed a recognized expertise on statelessness. Litigants who are interested in having UNHCR intervene in a case should contact the Senior Protection or Senior Legal Officer in their national office or in their regional bureau if the case is before a regional court.

Examples of significant third party interventions by UN and other international agencies in cases related to statelessness include:

- By UNHCR at national level in Colombia,¹²⁶ the Netherlands,¹²⁷ Norway,¹²⁸ Hungary,¹²⁹ Ireland,¹³⁰ and the UK.¹³¹
- By UNHCR before the European Court of Human Rights in cases against Croatia,¹³² Slovenia,¹³³ and Russia.¹³⁴
- By the Office of the UN High Commissioner for Human Rights in a case before the Indian Supreme Court challenging the Citizenship Amendment Act of 2019.¹³⁵
- By the UN Special Rapporteurs on freedom of expression and on racism and the Council of Europe Commissioner for Human Rights in the case of *Emin Huseynov v. Azerbaijan* before the European Court of Human Rights.¹³⁶

¹²³ UN General Assembly resolutions 3274 (XXIV) and 31/36 designate UNHCR as the body to examine the cases of persons who claim the benefit of the 1961 Convention on the Reduction of Statelessness and to assist such persons in presenting their claims to the appropriate national authorities (Article 11). The UN General Assembly further entrusted UNHCR with a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons, through UNGA resolutions A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI), Prevention and Reduction of Statelessness and the Protection of Stateless Persons, 20 October 1995, <http://www.refworld.org/docid/3ae68c443f.html>.

¹²⁴ ExCom Conclusion No. 90 (LII), Conclusion on International Protection, 5 October 2001, para. (q), <http://www.refworld.org/docid/3bd3e3024.html>; ExCom Conclusion No. 95 (LIV), General Conclusion on International Protection, 10 October 2003, para. (y), <http://www.refworld.org/docid/3f93aede7.html>; ExCom Conclusion No. 99 (LV), General Conclusion on International Protection, 8 October 2004, para. (aa), <http://www.refworld.org/docid/41750ef74.html>; ExCom Conclusion No. 102 (LVI), General Conclusion on International Protection, 7 October 2005, para. (y), <http://www.refworld.org/docid/43575ce3e.html>; ExCom Conclusion No. 106 (LVII), Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, 6 October 2006, paras (f), (h), (i), (j) and (t) <http://www.refworld.org/docid/453497302.html>.

¹²⁵ UNGA resolutions A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995.

¹²⁶ Observaciones de la Oficina del Alto Comisionado de las Naciones Unidas para los Refugiados ante la Corte Constitucional de la República de Colombia en respuesta al Oficio OPTB – 1443/19, Expedientes T-7.206.829 y T-7.245.483 AC, Julio 2019, <https://www.refworld.org/es/jur/amicus/unhcr/2019/es/129655>. See also, UNHCR, Observaciones de la Oficina del Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR) a la solicitud de información de la Honorable Corte Constitucional de Colombia, T-9917118, 26 April 2024, www.refworld.org/jurisprudence/amicus/unhcr/2024/es/147996.

¹²⁷ Submission by the Office of the United Nations High Commissioner for Refugees in case number 202105598/1/A3 before the Council of State, February 2022, <https://www.refworld.org/jurisprudence/amicus/unhcr/2022/en/124176>.

¹²⁸ Amicus curiae of the United Nations High Commissioner for Refugees regarding the interpretation of the 1954 Convention Relating to the Status of Stateless Persons before the Borgarting Court of Appeal of Norway, UNHCR, 3 September 2018, <https://www.refworld.org/docid/5b9272b74.html>.

¹²⁹ Observations of the Office of the United Nations High Commissioner for Refugees in the Case of *X v. Office of Immigration and Nationality* (17.K.32.297/2013) before the Constitutional Court of Hungary, UNHCR 30 November 2014, <https://www.refworld.org/docid/547c69434.html>.

¹³⁰ Amicus curiae of UNHCR in the case of *B.D. (Bhutan and Nepal) v. The Minister for Justice and Equality & Ors*, High Court of Ireland, Case no. 2010/1188 JR, 25 June 2018, <https://www.refworld.org/jurisprudence/amicus/unhcr/2018/en/121834>.

¹³¹ Submission by the United Nations High Commissioner for Refugees in the case of *AS (Guinea) v. Secretary of State for the Home Department* before the Court of Appeal (Civil Division), C5/2016/3473/A, 20 February 2018, <https://www.refworld.org/jurisprudence/amicus/unhcr/2018/en/122418>.

¹³² Submission by UNHCR <https://www.refworld.org/jurisprudence/caselaw/echr/2018/en/120761>, 3 July 2015, in the case of *Hoti v. Croatia*, Application No. 63311/14, Grand Chamber, 26 April 2018, <https://www.refworld.org/publisher/UNHCR/AMICUS/SRB/560a2c4b4,0.html>.

¹³³ UNHCR intervention before the European Court of Human Rights in the case of *Kuric and Others v. Slovenia*, Application No. 26828/06, 8 June 2011, <https://www.refworld.org/jurisprudence/amicus/unhcr/2011/en/78977>.

¹³⁴ Submission by the Office of the United Nations High Commissioner for Refugees in the case of *Lakatosh and Others v. Russia*, UNHCR, March 2011, <https://www.refworld.org/jurisprudence/amicus/unhcr/2011/en/77748>.

¹³⁵ Application for Intervention, *Mukharji and others v. Union of India and others*, WP (Civic) No. 1474 OF 2019, Indian Supreme Court, UN High Commissioner for Human Rights, available at https://www.thehinducentre.com/resources/article30979486.ece/binary/pdf_upload-370845.pdf (a draft, final not available online); see also "UN High Commissioner for Human Rights files intervention application in Supreme Court against The Citizenship Amendment Act", *Law Times Journal*, 5 March 2020, <https://lawtimesjournal.in/un-high-commissioner-for-human-rights-files-intervention-application-in-supreme-court-against-the-citizenship-amendment-act/>; Priya Pillay, "Intervention of the UN High Commissioner for Human Rights at the Indian Supreme Court: International Law and the Citizenship Amendment Act" (blog post), *Opinio Juris*, 5 March 2020, <https://opiniojuris.org/2020/03/05/intervention-of-the-un-high-commissioner-for-human-rights-at-the-indian-supreme-court-international-law-and-the-citizenship-amendment-act/>.

¹³⁶ Intervention of the United Nations Special Rapporteurs on the Promotion and Protection of the Right to Freedom of Opinion and Expression and on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, 21 September 2018, (application no. 1/16), *Emin Huseynov v. Azerbaijan*, European Court of Human Rights, <https://freedex.org/wp-content/blogs.dir/2015/files/2019/10/Amicus-ECHR-Azerbaijan.pdf>; "Commissioner Mijatović intervenes before the European Court of Human Rights in the case of *Emin Huseynov v. Azerbaijan*", Council of Europe Commissioner for Human Rights, 4 October 2018, <https://www.coe.int/en/web/portal/-/commissioner-mijatovic-intervenes-before-the-european-court-of-human-rights-in-the-case-of-em-in-huseynov-v-azerbaijan>.

- By the UN Special Rapporteur on racism in relation to a nationality deprivation case in the Netherlands.¹³⁷
- By the UN Special Rapporteur on human rights and counter-terrorism in a joint intervention with the British organisation Liberty in the Shamima Begum nationality deprivation case before the British courts.¹³⁸

H - Case example: Bringing international and comparative legal analysis to Colombia's Constitutional Court

Unlike most countries in continental Americas, Colombia restricts the attribution of nationality to those born in the territory to children of parents who are Colombian nationals or are “domiciled” in Colombia (a status that included a number of different types of visa). This provision was applied to deny Colombian nationality to children born in Colombia to Venezuelan parents with the Special Permit for Permanence “PEP” a humanitarian measure that allows migrants to reside in Colombia and access basic rights such as education, health and work, but was not considered valid evidence of “domicile” in Colombia.

With the support of the Open Society Justice Initiative, *De Justicia*, a national NGO with experience in strategic litigation, worked with *Corporación Opción Legal* and the Universidad de Antioquia, clinics providing support on individual cases, to identify plaintiffs and coordinate a submission to the Constitutional Court to challenge this practice. Ultimately, 12 organisations jointly submitted an intervention to the Constitutional Court.¹³⁹ The Open Society Justice Initiative submitted its own amicus brief in the case, focusing on the international legal framework and obligations of states with respect to children's right to nationality,¹⁴⁰ and facilitated the submission of an amicus brief from the University Alberto Hurtado of Chile. UNHCR also intervened in the case.¹⁴¹ The litigation was combined with other advocacy from civil society, including submissions to the Inter-American Commission on Human Rights.¹⁴²

Arguments presented included the child's fundamental right to a nationality, and the regional and international standards that protect the right to nationality of children born in the territory, including the safeguard against statelessness. The briefs highlighted deficiencies in the interpretation of the domestic legal framework, through a series of administrative acts which establish a complex system with little certainty, creating arbitrary distinctions among children with parents with different forms of regular migratory status.

In 2018, the Constitutional Court selected the case for review, joining the case with another addressing similar facts. Only a minority of cases submitted are selected in this way, and the joint submission by many Colombian actors, supported by international interventions, no doubt made an important contribution to this decision. In January 2020 the court ruled in favour of the applicants. Several of the arguments presented in the amicus briefs were reflected in the decision, with references to jurisprudence of the Inter-American Court and in Chile; a summary of the Justice Initiative's amicus brief formed an annex to the final ruling.¹⁴³ The Court addressed the interpretation of “domicile” in the discussion of the issues, but (disappointingly) did not make any order on the point in its judgment.

Even before the judgment was issued, two different measures addressed the status of Venezuelan children born in Colombia. In August 2019, an administrative resolution provided for the civil registry to recognise the Colombian nationality of the children of Venezuelans born in Colombia¹⁴⁴; later that year, in a parallel process supported by the ombuds office (Defensoría del Pueblo), the legislature adopted a new law that provided the same protection (though with differences in detail).¹⁴⁵ These measures applied only to the children of Venezuelan parents, and were time limited, applying to those born in Colombia from 2015, initially up to 2021, extended to 2025.¹⁴⁶ It was estimated that more than 24,000 children immediately benefited from the grant of Colombian nationality.¹⁴⁷ Almost 105,000 children had benefited from this grant as of February 2024. In 2021, a new migration policy was adopted that also provided for the recognition of stateless person status.

¹³⁷ Amicus Brief Presented by the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, before the Dutch Immigration and Naturalisation Service, 23 October 2018, Office of the United Nations High Commissioner for Human Rights, https://www.ohchr.org/Documents/Issues/Racism/SR/Amicus/DutchImmigration_Amicus.pdf.

¹³⁸ Skeleton Argument of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while combatting terrorism, *R (Shamima Begum) v. Special Immigration Appeals Commission and Secretary of State for the Home Department*, Administrative Court Co/798/2020, https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/2020_05_29_FINAL_Begum_Intervention.pdf.

¹³⁹ Gobierno colombiano estaría poniendo en riesgo de apatridia a bebés de padres venezolanos que nacen en Colombia, *De Justicia*, 25 June 2019, <https://www.dejusticia.org/dejusticia-interviene-ante-la-corte-constitucional-en-casos-de-hijos-de-venezolanos-en-riesgo-de-apatridia/>.

¹⁴⁰ Case summary by OSJI: <https://www.justiceinitiative.org/litigation/right-to-nationality-of-children-born-in-colombia>.

¹⁴¹ Supra n 130.

¹⁴² “Necesidades de protección de las personas venezolanas forzadas a migrar, refugiadas y en riesgo de apatridia en Colombia”, Informe país como aporte a la Audiencia Temática 168 período de sesiones de la Comisión Interamericana de Derechos Humanos (CIDH) en República Dominicana, 11 May 2018, <https://www.refworld.org/es/docid/5b50d8494.html>.

¹⁴³ *Sentencia T-006/20*, supra n 29, pp.22-23, 50, 58.

¹⁴⁴ Registrador Nacional del Estado Civil, Resolución 8470 de 5 de agosto de 2019.

¹⁴⁵ Lei 1997 de 16 de setembro de 2019. See discussion in Miguel Ángel Rodríguez Vázquez, Flor María Ávila Hernández & Isidro de los Santos, ‘Reflexiones sobre nacionalidad, apatridia y derechos de los niños: Análisis comparado entre Colombia y República Dominicana’, *Novum Jus*, 14, no.2 (2020), 197–231, <https://doi.org/10.14718/NovumJus.2020.14.2.9>

¹⁴⁶ Abraham Puche, ‘¿Cómo los hijos de migrantes venezolanos nacidos en Colombia pueden adquirir la nacionalidad?’ *Conectando Caminos por los Derechos & ColombiaCheck*, 18 May 2022, <https://colombiacheck.com/investigaciones/como-los-hijos-de-migrantes-venezolanos-nacidos-en-colombia-pueden-adquirir-la>.

¹⁴⁷ ‘Colombia otorga nacionalidad a 24.000 niños y niñas nacidos de padres y madres venezolanos’, CEJIL, 5 August 2019, <https://cejil.org/comunicado-de-prensa/colombia-otorga-nacionalidad-a-24-000-ninos-y-ninas-nacidos-de-padres-y-madres-venezolanos/>.

5.6. Remedies II: The detailed requests

The types of remedy sought in litigation will vary according to what is available in any jurisdiction, as well as by the national political context, and the needs of the particular complainants. The typical litigant in a case about access to nationality and documentation seeks to have government conduct declared wrongful, their status as a citizen confirmed or granted, and—ideally—to be compensated for the harm suffered by previous non-recognition.

International and regional courts and other treaty bodies usually only offer general remedies, such as recommending or ordering changes in legislation, or other forms of structural change, although they may also award damages for non-pecuniary loss, and recommend that the state assess and pay compensation. At national level, there is likely to be a wider range of options, including remedies that may be declaratory (for example, stating that a person is already a citizen), material (financial or other compensation), injunctive (legal or procedural reform), or symbolic, including punitive damages awards.¹⁴⁸ In some jurisdictions there is the possibility to request the court to order that the respondent must report back within a reasonable time on the implementation of a judgment.

Declaratory remedies

In many cases, a primary remedy sought from a court will be a declaration that an individual or group of people are in fact nationals of the country where their case is being litigated. There are many individual cases in countries across the world in which courts order the executive branch to recognise an individual's nationality on the basis that legal requirements are fulfilled, and issue documents accordingly. Courts have also made judgments applying to members of a general category:

- The High Court of Bangladesh adopted two important judgments that declared members of the Urdu-speaking minority in Bangladesh to be citizens, where they fulfilled the provisions of the Citizenship Act, and ordered identity documents to be issued accordingly.¹⁴⁹
- In South Africa, the Constitutional Court declared sections of the Citizenship Act unconstitutional because they denied citizenship to children born outside of South Africa with one parent who was a citizen, upheld the High Court declaration that the appellants were citizens, and ordered the issuing of identity documents. In considering the appropriate relief, the court noted that:

citizenship does not depend on a discretionary decision; rather, it constitutes a question of law.... [I]f the requisite conditions to acquire citizenship are satisfied, the Department of Home Affairs is required to recognise this citizenship and proceed with the concomitant administrative procedures, without any further consideration.¹⁵⁰

- In Uganda, the High Court considered the situation of Ugandans of Somali ethnicity with roots in the country since before independence and issued a declaration that the plaintiffs were Ugandan citizens, ordering the Directorate of Citizenship and Immigration Control to issue national identity cards to eligible applicants.¹⁵¹

Aiming at broader impact, litigators may ask a court to declare a provision of the law to be unconstitutional. A number of apex national courts have made such declarations in case of legal provisions discriminating on the basis of sex:

- The Botswana Supreme Court held that provisions of the Citizenship Act which discriminated against women in transmission of citizenship to their children were unconstitutional.¹⁵²
- The Constitutional Court of Benin similarly found provisions of the nationality code discriminating on the basis of sex to be unconstitutional.¹⁵³
- The Sudanese Constitutional Court found that changes to the law that had denied Sudanese nationality to the children of one Sudanese parent and one South Sudanese parent were unconstitutional.¹⁵⁴

¹⁴⁸ The five headings on the right to remedy established by the UN General Assembly in case of gross violations are: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", adopted by UN General Assembly Resolution 60/147, 16 December 2005, UN Doc. A/RES/60/147, <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>. See also, Dinah Shelton, *Remedies in International Human Rights Law* (OUP, 3rd ed, 2015).

¹⁴⁹ The two judgments are available in Namati and Council of Minorities, 'Citizenship Rights of Urdu-Speaking Bangladeshis'. See also ► [focus box I](#).

¹⁵⁰ *Yamikani Vusi Chisuse and Others v Director-General, Department of Home Affairs and Another*, CCT 155/19, South African Constitutional Court, Judgment of 22 July 2020, para. 88., <https://collections.concourt.org.za/handle/20.500.12144/36628?show=full>.

¹⁵¹ *Abdu Abucar Hussein and 7 others v Attorney General*, Uganda High Court, Civil Suit No. 437 of 2019 (18 March 2022) [2022] UGHCCD 49, <https://citizenshiprightsafrika.org/uganda-abdu-abucar-hussein-and-7-others-v-attorney-general/>.

¹⁵² *Attorney-General v. Dow*, Botswana Court of Appeal, judgment of 3 July 1992, 1992 BLR 119 (CA).

¹⁵³ *Décision DCC14-172 du 16 septembre 2014*, Cour constitutionnelle du Bénin, <https://citizenshiprightsafrika.org/benin-decision-dcc14-172-du-16-septembre-2014/>.

¹⁵⁴ *Mazin Adil Ali Deng and others v. Ministry of Interior and another*, Sudan Constitutional Court judgment of 23 August 2016, <https://citizenshiprightsafrika.org/mazin-adil-ali-deng-and-others-vs-ministry-of-interior-and-another/>.

- The South African Constitutional Court ruled that the Births and Deaths Registration Act was unconstitutional because it discriminated against unmarried fathers by failing to permit them to register the birth of their child.¹⁵⁵
- The Bahamas Court of Appeal confirmed a High Court judgment that discrimination on the basis of sex of the parent in transmission of citizenship to children was unconstitutional, and that all children of a Bahamian mother and foreign father born since independence in 1973 should be deemed to be citizens.¹⁵⁶

Material remedies

International and regional human rights treaty bodies have on occasion ordered national authorities to assess damages in respect of violations connected with nationality and legal status in a country—or directly awarded financial compensation, although generally at a modest level. For example:

- In the case of *DZ v. The Netherlands*, the UN Human Rights Committee required the Netherlands to provide the author with an effective remedy, including adequate compensation (as well as legal reforms).¹⁵⁷
- The Inter-American Court ordered payment of US\$8,000 to each girl in the *Yean and Bosico* case as compensation for the harm done¹⁵⁸; in the *Expelled Dominicans and Haitians* case, the court awarded US\$10,000 compensation to each person.¹⁵⁹
- In the case of *Hoti v. Croatia*, concerning the situation of individuals erased from the register of those with residence in Croatia, the European Court of Human Rights awarded €7,500 to those affected.
- In the case of *Keita v. Hungary*, concerning a stateless person unable to regularise his status, the European Court of Human Rights awarded €8,000 in respect of non-pecuniary damages.¹⁶⁰
- In the similar case of *Kurić and Others v. Slovenia*, the ECtHR awarded €20,000 to each of the six successful applicants in respect of non-pecuniary damage for discriminatory erasure from the national population register. Slovenia was also ordered to set up a domestic compensation scheme in respect of pecuniary damage.¹⁶¹
- In *Mennesson v. France* the European Court of Human Rights awarded €5,000 to each of the two children affected by non-recognition of a their biological father in the civil registry in a case of surrogacy.¹⁶²
- In the case of *Anudo v. Tanzania*, the African Court on Human and Peoples' Rights awarded the complainant and members of his family a total of TZS 229,200,000 (roughly US\$90,000) for pecuniary and non-pecuniary damages, in addition to ordering Tanzania to allow him to return to the territory and restore his nationality.¹⁶³
- The case of *Lakatosh and others v. Russia*, brought to the European Court of Human Rights by stateless Roma in relation to their prolonged detention pending planned deportation, was settled on the basis of payment of €30,000 to each applicant.¹⁶⁴

Injunctive remedies: individual relief, legal and procedural reform

In seeking structural reforms that will benefit not only the plaintiff but also a wider group of people affected by similar problems, a court may be requested to issue an injunction requiring the competent authorities to reform the law or procedures.

The first questions to ask in seeking such remedies will focus on the causes of non-recognition of nationality or non-issue of identity documents, and therefore what the solutions are. A detailed understanding of different laws and procedures may be required to explain the situation of plaintiffs with different personal histories or characteristics, in order to specify the remedies requested from the court (► [focus box F](#)).

¹⁵⁵ *Centre for Child Law v. Director-General Dept of Home Affairs and Others*, Case CCT101/20 ; [2021] ZACC 31, Constitutional Court of South Africa, Judgement of 22 September 2021, <https://www.concourt.org.za/index.php/judgement/410-centre-for-child-law-v-director-general-dept-of-home-affairs-and-others-cct101-20>.

¹⁵⁶ *The Attorney General v. Shannon Tyreck Rolle et al*, Court of Appeal of the Commonwealth of the Bahamas, Case No. 62 of 2020, Judgement 21 June 2021, <https://www.courtsofappeal.org.bs/judgments.php?action=view&judgment=3629>.

¹⁵⁷ *DZ v. The Netherlands*, supra n 53.

¹⁵⁸ *Case of the Girls Yean and Bosico*, supra n 52.

¹⁵⁹ *Expelled Dominicans and Haitians*, supra n 64.

¹⁶⁰ *Hoti v. Croatia*, supra n 132; *Sudita Keita v. Hungary*, Application no. 42321/15, European Court of Human Rights, Judgment of 12 May 2020, <https://hudoc.echr.coe.int/eng?i=001-202433>.

¹⁶¹ *Kurić and Others v. Slovenia*, supra n 133; for more on the domestic compensation scheme see *Kurić and Others v. Slovenia*, Application no. 26828/06, European Court of Human Rights, Grand Chamber (Just satisfaction), 12 March 2014, <https://hudoc.echr.coe.int/eng?i=001-141899>.

¹⁶² *Mennesson v. France*, Application no. 65192/11, European Court of Human Rights, Judgment of 26 June 2014, <https://hudoc.echr.coe.int/eng?i=001-145389>.

¹⁶³ *Anudo Ochieng Anudo v. United Republic of Tanzania*, Communication No. 012/2015, African Court on Human and Peoples' Rights, decision on reparations, 2 December 2021, <https://www.african-court.org/cpmt/details-case/0122015>.

¹⁶⁴ *Anna Lakatosh and Others v. Russia*, European Court of Human Rights, Application no. 32002/10 Decision of the First Section, 7 June 2011, <https://hudoc.echr.coe.int/#/%22itemid%22:%22001-105325%22>]. UNHCR submitted a third party intervention in this case: UNHCR intervention before the European Court of Human Rights in the case of *Lakatosh and Others v. Russia*, March 2011, <https://www.refworld.org/jurisprudence/amicus/unhcr/2011/en/77748>.

Individual relief

In seeking injunctive relief for individuals, an initial distinction that may be important to draw is whether the complainant(s) in a case were born in the country, or moved from another state at a later date. In the latter case, it may also be relevant if the person first arrived in the country as a child or as an adult.

- The remedy sought for a person born in the country who has been denied identity papers by that state—and any other state to which there is a connection—is almost always going to be a court order that the authorities either recognise the person's existing nationality or (where national law allows) grant nationality on the basis that the person was born stateless, and issue identity documents accordingly. There are many examples of such court orders from multiple jurisdictions.
- In case of a person born in another country, but with ancestral origins in the state where litigation is taking place, there may be the possibility to request the court to order recognition of nationality based on descent from a national.
- If the plaintiff was born in another country and has no ancestral connection to the state of litigation, but has been resident in that country for a long time, including as a child, then there may be an argument in national or international law that acquisition of nationality should be facilitated, on the grounds of statelessness and/or assimilation into the national community.
- Alternatively, for a stateless migrant, a court may be asked to order formal assessment and/or recognition of stateless status, or grant of other status that regularises residence in that country and provides a route to acquisition of nationality in due course.

Legal reform

In those cases where national law permits, the primary relief sought from the court may be an order that a law should be reformed to bring it in line with the constitution or—less likely, but possible in some jurisdictions—with international law. If primary legislation establishes a right, but this is not respected in practice, a court may be requested to order the executive to adopt regulations to make the legislation effective.

- The South African Supreme Court ordered the Department of Home Affairs to adopt regulations enabling children born in the country and still resident at majority to access a right to citizenship provided in legislation.¹⁶⁵

Legal reforms that may be necessary could include:

- Addressing gaps in the law in relation to the right of every child to acquire a nationality, including the presumption of nationality for children found in the territory of unknown parents and place of birth; children who cannot acquire nationality from a parent; children born through assisted reproduction technology; or adopted children.
- Removal of discrimination in the rights of men and women to transmit nationality automatically to their child at birth.
- Reform of family law to allow for legal recognition of both parents in case of birth out of wedlock or to same-sex parents.
- Repeal or reform of provisions in the law that prevent members of certain ethnic or religious groups from acquiring nationality.
- The removal of or exemption from onerous legal, procedural, or financial conditions to acquisition of nationality.
- The adoption of subsidiary legislation to implement a primary law, enabling substantive provisions for recognition or acquisition of nationality to be accessed in practice.

Examples of legal reforms ordered by courts are given throughout ► [section 7: Legal arguments](#).

Procedural reform

The most significant remedy sought may be the establishment of universally applicable, fair, and effective procedures that enable the individual assessment and resolution of the situation of those excluded recognition of nationality and/or issuance of identity documents. This means establishment of nationality determination procedures that not only consider a person's possible statelessness, but also their positive right to a nationality; and that enable resolution of cases where the required documentary evidence (especially civil registration certificates) is not available.

Other types of procedural reform which a court may be requested to order could include:

- Establishment of child protection systems and procedures to ensure that children are recognised as nationals (including through the issue of identity documents) or granted nationality when they are entitled to it under the law.

¹⁶⁵ *Minister of Home Affairs and Another vs. Miriam Ali and others*, Case No.1289/17, Supreme Court of Appeal, South Africa, judgment of 30 November 2018.

- Reform of civil registration procedures to ensure that registration of births and other civil status events, and the issue of certificates recording that registration, are freely and universally available, including to the most marginalised groups.
- The removal of procedural barriers to recognition of nationality, especially those that place additional administrative burdens to prove entitlement to identity documents on members of certain ethnic or religious groups that are not applied to the majority of the population.
- The admissibility of evidence of identity and nationality other than the standard documents generally required in law, including witness testimony.
- The establishment of exemption procedures for indigent persons for the payment of application or processing fees for documents.

A strategic decision that may be required in some cases is whether a remedy is acceptable that requires those whose nationality is not currently recognised to accept their “foreignness” as a first step, meaning that they must apply to acquire nationality, rather than have documents issued recognising an existing nationality. Whether to accept such a resolution will depend on national context and on consultation with the clients in the case.

- The African Commission on Human and Peoples’ Rights specifically rejected a special application procedure that had been put in place by the Ivorian government to allow some categories of person to acquire Ivorian nationality as a remedy for those who should rather have been recognised as holding *nationalité d’origine* (nationality from birth).¹⁶⁶

Many other examples of procedural reforms ordered by courts are referred to in ► [section 7 Legal arguments](#) and ► [section 7.5: Arbitrary denial or deprivation of nationality and the right to due process](#) and ► [section 7.8: Birth registration](#).

Symbolic and punitive damages

In some cases, an important non-material remedy sought by victims will be an acknowledgement by the state that denial of nationality was wrong—an important element of support for a broader campaign for membership of that society.

- The Inter-American Court ordered that its judgments in cases relating to the Dominican Republic be publicised in national newspapers and, in the *Yean and Bosico* case, that there should be a “public act to acknowledge international responsibility and to make reparation to the children Dilcia Yean and Violeta Bosico and their next of kin.”¹⁶⁷
- The Extraordinary Chambers in the Courts of Cambodia (informally known as the Khmer Rouge Tribunal) heard charges of genocide against two minority groups, including the Vietnamese minority whose status as Cambodian nationals remains contested. The Trial Chamber found that the crimes to which the Vietnamese minority in Cambodia were subjected during the Khmer Rouge genocide “caused, in part, their present-day harm in that, during the various occasions in which they were forcibly relocated by the Khmer Rouge in 1975, victims were forced to leave behind, destroy or otherwise lost, important documentation demonstrating their ties to Cambodia”. The court endorsed “legal and civic education to allow Civil Parties to better understand their legal status according to Cambodian law” as measures of “collective and moral reparations”.¹⁶⁸

In other cases, the statement that a group has faced discrimination and exclusion, and that this exclusion should end, may contribute to a change of political discourse, affirming that those affected have a right to inclusion, even if this does not impact the legal situation or ensure issue of identity documents to any particular person.

- In Kenya, advocacy of various types—including protest marches and petitions to parliament—have resulted in presidential declarations that certain minority groups, including Kenyan Asians and Kenyans with origins in the island of Pemba, are to be treated as Kenyan ethnic communities.¹⁶⁹ Although of contested legal force, these declarations have represented an important acknowledgement that these groups have been excluded by discriminatory practices from recognition of their entitlement to Kenyan citizenship.¹⁷⁰

¹⁶⁶ *Open Society Justice Initiative (OSJI) v. Côte d’Ivoire*, Communication No. 318/06, African Commission on Human and Peoples Rights, 28 February 2015, para. 132 et seq., <https://achpr.au.int/index.php/en/decisions-communications/open-society-justice-initiative-v-cote-divoire-31806>.

¹⁶⁷ *Case of the Girls Yean and Bosico*, supra n 52, paras 234–235; *Expelled Dominicans and Haitians*, supra n 64, para 460.

¹⁶⁸ Case No.002/02, Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia, Judgment of 18 November 2018, paras 4458–59; see also <https://www.eccc.gov.kh/en/document/court/case-00202-judgement>. See also Lyma Nguyen and Christoph Sperfeldt, “Victim Participation and Minorities in Internationalised Criminal Trials: Ethnic Vietnamese Civil Parties at the Extraordinary Chambers in the Courts of Cambodia”, *Macquarie Law Journal* Vol.4 (2014), pp.97–126; Christoph Sperfeldt, “Nationality as Reparation? The Case 002/02 Trial Judgment at the Extraordinary Chambers in the Courts of Cambodia”, *Statelessness & Citizenship Review* Vol. 5, no. 1 (2023), pp.118–26.

¹⁶⁹ Presidential Proclamation: In the Matter of the Petitions by the Asian Community for Formal Recognition as a Tribe in Kenya, Gazette Notice No. 7245, Kenya Gazette, Vol. CXIX—No. 102, 21 July 2017; Presidential Proclamation in the Matter of the Petition by the Pemba Community for Formal Recognition as an Ethnic Community of Kenya, Gazette Notice 1135, Kenya Government Gazette, Vol. CXXV—No. 23, 30 January, 2023.

¹⁷⁰ Dalle Abraham et al., “Citizenship Is a Right, Not a Political Tool”, *The Elephant* (blog), 9 October 2023, <https://www.theelephant.info/analysis/2023/10/09/citizenship-is-a-right-not-a-political-tool/>.

Settlement

At both national and regional or international level, there may be the possibility of settling a case. If the government is seeking to avoid a precedent or bad publicity that may strengthen demands for systemic change, it may offer to settle cases before they reach court, or not appeal an adverse decision of a lower court. The interests of the client demand—in most cases—that a settlement recognising nationality and issuing identity documents be accepted, rather than a fight to the end on the principle and policy. However, where possible, and especially where the complainant is one of a large number of similar cases, a settlement should also seek to identify structural reforms that may assist a wider group of people.

- In South Africa, a case brought by Lawyers for Human Rights was settled with the agreement not only that the status of the individuals in the case should be granted South African citizenship, but also that the Department of Home Affairs should adopt regulations enabling other stateless children in the same situation to apply for citizenship.¹⁷¹

6. AFTER A JUDGMENT

KEY MESSAGES

- In most cases, a court judgment will be only one component of an effort to remedy the situation of individuals or groups denied recognition of nationality.
- Even if the case is wholly successful in court, there will be the need to follow up to ensure that a judgment is implemented.
- Thinking about the aftermath of a positive or negative result is an integral part of the planning of the litigation from the outset.

A court judgment, whether successful or unsuccessful, is never the end of advocacy for recognition of nationality and issue of identity documents. In some cases, it may mark the start of a much more intensive campaign outside the courts, whether for the judgment to be applied, or for legislation to overturn the implications of a ruling. Litigators need to consider from the start who would be their partners for this work, how they can best work together, and the support that is needed to enable this to happen.

Litigators should return to the power mapping undertaken in the early framing of a litigation strategy: who has the authority and means to secure the implementation of the decision, do they know about the decision, how can they be moved to action, what obstacles stand in the way? How can the political will to implement the decision be created or supported? Are there major political pressure points on the horizon (elections, proposed legislative reforms, anniversaries)? What about other opportunities for advocacy in international forums, such as the Universal Periodic Review process of the UN, or major international events in which the state concerned plays a prominent role?

Following a decision at national level, among the factors to consider are:

- **Preparation for the possibility of appeal** through the national courts, whether by the applicants or by the state.
- **Consideration of a complaint to a regional or international treaty body or court**, If unsuccessful at the apex court at national level—in some cases, national litigation may even be launched in the expectation of failure in the national courts, in order to challenge national law by seeking the establishment of a normative principle at international level.
- **Advocacy for implementation of a favourable judgment.** Here, the work done in requesting detailed remedies (► [section 5.6: Remedies II: The detailed requests](#)) will bear fruit—since, beyond the individual relief granted the applicants, court orders for specific legislative, procedural or policy reform can establish the legal basis for civil society to demand that such changes are not only adopted in principle but also brought into effect in practice.
- **Invoking any mechanisms for court monitoring of compliance with a decision**, in jurisdictions where there is that possibility, based on a request that the court to order that the government report back on steps it has taken to do so (► [section 5.6](#)).
- **Establishing a database of those impacted**, to ensure that successful court judgments are applied for the benefit

¹⁷¹ *Minister of Home Affairs and Others (appellants) v. DGLR and Another (respondents)*, Supreme Court of Appeal of South Africa, Appeal Case 1051/2015, 6 September 2016. Court documents including the consent order available at <http://citizenshiprightsafrika.org/south-africa-dglr-and-another-vs-minister-of-home-affairs-and-others/>.

of individuals belonging to a category concerned by the decision who seek to access new rights. Such data collection can in turn be used to show exactly what the problems are with existing systems, and advocate for further reform.¹⁷²

Following a successful case at regional or international level, litigators will need to develop strategies to “bring the case home” to the country concerned. Here the factors to consider may include:

- How can general statements of principle in international law be translated into specific national reforms?
- Who are the parliamentary and civil society allies who can use the judgment as the basis for further advocacy; and
- Can the follow-up mechanisms that exist before some treaty bodies and courts be activated in case of non-implementation?

I - Case example: Litigation as the foundation for ongoing advocacy on behalf of Urdu-speakers in Bangladesh

There are about 300,000 members of the Urdu-speaking community living in “camps for stranded Pakistanis” in Bangladesh, whose status as Bangladeshi citizens has been contested since the war in 1971 by which East Pakistan gained independence from West Pakistan and became the separate state of Bangladesh.¹⁷³

In two landmark judgments concerning the status of Bihari Urdu speakers in 2003¹⁷⁴ and 2008¹⁷⁵, the Bangladesh High Court confirmed the status of the litigants in the case as existing Bangladeshi citizens and ordered their recognition as such and registration on the electoral roll.¹⁷⁶

Following the decision in 2003, UNHCR increased its advocacy for policy reform to reduce statelessness among the Urdu-speakers of Bangladesh. International nongovernmental organisations also drew attention to the situation.¹⁷⁷ In November 2007, a group of 23 eminent academics, journalists, lawyers, and human rights activists made a joint statement urging the government to respect the citizenship rights of the Urdu-speakers.

In 2008 a new law was adopted finally accepting the judgments of the courts and providing citizenship for “Bihari refugees”. Since passage of this law, the Urdu-speaking minority in Bangladesh should have all the rights accorded any other citizen of Bangladesh. Many were able to acquire national identity cards and were able to vote for the first time in national elections, as well as enjoying free movement throughout Bangladesh for the first time.

In 2013, the Council on Minorities, led by one of the Urdu speaking community, partnered with the international legal empowerment organisation Namati to provide services to people seeking citizenship documents by training a corps of local paralegals to advocate with the authorities to assert the rights to identity documents.¹⁷⁸ The court cases and resulting legal reform were what had enabled this work to establish and enforce the citizenship rights of the Urdu-speaking minority.

As is often the case, however, discrimination continues in practice, and those living in the camps still struggle to acquire birth certificates and passports. They remain among the most marginalised communities in Bangladesh, and advocacy continues.

¹⁷² See *Community-Based Practitioner's Guide*, supra n 67.

¹⁷³ The situation of the Biharis is summarised by Minority Rights Group International here: <https://minorityrights.org/minorities/biharis/>. See also ► [focus box D](#) on Kenya.

¹⁷⁴ *Abid Khan and others v. Government of Bangladesh and others*, Writ Petition No. 3831 of 2001, Bangladesh High Court, judgment of 5 May 2003. This case is discussed in Eric Paulsen, “The Citizenship Status of the Urdu-Speakers/Biharis in Bangladesh”, *Refugee Survey Quarterly* Vol. 25, no. 3 (2006), pp. 54–69, <https://doi.org/10.1093/rsq/hdi0146>.

¹⁷⁵ *Sadaqat Khan and others v. Chief Election Commissioner, Bangladesh Election Commission, and others*, Writ Petition No. 10129 of 2007, Bangladesh High Court, Judgment of 18 May 2008.

¹⁷⁶ The litigation and its impacts are set out in “Good Practices Paper – Action 1: Resolving Existing Major Situations of Statelessness”, (reissued), UNHCR, 2022, <https://www.refworld.org/docid/54e75a244.html>. Both judgments are available in English and Bengali at: *Citizenship Rights of Urdu-speaking Bangladeshis: The Milestone Judgements of the Bangladeshi High Court*, Namati and Council of Minorities, 2015, <https://namati.org/resources/citizenship-rights-of-urdu-speaking-bangladeshis/>.

¹⁷⁷ For example, Refugees International: *Stateless Biharis in Bangladesh: A Humanitarian Nightmare*, Refugees International, December 2004, <https://www.refworld.org/docid/47a6eeacd.html>; *Citizens of Nowhere: the Stateless Biharis of Bangladesh*, Refugees International, January 2006, <https://www.refworld.org/docid/47a6eba70.html>.

¹⁷⁸ Bremen Donovan “At Work with the Paralegals of Bangladesh: A citizenship sea change for the Urdu-speaking minority in Bangladesh” (blogpost) Namati, 14 January 2015, <https://namati.org/news-stories/at-work-with-the-paralegals-of-bangladesh/>.

7. LEGAL ARGUMENTS

The legal arguments deployed in any litigation will be influenced by the most helpful framing for the case, but the choice of framing is also influenced by the legal arguments available before the particular jurisdiction that is the forum for the complaint. This section provides a summary of key arguments on the right to a nationality that may be derived from the different treaties, soft law documents, and decisions of international courts and other treaty bodies that can be drawn upon by lawyers litigating both before these instances, and at national level. The main focus is on international law, but national decisions are referenced where they are particularly significant.

This section sets out legal resources to establish arguments in relation to:

- The definition of “stateless person” and the determination of whether a person is stateless
- The right of every child to acquire a nationality
- Discrimination based on sex
- Discrimination based on race, religion or ethnicity
- The acquisition of nationality based on habitual residence
- Arbitrary deprivation or denial of nationality
- The interpretation of rules applied on state succession (transfer of sovereignty over a territory)
- The right to birth registration
- Dignity, legal identity, and recognition as a person before the law
- Digitalisation of identity
- Consequential violations such as freedom of movement, arbitrary detention, participation in public affairs and the right to family life

► [section 8 for resources on international law, comparative jurisprudence and other materials](#)

7.1. The definition of stateless person and the determination that a person is stateless



KEY MESSAGES

- Determination of whether a person is stateless requires analysis not only of the relevant nationality laws, but also of related laws such as those governing the family, civil registration, identity documents, migration, consular registration and the recognition of foreign civil status certificates.
- Determination of whether a person is stateless also requires analysis of the application of the laws in practice, including with reference to any secondary legislation (regulations or decrees), as well as internal departmental circulars, and documentation of administrative practice.
- Based on this broader analysis, it may be possible to argue that a person is stateless even if they appear to be entitled to a nationality on the basis of a review only of the relevant nationality laws.

The strongest limits in international law to state discretion in grant or recognition of nationality relate to the obligation to prevent and reduce statelessness. In many cases around recognition of nationality and issue of identity documents a preliminary question will therefore be to assess whether the complainant or group of complainants is stateless—in parallel with a discussion around the best framing for the case (► [section 5.1: Issue framing](#)). A determination of statelessness will also often be relevant in cases relating to deprivation of nationality or where a state seeks to deport a failed asylum-seeker or irregular migrant.

The definition of stateless person is found in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons:

The term stateless person means a person who is not considered as a national by any state under the operation of its law.

The International Law Commission considers this definition to be part of customary international law.¹⁷⁹ As observed in UNHCR's *Handbook on Protection of Stateless Persons*:

Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual's case in practice and any review/appeal decisions that may have had an impact on the individual's status. This is a mixed question of fact and law.¹⁸⁰

Thus, it is necessary to analyse not only the law, but also its application in practice by the competent authorities for nationality matters in any given state. This interpretation of the 1954 Convention definition has been accepted by a number of national apex courts.¹⁸¹

This analysis can, however, be a complex exercise to which the answer is not clear. There may be situations where different state authorities treat the same person as a citizen or non-citizen, or the practice of non-state actors should be included, if they are authorised by the state in nationality matters, for example to verify identity.¹⁸²

In the context of a determination as to whether a child born in the territory is stateless, the UNHCR Guidelines on Statelessness No. 4 note that:

The test is whether a child is stateless because he or she acquires neither the nationality of his or her parents nor that of the State of his or her birth; it is not an inquiry into whether a child's parents are stateless....

A Contracting State must accept that a person is not a national of a particular State if the authorities of that State refuse to recognise that person as a national. A State can refuse to recognise a person as a national either by explicitly stating that he or she is not a national or by failing to respond to inquiries to confirm an individual as a national. A Contracting State to the 1961 Convention cannot avoid the obligations to grant its nationality to a person who would otherwise be stateless ... based on its own interpretation of another State's nationality laws where this conflicts with the interpretation applied by the State concerned.¹⁸³

The African Committee of Experts on the Rights and Welfare of the Child has adopted a General Comment on the right to birth registration and a nationality, in which it drew on the UNHCR Guidelines to affirm that states must accept that a child is not a national of another State if the authorities of that state indicate that the child is not a national or fail to respond to inquiries.¹⁸⁴ In a comprehensive resolution on the right to a nationality adopted in 2023, the Inter-American Commission on Human Rights stated that the standard of proof in statelessness determination procedures should be that it is proven to a „reasonable degree” that a person is not considered a national by any state, according to its legislation, while the burden of proof should be shared, whereby both the applicant and the authorities of the examining State must cooperate to obtain the evidence and establish the facts.¹⁸⁵ A recommendation on the nationality of children adopted by the Council of Europe Committee of Ministers urges states to ensure that children who cannot reasonably be expected to acquire another nationality to which they appear to be entitled are not excluded from protections against statelessness in the country of birth.¹⁸⁶

Although it is accepted by courts and treaty bodies that states may properly require a person claiming to be stateless to seek recognition of the nationality of another state if that appears to be an entitlement in law, such requirements must be reasonably possible to fulfil. The application of such requirements is particularly problematic in the case of children of refugees, who cannot generally approach the authorities of their country of origin, since to do so would put their refugee status at risk, or (even if not officially recognised as refugees) they may be afraid of the consequences.¹⁸⁷

¹⁷⁹ International Law Commission, Draft Articles on Diplomatic Protection with commentaries, 2006, commentary to article 8, <https://www.refworld.org/docid/525e7929d.html>.

¹⁸⁰ *Handbook on Protection of Stateless Persons*, supra n 2, para 23.

¹⁸¹ For example: by the Supreme Court of Hungary in Judgment no. Kfv.II.37.715/2021/6 of 25 May 2022, supra n 117; and by the Italian Court of Cassation in Sentenza N. 28873 del 09.12.2008, <http://www.apolidia.org/index.php/giurisprudenza/44-corte-di-cassazione/114-cassazione-civile-sez-unite-sentenza-n-28873-del-09-12-2008> and Sentenza N. 25212 del 08.11.2013, <http://www.apolidia.org/index.php/giurisprudenza/44-corte-di-cassazione/98-sentenza-cassazione-civile-n-25212-del-08-11-2013>. See also Gabor Gyulai, “Should nationality have a ‘minimum content’? – Italian Supreme Court passes landmark decision” (blog post) European Network on Statelessness, 19 September 2014, <https://www.statelessness.eu/updates/blog/should-nationality-have-minimum-content-italian-supreme-court-passes-landmark-decision>; and discussion in footnote 1.

¹⁸² *Handbook on Protection of Stateless Persons*, supra n 2, paras 22–56.

¹⁸³ UNHCR, Guidelines on Statelessness No. 4, supra n 102, paras 18–19.

¹⁸⁴ ACERWC General Comment on Article 6, supra n 55, para. 100.

¹⁸⁵ Resolution on the right to nationality, prohibition of arbitrary deprivation of nationality and statelessness supra n 10.

¹⁸⁶ Council of Europe, Recommendation CM/Rec(2009)13 and explanatory memorandum of the Committee of Ministers to member states on the nationality of children, 9 May 2009, CM/Rec(2009)13, <https://www.refworld.org/docid/4dc7bf1c2.html>.

¹⁸⁷ UNHCR, Guidelines on Statelessness No. 4, supra n 102, para. 27–28.



Uganda. Cultural activities of Benet Community. © UNHCR/Esther Ruth Mbabazi

- In two cases brought against the Netherlands, the UN Human Rights Committee considered that the state had placed unreasonable demands on an unaccompanied 12-year-old asylum-seeker from China to seek recognition of Chinese nationality¹⁸⁸; and that the state had violated the rights of another child by treating him as a Chinese national, even though both he and his mother had been denied recognition of Chinese nationality.¹⁸⁹

States should establish a system for determining that a person is stateless in order to fulfil the obligations in relation to the right to a nationality, the avoidance of statelessness, and protection of stateless persons. Although a statelessness determination procedure is not specifically provided for in the 1954 Convention relating to the Status of Stateless Persons, it is part of a state's good faith interpretation, as well as the logical result, of the legal frameworks that there must be a way to identify a person as stateless in order to provide protection as a stateless person (under the 1954 Convention) or grant nationality (under the 1961 Convention or the regional treaties). Even if there is no specific stateless person status, it is possible to argue that statelessness should be recognised as part of refugee status determination.¹⁹⁰

- The Swiss Federal Administrative Court ruled in 2017 that the applicants had a right to be recognised as stateless persons in addition to the grant of asylum-based residence status.¹⁹¹

The question of whether a person is stateless may also arise in deprivation cases. States wishing to deprive a person of nationality often assert that a person has another nationality even if the authorities of the other state deny that fact. UNHCR Guidelines on Statelessness No. 5 call for an inquiry into whether a person would be rendered stateless before nationality is deprived, with the burden of proof to be shared.¹⁹²

- The UK Supreme Court has declined to challenge the executive's very legalistic interpretation of a right to nationality in another country in national security deprivation cases.¹⁹³ In immigration cases, however, the UK Court of Appeal has confirmed that proof of statelessness depends in part on factual evidence, including refusal by the relevant consular authorities to confirm nationality (even though it has applied a more stringent standard of proof than that recommended by UNHCR).¹⁹⁴

¹⁸⁸ *X.H.L. v. Netherlands*, Human Rights Committee, Views on Communication No. 1564/07,

CCPR/C102/D/1564/2007, adopted 22 July 2011 (finding the Netherlands' decision to deport an unregistered minor to China to face economic and social exclusion to be degrading treatment and contrary to the protection of children required by Articles 7 and 24 of the Covenant), http://www.bayefsky.com/pdf/netherlands_t5_ccpr_1564_2007.pdf.

¹⁸⁹ *DZ v. The Netherlands*, supra n 53.

¹⁹⁰ *Handbook on Protection of Stateless Persons*, supra n 2, paras 57–124. See also "Due Process in Procedures for the Determination of Refugee Status and Statelessness and the Granting of Complementary Protection", OEA/Ser.L/V/II, Doc. 255, Inter-American Commission on Human Rights, 5 August 2020, <https://www.oas.org/en/iachr/reports/pdfs/DueProcess-EN.pdf>.

¹⁹¹ Judgment No. F-6147/2015, Summary, <https://caselaw.statelessness.eu/caselaw/switzerland-federal-administrative-court-judgment-no-f-61472015>.

¹⁹² UNHCR, Guidelines on Statelessness No. 5, supra n 103, para. 45, <https://www.refworld.org/docid/5ec5640c4.html>.

¹⁹³ The U.K. Supreme Court accepted the executive's argument that deprivation of British citizenship from someone accused of terrorist offences would not render a person of Vietnamese origin stateless, even though the Vietnamese authorities had declined to confirm his nationality. *Pham (Appellant) v Secretary of State for the Home Department (Respondent)*, UK Supreme Court, Judgment of 25 March 2015 [2015] UKSC 19, <https://www.supremecourt.uk/cases/uksc-2013-0150.html>. This case is pending before the European Court of Human Rights. See also Rayner Thwaites, "Proof of Foreign Nationality and Citizenship Deprivation: Pham and Competing Approaches to Proof in the British Courts", *Modern Law Review*, Vol.85, no.6 (2022), pp.1301-1328. A similar view was reached by the Supreme Court in the proceedings in the case of *Begum (Respondent) v Secretary of State for the Home Department (Appellant)* [2021] UKSC 7, declining to find that Shamima Begum was stateless on the grounds that she had a theoretical right to Bangladeshi nationality. Discussed in Eric Fripp, "Case Note: R (Begum) v Special Immigration Appeals Commission; R (Begum) v Secretary of State for the Home Department; Begum v Secretary of State for the Home Department" [2021] UKSC 7, [2021] AC 765", *Statelessness & Citizenship Review*, Vol. 4, no.1, (2022), pp. 169-176.

¹⁹⁴ *AS (Guinea) v Secretary of State for the Home Department*, UK Court of Appeal, Judgment of 12 October 2018 [2018] EWCA Civ 2234, para 46; Judith Carter, "Case Note: AS (Guinea) v Secretary of State for the Home Department [2018] EWCA Civ 2234" *Statelessness & Citizenship Review*, Vol.1 no.2, (2019), pp.336-342.

7.2. The right of every child to acquire a nationality



KEY MESSAGES

- The right of every child to a nationality is often the strongest entry point for litigation, especially at regional or international level.
- The right of every child to acquire a nationality is established by the international human rights treaties, and is also provided for in more detail by the 1961 Convention on the Reduction of Statelessness, and by specific treaties on nationality adopted by the Council of Europe and the African Union.
- The primary obligation is on the state in which the child is born to grant nationality, if the child does not acquire another nationality at birth; however, the country of nationality of the parents also has obligations to avoid statelessness if the child does not acquire the nationality of the country of birth.
- Legal provisions creating a presumption of nationality in case of children of unknown parents found on the territory also require procedures to establish recognition of the child's legal identity.
- Where nationality of a child depends on the nationality of the parents, key elements of the right to a nationality are likely to be the issue of the identity documents of the parents, and the establishment of legal parentage of the child.
- Questions of legal parentage can be complex, especially in case of birth out of wedlock, adopted children, children born and whose births are registered in a different country from that of the nationality of the parents, and children born through assisted reproductive technologies.
- Jurisprudence from the African human rights system is beginning to support a positive right to nationality in a country where a person has the closest connections, even in the absence of proof of statelessness.

The right of every child to acquire a nationality is provided in both UN and regional human rights treaties and other norms (► [focus box J](#)). This section provides guidance on how these obligations have been interpreted by the relevant treaty bodies and courts, in relation to (i) children born or found in the territory of a state, (ii) children born outside the state of nationality of their parents, and (iii) children who are adopted or born through assisted reproductive technologies.¹⁹⁵

► [section 7.3: Discrimination based on sex & gender](#)

J - The right to a nationality in international and regional human rights treaties

International Covenant on Civil and Political Rights, Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Convention on the Rights of the Child, Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

¹⁹⁵ See also the toolkit on addressing the right to a nationality through the Convention on the Rights of the Child, published by the Institute on Statelessness and Inclusion, and associated texts and materials: "Addressing the right to a nationality through the Convention on the Rights of the Child: A Toolkit for Civil Society", Institute on Statelessness and Inclusion, 2016, https://files.institutesi.org/CRC_Toolkit_Final.pdf; The Child's Right To A Nationality And Childhood Statelessness: Texts and Materials, Institute on Statelessness and Inclusion, 2020, https://files.institutesi.org/crn_texts_materials.pdf.

Convention on the Rights of the Child, Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 29: "Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality."

Convention on the Rights of All Migrant Workers and Members of their Families, Article 29

Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality.

Convention on the Rights of Persons with Disabilities, Article 18

1. States Parties shall recognise the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:
 - a. Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;
 - b. Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;
 - c. Are free to leave any country, including their own;
 - d. Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.
2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

American Convention on Human Rights, Article 20

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

African Charter on the Rights and Welfare of the Child, Article 6

1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.
4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognise the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

Arab Charter on Human Rights, Article 29

Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality.

Covenant on the Rights of the Child in Islam, Article 7

1. A child shall, from birth, have the right to a good name, to be registered with the authorities concerned, to have his or her nationality determined, and to know his/her, parents, all his/her relatives and foster mother.
2. States Parties to the Covenant shall safeguard the elements of the child's identity, including his/her name, nationality and family relations in accordance with their domestic laws, and shall make every effort to resolve the issue of statelessness for any child born on their territories or to any of their citizens outside their territory.
3. The child of unknown descent or who is legally assimilated to this status shall have the right to guardianship and care but without adoption. He shall have a right to a name, title, and nationality.

Children born or found in the territory

The clearest specific obligations on states to prevent and reduce statelessness relate to people born in the territory who cannot claim another nationality (whether because their parents are stateless or of unknown nationality, or because of restrictions on the acquisition of nationality from the parents based on place of birth or various forms of discrimination), and those found as children in the territory of unknown parents (foundlings). The claims of children of unknown parents and of parents who are stateless or of unknown nationality to be recognised as nationals of the state of birth were first set out in international law in the 1930 Convention on the Conflict of Nationality Laws.

It has been argued for several decades that the obligation to grant nationality to an otherwise stateless child born or found on a state's territory has entered customary international law; these arguments have strengthened with greater state adherence to the relevant treaties and lack of explicit state opposition to the principle.¹⁹⁶

The 1961 Convention on the Reduction of Statelessness provides in its first article that a contracting state "shall grant its nationality to a person born in its territory who would otherwise be stateless"; article 2 restates the presumption of nationality for foundlings. The American Convention on Human Rights (article 20) and the African Charter on the Rights and Welfare of the Child (article 6[4]) also create specific obligations on states to grant nationality to children born on their territory who are not granted nationality by any other state at the time of their birth. The European Convention on Human Rights does not include a provision on nationality; however, the European Convention on nationality provides both for the presumption of nationality in case of foundlings (article 6[1][b]), and for the grant of nationality to children who do not acquire another nationality at birth (article 6[2]).

A key question in activating these protections is therefore whether a child born on the territory is in fact stateless or has the nationality of another country (► [section 7.1: The definition of stateless person and the determination that a person is stateless](#)). In the case of *DZ v. The Netherlands*, the Human Rights Committee cited the UNHCR Guidelines on Statelessness No. 4 on the shared burden of proof between the claimant and the state authorities to establish the facts as to whether a child would "otherwise be stateless" in the terms of the 1961 Convention, and noted that the Dutch authorities had made no attempt of their own to confirm Denny Zhao's nationality status.¹⁹⁷

The 1961 Convention provides that the grant of nationality by the state of birth to otherwise stateless children may either be by operation of law, or upon application; a limited set of conditions are permitted if an application is required, including a period of habitual residence (article 1[2]). UNHCR considers that there should be no requirement that the residence of parent or child must be legal in case of a stateless person, since this may be impossible to establish without a specific procedure to grant such status.¹⁹⁸

The Inter-American Court addressed the question of the immigration status of the parents in relation to the grant of nationality to a child born in the country in the *Yean and Bosico* case:

- a. The migratory status of a person cannot be a condition for the State to grant nationality, because migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights;
- b. The migratory status of a person is not transmitted to the children; and
- c. The fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born.¹⁹⁹

In the case of the Expelled Dominicans and Haitians, the Inter-American Court similarly instructed the state to adopt a range of measures to ensure non-repetition of the violations, including amendments to the substantive law, human rights training, and amendments to civil registration procedures, in order "to eliminate the distinction established in Dominican law that prevents the children of aliens born in the Dominican Republic from acquiring this nationality".²⁰⁰ The Inter-American Commission on Human Rights adopted a resolution on the right to a nationality in 2023 that reaffirmed these principles.²⁰¹

¹⁹⁶ Johannes M.M. Chan, "The Right to a Nationality as a Human Right: The Current Trend Towards Recognition", *Human Rights Law Journal* Vol. 12, no. 1–2 (1991), pp.1–14; Mai Kaneko-Iwase, *Nationality of Foundlings: Avoiding Statelessness among Children of Unknown Parents in International Law* (Springer, 2021); William Thomas Worster, "Customary International Law Requiring States to Grant Nationality to Stateless Children Born in Their Territory", *Statelessness & Citizenship Review* Vol. 4, no. 1 (2022), pp.113–39.

¹⁹⁷ *DZ v. The Netherlands*, supra n 53, paras 8.4 & 8.5. The Human Rights Committee's analysis of the shared burden of proof was cited by the South African High Court in the case of *Khoza v Minister of Home Affairs and Another*, supra n 43.

¹⁹⁸ UNHCR, Guidelines on Statelessness No. 4, supra n 102, paras 40–43. Nonetheless, the Council of Europe Convention on Nationality provides that residence may be required to be lawful in such cases (Art 6[2][b]). See also Council of Europe, Recommendation CM/Rec.(2009)13 supra n 190, paras 2 & 5.

¹⁹⁹ *Case of the Girls Yean and Bosico*, supra n 52.

²⁰⁰ *Expelled Dominicans and Haitians*, supra n 64, para. 464.

²⁰¹ Resolution on the right to nationality, prohibition of arbitrary deprivation of nationality and statelessness, supra n 10.

In its General Comment 17 on the rights of the child, the UN Human Rights Committee noted that:

States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.²⁰²

These principles were elaborated on in a joint General Comment by the Committee on the Rights of the Child and the Committee on the Rights of Migrant Workers:

While States are not obliged to grant their nationality to every child born in their territory, they are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he or she is born. A key measure is the conferral of nationality to a child born on the territory of the State, at birth or as early as possible after birth, if the child would otherwise be stateless.

States should strengthen measures to grant nationality to children born in their territory in situations where they would otherwise be stateless.²⁰³

In its guidelines on preventing statelessness among children, UNHCR has recommended that states should not register children born in their territory as holding “unknown” or “undetermined” nationality for a period exceeding five years, stressing that: “When this occurs, States need to determine whether a child would otherwise be stateless as soon as possible so as not to prolong a child’s status of undetermined nationality.”²⁰⁴ Similarly, the Council of Europe Committee of Ministers advised in its Recommendation 13/2009 that member states should register children’s as “unknown” or “undetermined” for “as short a period as possible” as a means of reducing statelessness among children.²⁰⁵

Treaty bodies in Africa and at the UN have affirmed these principles:

- In its decision on Kenyan Nubian children, the African Committee of Experts on the Rights and Welfare of the Child highlighted that statelessness was the “antithesis of the best interests of the child”; accordingly “a purposive reading and interpretation of the relevant provision strongly suggests that, as much as possible, children should have a nationality beginning from birth.”²⁰⁶
- The UN Human Rights Committee found in the *DZ* case against the Netherlands that it was not acceptable to impose the requirement for the parent to be a *legal* resident in order for a child to benefit from protections for stateless children born in the territory.²⁰⁷
- In relation to questions of proof that a stateless child was born on the territory, the African Committee of Experts drew on its decision in the Kenyan Nubian Children’s case to recommend in its General Comment on the right of every child to a name, birth registration, and a nationality that:

While the obligation of States is to ensure that birth registration is universal, free and accessible, as outlined in this General Comment, States should also adopt laws and procedures that allow for alternative forms of evidence of possession of a nationality where a birth certificate is not available or accessible. These may include the notification of birth provided by a hospital or clinic, oral testimony from a birth attendant, religious leader or other person with knowledge of the birth, and other appropriate forms of documentary or non-documentary evidence.²⁰⁸

In its General Comment, the African Committee of Experts also went beyond the UNHCR Guidelines No. 4 to provide perhaps the strongest statement on state obligations to grant nationality to a child born in the territory even if the child is not proved to be stateless. In recognition of the difficulty of proving a negative if a child’s parents have origins in another territory, it recommended that states should adopt legal provisions that provide nationality to children born on their territory not only where the child is otherwise stateless, but also in other cases where the child has the strongest connection to that state.

²⁰² General Comment No. 17: Rights of the child (Art. 24), UN Human Rights Committee, 7 April 1989, para. 8.

²⁰³ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 23, 24, <https://www.refworld.org/docid/5a12942a2b.html>.

²⁰⁴ UNHCR, Guidelines on Statelessness No. 4, supra n 102, para 22.

²⁰⁵ Council of Europe, Recommendation CM/Rec.(2009)13 supra n 190, para. 8.

²⁰⁶ *Kenyan Nubian Children’s Case*, supra n 35, paras 46, 42. See also *ACJPS & PLACE (Benjamin) v. Sudan*, supra n 42, para. 57.

²⁰⁷ *DZ v. The Netherlands*, supra n 53.

²⁰⁸ ACERWC General Comment on art 6, supra n 55, para. 24.

The Committee endorsed as good practice the rule of “double *jus soli*” where a child is automatically attributed nationality if one parent (either mother or father) was also born in the state. It also urged that children born in the territory of a state of foreign parents should have “the right to acquire nationality after a period of residence that does not require the child to wait until majority before nationality can be confirmed.”²⁰⁹

- In a case concerning Sudan’s failure to recognise the citizenship of the child of a Sudanese mother and a father who, it was asserted, would have acquired South Sudanese citizenship on the secession of South Sudan (had he not predeceased), the African Committee of Experts stated that it is an international obligation for states to confer nationality on “children who have the required social fact of attachment, a genuine connection of existence, interests and sentiments in the state concerned.”²¹⁰ The Committee was drawing on the definition of nationality in the ICJ’s judgment in the *Nottebohm* case²¹¹ to derive a positive obligation to grant nationality if the definition is fulfilled. The Committee noted that it is the state of the child’s birth that has the primary obligation to grant nationality if a child is stateless.²¹²

The African Commission on Human and Peoples’ Rights has adopted the same view.

- In a decision against Côte d’Ivoire adopted in 2015, the African Commission drew on the provisions of the 1961 Convention on the Reduction of Statelessness and the African Charter on the Rights and Welfare of the Child in order to recommend that the Ivorian government should reform its nationality law. It affirmed that:

[T]he obligation of the State on whose territory a person claims to have been born to grant him nationality, unless the said State [can] prove that the person in question has already acquired or is eligible to another nationality. The totality of all the historical and legal prerequisites established above [in discussion of the history of labour migration in Côte d’Ivoire] is of key relevance to the interpretation and implementation of the right guaranteed by Article 5 of the Charter.²¹³

In line with the recommendation of the African Committee of Experts in relation to the rule of “double *jus soli*”, the Protocol to the African Charter on Human and Peoples’ Rights relating to the Specific Aspects of the Right to a nationality and the Eradication of Statelessness in Africa adopted by the African Union in 2024 establishes the requirement that states should automatically attribute nationality not only to children born or found in their territory who are otherwise stateless, but also to children born in the territory who have one parent who was also born there. The Protocol also provides for states to permit acquisition of nationality by people born in the territory and habitually resident there during a period of his or her childhood.

Children not born in the territory

The 1961 Convention on the Reduction of Statelessness requires that states parties attribute nationality to children born outside the country to one of their nationals at minimum where those children would otherwise be stateless (Articles 1(4) and 4).²¹⁴

An analysis of the “best interests of the child” may in addition extend the obligation to grant nationality to include stateless children resident but not born in the territory and with no family connection to an existing citizen.

- An important 2021 decision from a provincial appeal court in Spain (and not appealed by the Spanish government) recognised the Spanish nationality “of origin” of a child born in Morocco to a Cameroonian mother, who had entered Spain irregularly but eventually settled there. The birth had not been registered in Morocco, and there was no possibility of registering the birth with the consular authorities of Cameroon.²¹⁵
- In 2019, the Committee on the Rights of the Child found that Article 7 of the Convention on the Rights of the Child, on the right of every child to acquire a nationality, implied that Switzerland must take the necessary positive actions to implement this right. The case concerned a child born in Lebanon to Palestinian parents that Switzerland wished to deport with the mother to Bulgaria, where mother and child had previously been given subsidiary protected status.²¹⁶

²⁰⁹ *Ibid.*, para. 92.

²¹⁰ *ACJPS & PLACE (Benjamin) v. Sudan*, supra n 42, para. 33.

²¹¹ *Nottebohm Case*, supra n 8, p.23.

²¹² *ACJPS & PLACE (Benjamin) v. Sudan*, supra n 42, para. 60.

²¹³ *Open Society Justice Initiative v. Côte d’Ivoire*, supra n 166, para. 115. The judgment has “cannot” when it clearly means (and says in French) “can”.

²¹⁴ The same rule is adopted by the Protocol to the African Charter on the Right to a Nationality, art. 5.

²¹⁵ Case summary at: http://www.migrarconderechos.es/jurisprudencia/Mastertable/jurisprudencia/SAPr_Guipuzcoa_11_05_2022;jsessionid=DA1E52442B-42F7B82C94B9E00BE1C338; see also José Alberto Navarro, Laura Lozano, and Cristina Manzanedo, “Landmark Judgment from Spain: Court Grants Spanish Nationality to a Stateless Child Born En Route (a case of ‘invisible children’)” (blog post), European Network on Statelessness, 7 July 2022, <https://www.statelessness.eu/updates/blog/landmark-judgment-spain-court-grants-spanish-nationality-stateless-child-born-en-route>.

²¹⁶ *A.M. (on behalf of M.K.A.H.) v. Switzerland*, UN Committee on the Rights of the Child, CRC/C/88/D/95/2019, 6 October 2021. <https://juris.ohchr.org/casedetails/2957/en-US>.

- Several cases in European states have litigated the situation of the children born abroad of nationals who have joined the Islamic State or similar groups, including where the parent's nationality has been deprived on national security grounds (either before or after the birth). In cases brought to the European Court of Human Rights²¹⁷ and the Committee on the Rights of the Child²¹⁸ the key issues have, however, been the question of extraterritorial jurisdiction of the state of (former) nationality of the parents and their obligations to repatriate the children rather than the question of nationality itself.²¹⁹
- A number of countries with laws that attribute nationality to almost all children born in the territory have restrictions on transmission of nationality to children born outside the territory. These restrictions had a particularly severe effect on children of parents who fled Chile and Brazil during the military dictatorships in those countries. When democracy was restored, both countries reformed their constitutions and laws to ensure access to nationality for children born abroad, processes in which litigation at national level also played an important role.²²⁰

Adopted children and children born through assisted reproductive technologies

The 1961 Convention does not consider the nationality of adopted children; nor are there any explicit provisions in the human rights treaties. The Hague Convention on Intercountry Adoption²²¹ also does not explicitly consider the question of acquisition of nationality by a child adopted from one country to another.²²²

The European Convention on nationality, however, establishes that acquisition of nationality shall be facilitated for adopted children, as does the European Convention on the Adoption of Children. A recommendation adopted by the Committee of Ministers of the Council of Europe provides for a distinction between those adopted children where no continuing relationship exists with the birth parents, and those where the parental link is not broken. In the first case, no additional conditions should be applied than those generally applicable to establish the legal connection between parent and child (that is, generally an entry in the civil register of that state); whereas facilitated acquisition of nationality is appropriate in the latter case.

In its General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, the African Committee of Experts endorsed similar principles to those in the Council of Europe Recommendation, while recognising the very varied traditions in relation to care of non-biological children within the African continent. The Protocol to the African Charter on Human and Peoples' Rights on the Right to a nationality establishes that nationality law should provide for acquisition of nationality for children who are adopted or looked after under the Muslim principle of *kafala*.

The recognition of the nationality of children born in another country through surrogacy arrangements has also been the subject of litigation.²²³

- The European Court of Human Rights found in the *Mennesson* case that France had violated a child's right to private life by completely precluding the establishment of a legal relationship between children born as a result of lawful surrogacy treatment abroad and their biological fathers. The court held that the uncertainty as to legal status, including their French nationality, was "liable to have negative repercussions on the definition of their personal identity."²²⁴
- In the case of *Paradiso and Campanelli* the ECtHR ruled that Italy had violated the right of a child to family life by refusing to recognise a birth certificate issued in Russia recording as the "biological parents" the intended parents of a child born through a surrogacy agreement with a Russian woman. The child had been removed from the care of the intended parents, who were both Italian, and issued a birth certificate saying that he had been born to

²¹⁷ *H.F. and Others v. France*, Applications nos. 24384/19 and 44234/20, European Court of Human Rights [GC], Judgment of 14 September 2022, <https://hudoc.echr.coe.int/eng?i=001-219333>.

²¹⁸ *F.B. et al. and D.A. et al v. France*, UN Committee on the Rights of the Child, CRC/C/89/D/77/2019, CRC/C/89/D/79/2019, and CRC/C/89/D/109/2019, 9 March 2022, <https://digitallibrary.un.org/record/3995705/>.

²¹⁹ Discussed in Saeed Bagheri and Alison Bisset, "International Legal Issues Arising from Repatriation of the Children of Islamic State", *Journal of Conflict and Security Law*, Vol. 27, no. 3, 2022, pp.363–85; Annick Pijnenburg, "HF and Others v France: Extraterritorial Jurisdiction without Duty to Repatriate IS-Children and their Mothers", EJIL: Talk! 14 October 2022, <https://www.ejiltalk.org/hf-and-others-v-france-extraterritorial-jurisdiction-without-duty-to-repatriate-is-children-and-their-mothers/>.

²²⁰ Gabriel Echeverría, "Report on Citizenship Law: Chile", GLOBALCIT, European University Institute, 2016, <http://hdl.handle.net/1814/40849>; Patrícia Jerónimo, "Report on Citizenship Law: Brazil", GLOBALCIT, 2016, <http://hdl.handle.net/1814/38885>.

²²¹ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, adopted by The Hague Conference on Private International Law, 29 May 1993.

²²² An issue discussed in relation to Korean children adopted by US citizens in: Jay Milbrandt, "Adopting the Stateless", *Brooklyn Journal of International Law* Vol.39, no. 2 (2014), pp. 695–743.

²²³ The Hague Conference on Private International Law established a project in 2011 to consider the possibility of a legal instrument regulating recognition of legal parentage in cases of surrogacy. An expert group established under the project considered that it would not be feasible to include issues of nationality within such an instrument. See in particular "Final Report: The feasibility of one or more private international law instruments on legal parentage", Experts' Group on the Parentage / Surrogacy Project, Hague Conference on Private International Law, Document Prel. Doc. No 1 of November 2022, available at the webpage for the Project on Parentage and Surrogacy, <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

²²⁴ *Mennesson v. France*, supra n 162, paras 96–97.

unknown parents and not recognising Italian nationality.²²⁵

- In 2012, the Austrian Constitutional Court considered the case of a child born in a surrogacy arrangement in Ukraine to two Austrian nationals. The Court considered that the best interests of the child should prevail in such a case over a prohibition of surrogacy under Austrian law, and confirmed the child's right to Austrian nationality.²²⁶

7.3. Discrimination based on sex and gender



KEY MESSAGES

- The principle of equality of rights between the sexes in relation to nationality is clearly established in international law.
- In practice, equality in transmission of nationality to children is now the norm, and although discrimination based on sex in acquisition by a spouse remains more common, such discrimination is also decreasing.
- Litigation before the Court of Justice of the European Union and the European Court of Human Rights is challenging states that refuse to recognise the nationality rights of children born to same-sex parents or through assisted reproductive technology.

One of the most significant shifts in international law on nationality relates to the development of a prohibition on discrimination on the grounds of sex.²²⁷ While discrimination in transmission of nationality based on the sex of the parent or spouse was the norm until at least the 1970s, today only 24 states explicitly discriminate women in transmission of nationality to children, although more than 40 still discriminate in transmission to spouses.²²⁸

It was presumed by the drafters of the 1930 Convention on the Conflict of nationality Laws that the nationality of women and children would follow that of their fathers or husbands; a protocol adopted at the same time clarified that a mother should be able to confer nationality on her children at least where the father was unknown or stateless. The 1957 Convention on the nationality of Married Women accepted this assumption, while also attempting to give the woman more choice in the matter. Only with the 1979 adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was nationality law brought within the remit of requirements for non-discrimination on the basis of sex.

Article 9 of CEDAW now requires that “parties shall grant women equal rights with men to acquire, change or retain their nationality” and “with respect to the nationality of their children.” Article 16(1)(d) of CEDAW specifies that men and women should have “the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children.”²²⁹ In a general recommendation adopted in 1994, the CEDAW committee elaborated that “nationality should be capable of change by an adult woman and should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality.”²³⁰

Other treaty bodies have supported the equal rights of men and women in relation to transmission of nationality to spouses and children.²³¹ The impermissibility of discrimination based on sex was also asserted by the Committee on Migrant Workers and the Committee on the Rights of the Child in a joint general comment:

²²⁵ *Paradiso and Campanelli v. Italy*, Application No. 25358/12, European Court of Human Rights, Judgment of 24 January 2017 [GC], <https://hudoc.echr.coe.int/eng?i=001-170359>.

²²⁶ Judgment in case B99/12 UA, summary available at: <https://caselaw.statelessness.eu/caselaw/austria-constitutional-court-case-11-october-2012>.

²²⁷ UNHCR made eliminating sex discrimination in nationality laws a pillar of its campaign to eradicate statelessness. See Action 3 in the “Global Action Plan to End Statelessness: 2014–2024”, UNHCR, 2014, <https://www.unhcr.org/ibelong/global-action-plan-2014-2024/>; the updated “Global Action Plan to End Statelessness 2.0”, UNHCR, 2024 <https://www.refworld.org/policy/strategy/unhcr/2024/en/148761>; and “Good Practices Paper - Action 3: Removing Gender Discrimination from Nationality Laws”, UNHCR, 2015, <https://www.refworld.org/policy/opguidance/unhcr/2015/en/104247>.

²²⁸ “Background Note on Gender Equality, Nationality Laws and Statelessness 2024”, UNHCR, March 2024, <https://www.refworld.org/reference/themreport/unhcr/2024/en/147696>; GLOBALCIT database on modes of acquisition, available at: <https://globalcit.eu/modes-acquisition-citizenship/>.

²²⁹ Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, Article 9.

²³⁰ General Recommendation No. 21: Equality in Marriage and Family Relations, Committee on the Elimination of Discrimination Against Women, Thirteenth session (1994), commentary on Article 9 of CEDAW, <https://www.refworld.org/legal/general/cedaw/1994/en/61456>.

²³¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, para. 6. This view was endorsed by the Human Rights Committee's General Comment No. 19: The family (Art. 23), 1990, para. 7, and General comment No. 28: art 3 (The equality of rights between men and women), para. 25 (2000); by CERD in its General recommendation No. 21: Equality in marriage and family relations (1994).

When the law of a mother's country of nationality does not recognise a woman's right to confer nationality on her children and/or spouse, children may face the risk of statelessness. Likewise, where nationality laws do not guarantee women's autonomous right to acquire, change or retain their nationality in marriage, girls in the situation of international migration who married under the age of 18 years may face the risk of being stateless, or be confined in abusive marriages out of fear of being stateless. States should take immediate steps to reform nationality laws that discriminate against women by granting equal rights to men and women to confer nationality on their children and spouses and regarding the acquisition, change or retention of their nationality.²³²

The UN Human Rights Council also has urged states to "take immediate steps to reform nationality laws that discriminate against women by granting equal rights to men and women to confer nationality on their children and spouses and regarding the acquisition, change or retention of their nationality."²³³

- One of the early leading cases in the movement to reduce gender discrimination in nationality matters was the 1992 judgment of the Botswana Court of Appeal in favour of *Unity Dow*, a Botswanan woman married to a foreigner. The Court found that the provisions of the Citizenship Act preventing women from transmitting citizenship to their children and spouses were unconstitutional: "It cannot be correct that because the legislature is entitled to lay down the principles of citizenship, it should, in doing so, flout the provisions of the Constitution under which it operates."²³⁴
- The *Unity Dow* case was cited by the African Committee of Experts on the Rights and Welfare of the Child in a case brought against Sudan on behalf of the child of a Sudanese mother and a father who would have been considered South Sudanese by the Sudanese authorities, in which the African Committee of Experts aligned itself with the position of CEDAW and the CEDAW Committee. The African Committee held that a distinction between the automatic attribution of nationality to the child of a Sudanese father and the right to apply for nationality for the child of a Sudanese mother was impermissible discrimination.²³⁵

Often, these cases centre on discrimination based on birth in or out of wedlock. Such distinctions have been condemned by courts in three continents:

- The European Court of Human Rights dismissed Malta's arguments that a child's link with both parents was missing in cases of children born out of wedlock, stating that "the status of an illegitimate child derives from the fact that his or her parents were not married at the time of their child's birth. It is therefore a distinction based on such a status which the Convention prohibits, unless it is otherwise objectively justified."²³⁶
- In a case ruling unconstitutional the discrimination against unmarried fathers in transmission of nationality to children born outside the country, the U.S. Supreme Court asserted that "discrete duration-of-residence requirements for unwed mothers and fathers who have accepted parental responsibility is stunningly anachronistic."²³⁷
- The Bahamian Court of Appeal confirmed a lower court judgment that discrimination preventing the children of Bahamian fathers born out of wedlock was unconstitutional, stating that "the clear words of Article 6: 'either of his parents is a citizen of The Bahamas' leads inexorably to the conclusion that the intent is to avoid any apparent discriminatory feature in the Constitution, that is to say, both the mother and the father of the child are placed on an equal footing with no regard as to any artificial differentiation of legitimate or illegitimate."²³⁸
- The South African Constitutional Court similarly stated in a case concerning different requirements for birth registration that "a gender-neutral and marital-neutral approach to the process of registration of a child's birth enhances substantive equality by abolishing gendered and sexist stereotypes that regard women, and women alone, as responsible for the care of children."²³⁹

²³² Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 24, <https://www.refworld.org/docid/5a12942a2b.html>.

²³³ The right to a nationality: women's equal nationality rights in law and in practice, Resolution of the UN Human Rights Council, A/HRC/RES/32/7, 18 July 2016, <https://www.refworld.org/docid/57e910044.html>.

²³⁴ *Attorney-General v. Unity Dow*, Court of Appeal, (no 4/91), Judgment of 3 July 1992, BLR 119 (CA) at p.141. See also "The Citizenship Case: *The Attorney General of the Republic of Botswana v. Unity Dow*, Court Documents, Judgements, Cases and Materials", Metlhaetsile Women's Information Centre, 1995.

²³⁵ *ACJPS & PLACE (Benjamin) v. Sudan*, supra n 42, para. 33, para. 38, 41.

²³⁶ *Genovese v. Malta*, (application no. 53124/09), European Court of Human Rights, Judgment of 11 October 2011, para. 46, <https://hudoc.echr.coe.int/en-g?i=001-106785>.

²³⁷ *Jefferson B. Sessions, III, Attorney General, Petitioner v. Luis Ramon Morales-Santana*, Supreme Court of the United States, 12 June 2017, p.14, https://www.supremecourt.gov/opinions/16pdf/15-1191_2a34.pdf.

²³⁸ *The Attorney General v. Shannon Tyreck Rolle et al*, Court of Appeal of the Commonwealth of the Bahamas, Case No. 62 of 2020, Judgement 21 June 2021, para. 132, per Jon Isaacs JA, <https://www.courtsofappeal.org.bs/judgments.php?action=view&judgment=3629>.

²³⁹ *Centre for Child Law v. Director-General Dept of Home Affairs and Others*, Case No. CCT101/20 [2021] ZACC 31; 2022 (2) SA 131 (CC), Judgment of 22 September 2021, para. 56, <http://hdl.handle.net/20.500.12144/36654>.

Among those states that continue to discriminate, the majority are in the Middle East. While there have been some courageous judges prepared to challenge these rules, they have often not had wider impact. For example, a landmark decision granting Lebanese nationality to the children of a Lebanese woman married to an Egyptian man, following the death of her husband, was overturned on appeal.²⁴⁰ It is significant, therefore, that in 2017 the Arab League adopted a declaration requesting member states “to put an end to all forms of discrimination in the area of nationality and to take concrete steps to amend laws and legislation relating to nationality in order to grant women and men equal rights in conferring nationality to children and spouses and to acquire, change or retain nationality in conformity with international standards and not contrary to national interests.”²⁴¹ In 2018, a ministerial conference of the League adopted a further declaration on belonging and legal identity, calling on member states:

[T]o enact legislations, and review and enforce their national laws on nationality, to ensure, without exception, that all children, including unaccompanied children are registered upon birth and are able to acquire a nationality, in particular by promoting laws enabling women to pass their nationalities to their children in compliance with the relevant international Conventions and Covenants.²⁴²

The legal recognition of the children of same-sex parents, and issue of identity documents recognising their nationality and the link to non-biological parents, has become a contested issue in those countries where same-sex relationships are not recognised.

- In 2021, the CJEU ordered Bulgaria to issue an identity document to a child, based on a birth certificate issued by Spain in respect of a child of same-sex parents, and consider the child as a direct descendant of a European Union citizen to permit the exercise of rights of Union citizens, including free movement. A Member State could not rely on its national law as justification for refusing to draw up an identity card or passport.²⁴³ (The Bulgarian courts, however, declined to support the view that the child should be granted citizenship.²⁴⁴)
- In 2022, the CJEU considered the impossibility of listing two same-sex parents on a birth certificate issued in Poland. There are conflicting decisions on the issue from the Polish courts.²⁴⁵ The Court stated that regardless of whether Polish law recognises same-sex couples and the possibility of their parenthood, the child of such a couple must be able to obtain an identity card or passport confirming nationality, thus enabling exercise of free movement rights within the EU, the protection of family life, and the best interests of the child. The CJEU decision triggered preparation of amendments to Polish law.²⁴⁶

See also the discussion on assisted reproduction cases ► [section 7.2 Children not born in the territory](#).

²⁴⁰ Dalila Mahdawi, “The Case of Samira Soueidan” *al-raida* Issue 129 – 130, 2010 <https://alraidajournal.lau.edu.lb/images/The%20Case%20of%20Samira%20Soueidan.pdf>; see also Lebanon: Citizenship Denied to Children of Lebanese Mothers, US Library of Congress, 24 May 2010, <https://www.loc.gov/item/global-legal-monitor/2010-05-24/lebanon-citizenship-denied-to-children-of-lebanese-mothers/>.

²⁴¹ The First Arab Conference on Good Practices & Regional Opportunities to Strengthen Women’s Nationality Rights League of Arab States Secretariat General, 1-2 October 2017: Final Declaration, <https://www.refworld.org/docid/5a256c4a4.html>.

²⁴² Arab Declaration on Belonging and Legal Identity, League of Arab States, 28 February 2018, <https://www.refworld.org/docid/5a9ffbd04.html>. See also Arab Framework for the Rights of the Child, 2001 art. 15: “Children’s civil rights and citizenship rights must be guaranteed [including] the right to a name, an identity, a lineage and a nationality”. Annex to the letter dated 14 May 2001 from the Permanent Representative of Jordan to the United Nations addressed to the Secretary-General, UN Doc. A / 55/942- S / 2001/485, 15 May 2001, <https://digitallibrary.un.org/record/441818>.

²⁴³ *Stolichna obshtina, rayon ‘Pancharevo’*, Case C-490/20, Court of Justice of the European Union, Judgment of 14 December 2021, <https://curia.europa.eu/juris/documents.jsf?num=C-490/20>. See also Patricia Cabral, “Protecting the Right to a Nationality for Children of Same-Sex Couples in the EU – A Key Issue Before the CJEU in *V.M.A. v. Stolichna Obshtina* (C-490/20)”, (blog post), European Network on Statelessness, 3 February 2021, <https://www.statelessness.eu/updates/blog/protecting-right-nationality-children-same-sex-couples-eu-key-issue-cjeu-vma-v>; David de Groot, “EU Law and the Mutual Recognition of Parenthood between Member States : The Case of *V.M.A. v Stolichna Obshtina*” (Fiesole: European University Institute, 2021), <https://cadmus.eui.eu/handle/1814/69731>.

²⁴⁴ Krassen Nikolov, “Bulgaria denies citizenship to Spanish-born child with two mothers”, Euractive.com, 2 March 2023, <https://www.euractiv.com/section/politics/news/bulgaria-denies-citizenship-to-spanish-born-child-with-two-mothers/>.

²⁴⁵ In one decision, the Polish Supreme Administrative Court stated that “it is not possible to enter in the Polish civil records instead of the child’s father a “parent” who is not a man, as such a transcription would be contrary to the fundamental principles of the Polish legal order.” Judgment in case II OPS 1/19, summary available at: <https://caselaw.statelessness.eu/caselaw/poland-supreme-administrative-court-case-ii-ops-119>. In a separate decision, the court stated that: “the authorities are obliged to transcribe civil status certificates of a Polish citizen, when: 1) he has a civil status record drawn up in Poland confirming a past event, and requests to confirm legality in the context of registration of a civil status, 2) is applying for a Polish identity document” case II OSK 2552/16, summary available at: <https://caselaw.statelessness.eu/caselaw/poland-supreme-administrative-court-case-ii-osk-255216>.

²⁴⁶ *Rzecznik Praw Obywatelskich v K.S. and Others*, Case C-2/21, Court of Justice of the European Union, Order of the Court (Tenth Chamber) of 24 June 2022, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62021CO0002>. A similar case was filed against Poland before the European Court of Human Rights in 2015, but no judgment had been issued at the time of publication of this Guide (A.D.-K. and Others against Poland, Application no. 30806/15 lodged on 16 June 2015, <https://hudoc.echr.coe.int/eng/?i=001-192049>).

K - Case example: Family Frontiers litigates for equality in Malaysian citizenship laws

The Malaysian Constitution has, since independence in 1957, discriminated between men and women in transmission of citizenship to their children born outside the country, and to their foreign spouses. While the children of Malaysian men are attributed citizenship “by operation of law” if they are born outside the country, the children of Malaysian women and foreign men are not automatically attributed Malaysian citizenship if they are born outside Malaysia. These children can only apply to register as citizens, a process that is subject to long delays and inconsistencies in decision-making, including repeated rejections without reason. Approval rates for registration are reported as only 3 percent of applications.²⁴⁷ The Constitution also provides for the wives of Malaysian citizens—but not the husbands—to be able to register as citizens. The registration process for wives is also difficult to access, and non-citizen spouses (of either sex), and their children, are left vulnerable in Malaysian society.²⁴⁸

In 2009, the Foreign Spouses Support Group (FSSG) was formed by two mothers to challenge the difficulties they faced in raising Malaysian children as themselves foreigners in Malaysia. From 2015, FSSG expanded its advocacy to support not only foreign spouses but also Malaysian women who could not confer their citizenship on their children. In 2020, Family Frontiers was registered by FSSG and others as a new entity to lead the Malaysian Campaign for Equal Citizenship, with the aim of achieving gender equality in citizenship law.²⁴⁹

The FSSG and Family Frontiers have conducted advocacy across many platforms—from submissions to the UN treaty body mechanisms, to press and social media campaigns, to lobbying parliament. Finally, the decision was made to litigate before the Malaysian courts to challenge the continuing gender discrimination in transmission of citizenship to children born abroad.

Family Frontiers issued a call for women whose children affected by the discrimination in the law to volunteer to be complainants in a case. Seventeen mothers forwarded applications, of which six were picked, to illustrate particular situations and challenges. Their multiple applications for citizenship on behalf of their children had been rejected with no reason given—in some cases children of the same mother and father had different outcomes, with one child registered a citizen and others not. Often, applications remained pending for years, despite repeated visits to follow up on applications and supply additional information. Exclusion from citizenship leaves these non-citizen children living in Malaysia without equal access to education and health care. If they are not recognised before they are 21, the registration process is no longer available.

In 2021, a case was brought in the names of Family Frontiers and these six mothers against the minister of home affairs and the director-general of the National Registration Department to challenge the discriminatory aspects of the law.²⁵⁰ The government attempted to strike out the cases as “frivolous, vexatious, and an abuse of court process”, but both the High Court and the Court of Appeal ruled that the case could continue. The case was successful at the first instance hearing on the merits. In September 2021, the Kuala Lumpur High Court issued a ground-breaking judgment that Article 14(1)(b) of the Federal Constitution together with the Second Schedule, Part II, Section 1(b) and Section 1(c) of the Federal Constitution, must be read in a harmonious manner with Article 8 of the Constitution which prohibits gender-based discrimination. In doing this, the High Court judge announced that the word “father” must be read to include mother and that their children are entitled to nationality by operation of law.²⁵¹

The landmark case led to nationwide discussion for the issue with widespread support for change. Many members of parliament stated their support for equal citizenship rights, including ministers from the Ministry of Women, Family and Community Development, the Ministry of Foreign Affairs, a Minister in the Prime Minister’s Department on Law and Institutional Reforms, and the Minister of Communications.²⁵²

²⁴⁷ S. Indramalar, “Malaysian mums go to court to challenge sexist nationality laws”, *The Star* (Kuala Lumpur), May 31, 2021, <https://www.thestar.com.my/life-style/family/2021/05/31/malaysian-mums-go-to-court-to-challenge-sexist-nationality-laws>; Coalition of Malaysian NGOs in the UPR Process, “Civil Society Mid-Term Report on Malaysia’s Third Cycle in the UPR Process”: “In November 2020, MOHA revealed that they had received a total of 14,477 citizenship applications between the start of 2019 to 15 October 2020. Of these applications, 45 have been successful, 691 were rejected, and 13,741 are still being processed. The backlog of applications is reflective of the waiting period of up to five years that some families have experienced.” https://www.ohchr.org/sites/default/files/Documents/HRBodies/UPR/NGOsMidTermReports/COMANGO_Malaysia.pdf.

²⁴⁸ *Visit to Malaysia: Report of the Special Rapporteur on Extreme Poverty and Human Rights*, 6 April 2020 A/HRC/44/40/Add.1, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/087/52/PDF/G2008752.pdf?OpenElement>; see also FSSG submission to the Special Rapporteur at: <https://www.ohchr.org/Documents/Issues/Poverty/VisitsContributions/Malaysia/ForeignSpousesSupportGroup.docx>.

²⁴⁹ Family Frontiers website at: <https://familyfrontiers.org/about-us/>; Foreign Spouses Support Group Facebook page at: <https://www.facebook.com/FSSGMY/>.

²⁵⁰ “Case Update: The Right to Citizenship for a Child Born outside Malaysia”, 11 February 2021, <https://mahwengkwai.com/case-update-right-citizenship-child-born-outside-malaysia/>.

²⁵¹ *Suriani Kempe and Ors v. Kerajaan Malaysia and Ors* [2021] 8 CLJ 666 [HC].

²⁵² “Citizenship ruling ‘a ray of hope’ for women – Rina”, *Malaysiakini*, 11 September 2021, <https://www.malaysiakini.com/news/590933>; Sulok Tawie, “Law minister lauds KL High Court’s decision on automatic citizenship for children born to Malaysian mothers abroad”, *Malay Mail*, 9 September 2021, <https://www.malaymail.com/news/malaysia/2021/09/09/law-minister-lauds-kl-high-courts-decision-on-automatic-citizenship-for-children-born-to-malaysian-mothers-abroad/2004321>; “Annuar wants Cabinet to decide on citizenship issue Bernama -September 14, 2021 10:30 PM”, *Free Malaysia Today*, 14 September 2021, <https://www.freemalaysiatoday.com/category/nation/2021/09/14/annuar-wants-cabinet-to-decide-on-citizenship-issue/>; Ida Lim, “Malaysian mums deliver petition on kids’ citizenship bids to Putrajaya, minister says Cabinet to consult AG tomorrow”, *Malay Mail*, 23 September 2021, <https://www.malaymail.com/news/malaysia/2021/09/23/malaysian-mums-deliver-petition-on-kids-citizenship-bids-to-putrajaya-minis/2007793>.

But although both the Home Minister and Law Minister also announced their commitment to a Constitutional amendment on the matter²⁵³, the government appealed the High Court decision. In August 2022, Malaysia's Court of Appeal overturned the landmark High Court ruling, declaring in a 2:1 judgment that the relevant provisions of the Constitution specifically refer to the "biological father" and that this term cannot be extended to mean the "mother."²⁵⁴ The decision was widely deplored. UN experts called on Malaysia's government to ensure that Malaysian women can enjoy equal rights in relation to nationality and citizenship.²⁵⁵ Family Frontiers successfully filed an application for leave to appeal at the Federal Court. In February 2023, the government announced that it would amend the law so that children of Malaysian women born outside of Malaysia would have the right to citizenship.²⁵⁶

7.4. Discrimination based on race, religion, or ethnicity



KEY MESSAGES

- International law in relation to discrimination based on race, religion or ethnicity in grant or recognition of nationality has some ambiguities. Nonetheless, while preferential rules on acquisition of nationality may be permissible (within limits), deprivation or denial of nationality on discriminatory grounds is not permitted.
- The prohibition of racial discrimination is widely recognised as a "peremptory norm" of international law.
- Decisions of the Inter-American and African human rights systems have been particularly strong in their condemnation of both direct and indirect discrimination in relation to nationality law and administration.
- Discriminatory denial of nationality may itself sometimes be argued to constitute arbitrary deprivation of nationality.

In a majority of countries in the world, the central principle of nationality is that it is based on descent. In most cases, this principle is combined with some rights based on birth in the territory, or accessible naturalisation procedures. However, if nationality law is based exclusively on descent (or nearly so), and access to naturalisation is very limited, the impact is likely to be that nationality law discriminates at least indirectly based on race, ethnicity, or religion. Discrimination is pervasive in the administration of nationality laws, and a major cause of statelessness.²⁵⁷ Moreover, explicit provisions that discriminate on such grounds remain present in several nationality laws globally. There is increasing disquiet at such provisions and practice in nationality law and administration.²⁵⁸

International law is clear that deprivation of nationality on discriminatory grounds is not permitted. Article 9 of the 1961 Convention establishes the specific prohibition that "a Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds." There is extensive jurisprudence establishing that this prohibition goes well beyond the formal use of grounds for deprivation of nationality in national law. In any discussion of discriminatory provisions, an argument should be considered that discriminatory denial of nationality in itself constitutes arbitrary deprivation of nationality.

As early as 1973, in the *East African Asians* case brought on behalf of "citizens of the UK and colonies" who had been denied the right to enter the UK, the European Commission of Human Rights concluded that:

²⁵³ "Govt reiterates intention to amend constitution on child citizenship", Free Malaysia Today, 3 December 2021, <https://www.freemalaysiatoday.com/category/nation/2021/12/03/govt-reiterates-intention-to-amend-constitution-on-child-citizenship/>.

²⁵⁴ Ida Lim, "In 2-1 decision, Court of Appeal Rules Malaysian Mums Cannot Pass Citizenship to Overseas-born Kids", *Malay Mail*, 5 August 2022, <https://www.malaymail.com/news/malaysia/2022/08/05/in-2-1-decision-court-of-appeal-rules-malaysian-mums-cannot-pass-citizenship-to-overseas-born-kids/21229>; "Malaysia court overturns landmark citizenship ruling for women", *Al Jazeera*, 5 August 2022 <https://www.aljazeera.com/news/2022/8/5/malaysia-court-overturns-landmark-citizenship-ruling-for-women>.

²⁵⁵ "Malaysia: UN Experts Denounce Gender-discriminatory Citizenship Law", 5 September 2022, <https://www.ohchr.org/en/press-releases/2022/09/malaysia-un-experts-denounce-gender-discriminatory-citizenship-law>; "Statement of Working Group on discrimination against women and girls", United Nations, 21 September 2021, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26659>.

²⁵⁶ "UNHCR, Family Frontiers laud Putrajaya's move to confer automatic citizenship to children born abroad to Malaysian mums", *Malay Mail*, 18 February 2023, <https://www.malaymail.com/news/malaysia/2023/02/18/unhcr-family-frontiers-laud-putrajayas-move-to-confer-automatic-citizenship-to-children-born-abroad-to-malaysian-mums/55573>.

²⁵⁷ Amal de Chickera and Joanna Whiteman, "Addressing Statelessness through the Rights to Equality and Non-Discrimination", in *Solving Statelessness*, ed. Laura van Waas and Melanie Khanna (Oisterwijk, The Netherlands: Wolf Legal Publishers, 2017), pp.99–128.

²⁵⁸ E. Tendayi Achiume, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Racial Discrimination in the Context of Citizenship, Nationality and Immigration Status* (Geneva: United Nations, 25 April 2018), <https://undocs.org/A/HRC/38/52>.

a special importance should be attached to discrimination based on race, and that to publicly single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity; and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.²⁵⁹

The UN Commission on Human Rights adopted a series of resolutions dating back to 1977 on arbitrary deprivation of nationality noting that “arbitrary deprivation of nationality on racial, national, ethnic or religious is a violation of human rights and fundamental freedoms.”²⁶⁰ In later resolutions, “political or gender grounds” were added.²⁶¹ The Human Rights Council that replaced the Commission in 2006 has repeatedly confirmed and elaborated on this statement, most recently in 2016.²⁶² This position is also echoed by the Committee on the Elimination of Racial Discrimination in its General Recommendation on discrimination against non-citizens adopted in 2004.²⁶³

The European Convention on nationality, adopted in 1997, avoids any doubt on the universal application of the norms of non-discrimination, and specifically bars discrimination in law or administrative practice governing nationality: “The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour, or national or ethnic origin.”

The development of normative frameworks at the UN level has been complex. The Convention on the Elimination of Racial Discrimination (CERD), adopted in 1965, requires that enjoyment of the right to nationality be guaranteed to everyone “without distinction as to race, colour, or national or ethnic origin.”²⁶⁴ However, recognising that some forms of discrimination are intrinsic to the concept of nationality and form the basis of nationality law, the CERD also provides that “this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens,” and excludes from its application “legal provisions of States parties concerning nationality, citizenship or naturalisation, *provided that such provisions do not discriminate against any particular nationality*” (emphasis added).²⁶⁵

This convoluted language is the outcome of a compromise position between state sovereignty in nationality matters and the norm of non-discrimination.²⁶⁶ In 2004, the UN Committee on the Elimination of Racial Discrimination adopted a General Recommendation which urged states, among other things, to:

13. Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalisation, and to pay due attention to possible barriers to naturalisation that may exist for long-term or permanent residents.²⁶⁷

Resolutions of the UN Commission on Human Rights and Human Rights Council on arbitrary deprivation of nationality have consistently called for states “to refrain from taking measures and from enacting legislation that discriminates against persons or groups of persons on grounds of race, colour or national or ethnic origin by nullifying or impairing the exercise, on an equal footing, of their right to nationality, and to repeal such legislation if it already exists.”²⁶⁸

²⁵⁹ *East African Asians v. United Kingdom*, application no. 4715/70 and others (consolidated), European Court of Human Rights, Decision of 14 December 1973, para 207, <https://hudoc.echr.coe.int/eng?i=001-73658>.

²⁶⁰ Human rights and arbitrary deprivation of nationality, CHR res. 1997/36, ESCOR Supp. (No. 3) at 122, UN Doc. E/CN.4/1997/36 (1997), <http://hrlibrary.umn.edu/UN/1997/Res036.html>.

²⁶¹ For example, Commission on Human Rights, Resolution 2005/45: Human Rights and Arbitrary Deprivation of Nationality, E/CN.4/RES/2005/45, 19 April 2005, <https://www.refworld.org/docid/429c3b694.html>.

²⁶² Human Rights Council, Resolution on Human rights and arbitrary deprivation of nationality, A/HRC/RES/32/5, 15 July 2016, which, among other things, “stresses that the arbitrary deprivation of nationality, especially on discriminatory grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, including disability, is a violation of human rights and fundamental freedoms.” See also periodic Reports of the Secretary General to the Human Rights Council on “Human rights and arbitrary deprivation of nationality.” Human Rights Council reports and resolutions on nationality collated at: <https://www.ohchr.org/en/nationality-and-statelessness>.

²⁶³ General Recommendation XXX of the Committee on the Elimination of Racial Discrimination on Discrimination against Non-citizens, 5 August 2004, <https://www.refworld.org/docid/45139e084.html>, included within report *The Rights of Non-citizens*, Office of the UN High Commissioner for Human Rights, 2006, <https://www.ohchr.org/en/publications/special-issue-publications/rights-non-citizens>.

²⁶⁴ CERD, art. 5: “states Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:[...] (d) Other civil rights, in particular: [...] (iii) The right to nationality.”

²⁶⁵ CERD, art 1.

²⁶⁶ The CERD was adopted while decolonisation was rapidly progressing, and the newly independent states wished not to be constrained as they redressed the imbalances caused by pervasive discrimination under colonial laws. See Bronwen Manby, “Post-colonial Citizenship and Decolonisation as a Turning Point: Continuities and Discontinuities in African states”, Robert Schuman Centre for Advanced Studies, European University Institute Working Paper 2023/01, January 2023, <https://cadmus.eui.eu/handle/1814/75181>.

²⁶⁷ Committee on the Elimination of Racial Discrimination, General Recommendation XXX on Discrimination against Non-citizens, 5 August 2004, <https://www.refworld.org/docid/45139e084.html>.

²⁶⁸ Human rights and arbitrary deprivation of nationality, E/CN.4/1997/36, Commission on Human Rights, 11 April 1997, <http://hrlibrary.umn.edu/UN/1997/Res036.html>. Resolutions on arbitrary deprivation of nationality adopted by the Human Rights Council, which replaced the Commission on Human Rights, are available here: <https://www.ohchr.org/en/nationality-and-statelessness/resolutions>.

Both the Committee on the Elimination of Racial Discrimination and the Committee on the Rights of the Child have commented unfavourably on discriminatory provisions in national laws on acquisition of nationality by children.²⁶⁹ In 2021, UNHCR issued a background note on discrimination in nationality laws which included a general call to remove discriminatory provisions.²⁷⁰

Both the Inter-American and the African human rights mechanisms have taken a robust approach in condemning discrimination in nationality provisions, linking non-discrimination to the principle of equality before the law.

In its advisory opinion on Judicial Conditions and the Rights of Undocumented Migrants adopted in 2003, the Inter-American Court of Human Rights stated that “the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.” Accordingly:

Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable.²⁷¹

The Draft Conclusions on peremptory norms of general international law (or *jus cogens*) adopted by the International Law Commission in 2022 propose that the prohibition of racial discrimination should be included within the list of norms considered to reach that level.²⁷²

The understanding of prohibited discrimination continues to develop and now may be said to include “indirect” discrimination, that is, discrimination based upon ostensibly race-neutral provisions that have a disproportionate effect on specific ethnic groups.²⁷³ This understanding has been adopted by the Inter-American Court of Human Rights in nationality cases. In the *Yean and Bosico* case against the Dominican Republic, the Court stated that:

[T]he peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that, when regulating mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights. Moreover, States must combat discriminatory practices at all levels, particularly in public bodies and, finally, must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals.²⁷⁴

Similarly, in the later case of the Dominicans and Haitians expelled from the Dominican Republic, the Court stated that:

[T]he *jus cogens* principle of equal and effective protection of the law and non-discrimination requires States, when regulating the mechanisms for granting nationality, to abstain from establishing discriminatory regulations or regulations that have discriminatory effects on different groups of a population when they exercise their rights.²⁷⁵

This opinion was cited by the African Commission in *Open Society Justice Initiative v. Côte d'Ivoire*, considering that when the right to non-discrimination is violated, the right to equal protection of the law is necessarily also violated.²⁷⁶

The African human rights treaty bodies have made strong statements about the inadmissibility of discrimination based on factors that are the result of colonisation. In the case brought on behalf of former Zambian president Kenneth Kaunda, who had been prevented from running for office again on the grounds that he was actually Malawian, the Commission found that retroactive non-recognition of citizenship, in this case extending decades into the past,

²⁶⁹ For example: Committee on the Elimination of Racial Discrimination, Concluding Observations: Combined twelfth to sixteenth periodic reports of Sudan, CERD/C/SDN/CO/12-16, 15 May 2015; Committee on the Rights of the Child, Concluding Observations: Democratic Republic of the Congo, CRC/C/15/Add.153, 9 July 2001, para. 28; Committee on the Rights of the Child, Concluding Observations: Syria, CRC/C/SYR/CO/3-4, 9 February 2012, para. 42; Committee on the Rights of the Child, Concluding Observations: Liberia, CRC/C/LBR/CO/2-4, 13 December 2012, para. 41; Committee on the Rights of the Child, Concluding Observations: Croatia, CRC/C/HRV/CO/3-4, 13 October 2014, para. 27; Committee on the Rights of the Child, Concluding Observations: Dominican Republic, CRC/C/DOM/CO/3-5, 6 March 2015, para. 28; Committee on the Rights of the Child, Concluding Observations: Bhutan, CRC/C/BTN/CO/3-5, 5 July 2017, para. 15.

²⁷⁰ Background Note on Discrimination in Nationality Laws and Statelessness, UNHCR, October 2021, <https://www.refworld.org/docid/616fda104.html>.

²⁷¹ Judicial Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-American Court of Human Rights, Judgment of 17 September 2003, para. 101.

²⁷² Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) with commentaries, International Law Commission, 2022, https://legal.un.org/ilc/texts/1_14.shtml.

²⁷³ See the leading decision of the European Court on Human Rights in the case *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber (application no. 57325/00), 13 November 2007, at para. 175, in which it reiterated that “a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group.” Discussed in Jain, “Manufacturing Statelessness”, *supra* n 15, pp.279–81.

²⁷⁴ *Case of the Girls Yean and Bosico*, *supra* n 52, para. 141.

²⁷⁵ *Expelled Dominicans and Haitians*, *supra* n 64, para. 264.

²⁷⁶ *OSJI v. Côte d'Ivoire*, *supra* n 166, paras 154-155.

violated Charter guarantees not only of a fair hearing, but also of non-discrimination and equality before the law:

[T]he movement of people in what had been the Central African Federation (now the States of Malawi, Zambia and Zimbabwe) was free and ... by Zambia's own admission, all such residents were, upon application, granted the citizenship of Zambia at independence. Rights which have been enjoyed for over 30 years cannot be lightly taken away. To suggest that an indigenous Zambian is one who was born and whose parents were born in what came (later) to be known as the sovereign territory of the State of Zambia may be arbitrary and its application of retrospectivity cannot be justifiable according to the Charter.²⁷⁷

Considering the problems of recognition of nationality faced in Côte d'Ivoire by those northern Ivorians and descendants of those who migrated during the colonial era (whether forced or voluntarily) from what is now a neighbouring country, the Commission stated that its view was that:

[N]ationality as an ethnic, social and cultural unit poses a fundamental problem in the African context since the demarcation of borders inherited from independence has caused a split of entities of nationalities that existed before colonisation.²⁷⁸

Accordingly, the Commission took a historical approach to the analysis of the situation in Côte d'Ivoire, noting the need to "resolve, once and for all, the dramatic equation of imposing arbitrary borders on new sovereign African States at independence,"²⁷⁹ and concluding that:

In short, with regard to discrimination against Dioulas [people of northern or immigrant origin], the Commission notes that it is based on their ethnic origin, consonance of their patronymics and their Muslim religious persuasion. On the one hand, discrimination implies two groups of Ivorian citizens who are treated differently on bases prohibited by the Charter. On the other hand, successive Governments of the Respondent State produced no objective and reasonable justification, while the Complainant showed evidence of a difference in treatment.²⁸⁰

More generally, the Commission stated, in the case brought by the Nubian Community in Kenya to the African Commission on Human and Peoples' Rights, that:

States may not discriminate in law or in practice when providing people with or depriving them of nationality.²⁸¹

Both the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child have condemned Kenya's practice of additional "vetting" applied to applications for identity documents made in certain districts where minority ethnic groups are known to live:

The African Committee is not convinced, especially in relation to a practice that has led children to be stateless for such a long period of time, that the current discriminatory treatment of the Government of Kenya in relation to children of Nubian descent is "strictly proportional with" and equally importantly "absolutely necessary" for the legitimate state interest to be obtained. The Committee is of the view that measures should be taken to facilitate procedures for the acquisition of a nationality for children who would otherwise be stateless, and not the other way round.²⁸²

[T]he practice of requiring members of the Nubian community, simply because of their ethnic and religious affiliations, to meet different and more burdensome requirements in order to obtain identity documents is discriminatory and places them in a situation of extreme vulnerability as regards the exercise and enjoyment of their rights.²⁸³

In its General Comment on birth registration and the right to nationality, the African Committee of Experts on the Rights and Welfare of the Child condemns discrimination in all rules relating to nationality, stating that:

[A]ll criteria established by States relating to acquisition of nationality by children must not distinguish on the basis of "the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status". Accordingly, the Committee recommends that those African States that have legal provisions that discriminate on any of these grounds should review them and replace them with non-discriminatory provisions.²⁸⁴

²⁷⁷ *Legal Resources Foundation v. Zambia* (Kenneth Kaunda case), Communication No. 211/98, 7 May 2001, para. 71., <http://hrlibrary.umn.edu/africa/comcases/Comm211-98.pdf>.

²⁷⁸ *OSJI v. Côte d'Ivoire*, supra n 166, para. 99.

²⁷⁹ *Ibid.*, para. 115.

²⁸⁰ *Ibid.*, para. 151.

²⁸¹ *Kenyan Nubian children's case v. Kenya*, supra n 3, para. 116

²⁸² *Ibid.*, para. 57.

²⁸³ *Ibid.*, para. 149.

²⁸⁴ ACERWC General Comment on art 6, supra n 55, para. 94.

- In its 2015 ruling on a case against Sudan, the African Committee of Experts recommended that Sudan repeal amendments to its nationality Act that withdrew Sudanese nationality from people of South Sudanese origin, without ensuring that they had in fact acquired the nationality of South Sudan, and that the government should “ensure that rules governing citizenship acquisition and deprivation apply equally to all without discrimination based on, inter alia, ethnicity, and protect against statelessness.”

Even national courts in countries that include such explicit provisions within their nationality law have issued judgments that conform with this expectation to the extent legally possible.

- In Uganda, where the constitution provides for *jus soli* citizenship only for those who are members of one of a list of “indigenous communities” the High Court has applied the principle of continuity of existing citizenship in order to confirm the rights to citizenship of Ugandans of Somali origin (not one of the listed communities) who can show that they were, or are descendants of a person who was, attributed citizenship automatically under the legal provisions in force before the adoption of the current constitution.²⁸⁵

There is more ambivalence in treaty body commentary on preferential access to acquisition of nationality by naturalisation (rather than in attribution or recognition of nationality from birth), but the Committee on the Elimination of Racial Discrimination, the Human Rights Committee, and the Committee on the Rights of the Child have all expressed disquiet about discrimination in naturalisation procedures (in Korea, Japan, Panama, Kuwait, and other cases).²⁸⁶ Affinity-based naturalisation preferences, common in Hispanic countries, have been accepted by the Inter-American Court on Human Rights (with limits),²⁸⁷ but criticised by the UN bodies in the case of Israel’s law of return, and a Qatari provision favouring naturalisation of foreign nationals from Arab states.²⁸⁸ The Organisation for Security and Cooperation in Europe (OSCE) has accepted the idea of kin-based preferences in some circumstances, but placed restrictions on their use.²⁸⁹

Preferential access to nationality may also be perfectly acceptable—or even called for as a remedy—where it is designed to redress past injustices or displacement. The drafting history of CERD shows that exactly such forms of preference were envisaged as falling within state discretion.²⁹⁰ Compensatory grant of nationality to redress past wrongs has been employed in some former Soviet states of Eastern and Central Europe.²⁹¹ Similarly, immediately after gaining independence, Namibia adopted a law providing for privileged access to Namibian citizenship for descendants of those driven from the territory by the German colonial authorities in the early 20th century.²⁹²

In general, it has been argued by scholars that:

[In] the context of racial discrimination in nationality laws, and against the background of the peremptory prohibition of systemic racial discrimination, the effect of Articles 1(1) and 1(3) of ICERD is that state regulation of nationality must not discriminate, whether directly or indirectly, on the basis of race, color, descent, or national or ethnic origin in the attribution, regulation or deprivation of citizenship, except in narrowly circumscribed situations where differential access to citizenship is applied pursuant to a legitimate aim, and is proportional to the achievement of this aim. This limited exception is logically applicable only in relation to acquisition of or access to citizenship and not deprivation.²⁹³

²⁸⁵ *Abdu Abucar Hussein and 7 others v. Attorney General*, supra 151. Cf the similar position of the Equal Opportunities Commission of Uganda in relation to people of mixed race, *Yasin Omar v. Attorney General*, Uganda, EOC Reference No. EOC/CR/010/2016, 29 September 2017, <https://citizenshiprightsafrika.org/uganda-yasin-omar-vs-attorney-general/>.

²⁸⁶ Peter J. Spiro, “A New International Law of Citizenship”, *American Journal of International Law* Vol. 105, no. 4 (2011), pp.694–746, at pp. 727–730.

²⁸⁷ *Advisory Opinion on Naturalisation Provisions of Costa Rica*.

²⁸⁸ Spiro, “A New International Law of Citizenship”, supra n 286, pp. 727–730.

²⁸⁹ Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations, Organisation for Security and Co-operation in Europe, 2 October 2008, para. 11, <https://www.osce.org/hcnm/bolzano-bozen-recommendations>.

²⁹⁰ Michelle Foster and Timnah Rachel Baker, “Racial Discrimination in Nationality Laws”, *Columbia Journal of Race and Law*, Vol. 11, no. 1 (2021), pp. 83–146, at pp.108–14.

²⁹¹ Andre Liebich, “Introduction: Altneuländer or the Vicissitudes of Citizenship in the New EU States”, in *Citizenship Policies in the New Europe*, ed. Rainer Bauböck, Bernhard Perchinig, and Wiebke Sievers, 2nd ed., IMISCOE Research (Amsterdam: Amsterdam University Press, 2009).

²⁹² Namibian Citizenship (Special Conferment) Act No.14 of 1991; Namibian Citizenship (Second) Special Conferment Act, No.6 of 2015.

²⁹³ Foster and Baker, “Racial Discrimination in Nationality Laws”, supra n 290, p.144.

7.5. Arbitrary denial or deprivation of nationality and the right to due process



KEY MESSAGES

- Arbitrary deprivation of nationality implies the right to due process not only with regard to invocation of administrative measures to deprive a person of nationality that has previously been recognised, but also regarding denial of recognition of nationality to a person who appears to be entitled to such recognition.
- Deprivation on grounds of fraud or criminal offences should be subject to a rule of proportionality.
- Courts are generally more deferential to the executive in national security cases, but some deprivations have nonetheless been overturned.

Arbitrary deprivation of nationality is unlawful in international law and is also likely to be unlawful under the due process provisions of any national constitution. It may be an additional injury that those affected are rendered stateless, but the key issue is the arbitrariness of the decision and the abandonment of the rule of law: if nationality is arbitrarily deprived, it is a violation of human rights even if the person is not thereby rendered stateless.

Article 15 of the Universal Declaration of Human Rights provides that “no one shall be arbitrarily deprived of his nationality.” The provision was adopted as a direct response to the denationalisations carried out by Germany before and during the Second World War. More specifics were provided in 1961 by the Convention on the Reduction of Statelessness, which states that a contracting state “shall not exercise a power of deprivation ... 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” (Article 8[4]). Article 9 of the 1961 Convention adds the specific prohibition that “a Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds” ([▶ section 7.4: Discrimination based on race, religion, or ethnicity](#)). The prohibition on arbitrary withdrawal thus applies whether or not a person would become stateless.

The key question therefore is the nature of state action that counts as “arbitrary deprivation”.

The UN Human Rights Committee, considering the word arbitrary in other contexts, has said that “the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice,” and that “the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances.” Extensive guidance on the application of due process in deprivation of nationality is provided by the UNHCR Guidelines on Statelessness No. 5 on Loss and Deprivation of nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness. The Inter-American Commission has also adopted comprehensive guidelines on due process in the context of the protection of refugees and stateless persons. More generally, an assessment of arbitrariness may draw on the concept of the “rule of law” as recognised by national and international legal systems.

Arbitrary denial as deprivation

Deprivation of nationality is not restricted to cases where the state invokes formal deprivation proceedings under the law. A retroactive finding that a person was not a national and was issued nationality documents in error, or an arbitrary application of rules relating to loss by operation of law, constitutes deprivation of nationality and is equally subject to rules prohibiting arbitrary deprivation.²⁹⁴

Thus, in the *Anudo* case against Tanzania before the African Court on Human and Peoples’ Rights, the court stated that if a person had ever held documents recognising citizenship, the burden of proof shifts to the state to prove that the person is not a citizen, if recognition of citizenship is revoked and those documents withdrawn.²⁹⁵ In the *Modise* case against Botswana, concerning a person whose citizenship had been recognised without difficulty until he decided to run for president, the African Commission considered denial of citizenship on the alleged grounds that the applicant held another citizenship (dual citizenship was not permitted for adults in Botswana), and found that:

[F]ailure or refusal of a Respondent State to grant nationality on grounds that the Complainant had obtained another nationality or had accepted it without showing any proof is a violation of the right to recognition of legal status.²⁹⁶

²⁹⁴ UNHCR, Guidelines on Statelessness No. 5, supra n 103, para. 91 et seq.

²⁹⁵ *Anudo v. Tanzania*, supra n 109.

²⁹⁶ *John Modise v. Botswana*, Communication 97/93, African Commission on Human and Peoples’ Rights, decision of 6 May 2000, para. 88.

This principle is supported by the Protocol to the African Charter on the Right to a nationality, adopted in 2024, which provides that nationality should not be deprived from a person declared to have dual nationality without evidence that they do in fact hold another nationality.

In some circumstances, denial of recognition of nationality may constitute arbitrary deprivation even if the person has never held documents recognising nationality. This is especially the case where nationality is denied on discriminatory grounds. The UNHCR Guidelines on Statelessness No. 5, on loss and deprivation of nationality, include denial of recognition or acquisition of nationality on discriminatory grounds within the rubric of arbitrary deprivation of nationality, stating that:

[T]he prohibition of arbitrary deprivation of nationality encompasses both loss and deprivation of nationality, including where a State arbitrarily precludes a person or group from obtaining or retaining a nationality (e.g., on discriminatory grounds).²⁹⁷

One element of arbitrariness may be the vagueness of nationality law provisions, administrative procedures that are impossible to fulfil, and a lack of transparency in the criteria that are applied to determine if a person is or is not a national. Very often, procedural barriers provide a cover for discriminatory treatment (► [section 7.3](#) and ► [section 7.4: Discrimination based on sex & gender and Discrimination based on race, religion, or ethnicity](#)).

In the *Yean and Bosico* case, for example, the Inter-American Court found that by denying late registration of birth based on failure to comply with onerous requirements that were not needed in the case of children under 13 years of age:

the State acted arbitrarily, without using reasonable and objective criteria, and in a way that was contrary to the superior interest of the child, which constitutes discriminatory treatment.... This situation placed them outside the State's juridical system and kept them stateless, which placed them in a situation of extreme vulnerability, as regards the exercise and enjoyment of their rights.²⁹⁸

Among the principles established by cases before the African human rights institutions are that:

- Rules established for recognition of nationality may be invalid if they lack clear meaning and allow excessive discretion to the executive branch of government in their application.²⁹⁹
- If a person has ever held officially issued identity documents recognising him or her as a citizen of that country, the burden of proof shifts to the state to show that the person is not a citizen.³⁰⁰
- Where the systems for the registration of births or for the delivery of related documents are weak, the burden of proof that a person who claims to be a citizen is in fact a citizen must be shared between the person and that state in the event the required document is lacking.³⁰¹
- If the refusal of a state to recognise nationality is on the grounds that the person concerned has acquired another nationality the state must show proof that this is true.³⁰²
- 'Vetting' procedures, such as those that exist in Kenya, will be considered arbitrary if they have no basis in law (making them prone to abuse), and place significant burdens on a minority ethnic group that are not applied to the majority population.³⁰³
- The right to an appeal to competent national organs includes both the initial right to take a matter to court, as well as the right to appeal from a first instance decision to higher tribunals; this applies both in relation to a determination that a person is not a citizen and to a decision to expel him or her.³⁰⁴
- Where a person has a right to the nationality of the relevant country under existing law, the grant of nationality by naturalisation is not a suitable remedy for the previous denial of nationality.³⁰⁵

²⁹⁷ UNHCR, Guidelines on Statelessness No. 5, supra n 103, para. 9. See also para. 91: "Examples of arbitrary deprivation of nationality include the automatic withdrawal of nationality for an entire ethnic group through a judicial, legal or administrative action; the withdrawal of a person's nationality without a fair trial before a court or independent body; and the denial of acquisition of nationality on discriminatory grounds."

²⁹⁸ *Case of the Girls Yean and Bosico*, supra n 52, para. 166.

²⁹⁹ *OSJI v. Côte d'Ivoire*, supra n 166, especially para. 112; *Mouvement Ivoirien des Droits Humains v. Côte d'Ivoire*, Communication No. 246/02, 29 July 2008, para. 86., <https://achpr.au.int/fr/decisions-communications/mouvement-ivoirien-des-droits-humains-midh-cote-divoire>.

³⁰⁰ *Anudo v. Tanzania*, supra n 109.

³⁰¹ *OSJI v. Côte d'Ivoire*, supra n 166, para. 194.

³⁰² *Modise v. Botswana*, supra n 296, para. 88.

³⁰³ *Nubian Community v. Kenya*, supra n 35, para 133.

³⁰⁴ *Amnesty International v. Zambia*, Communication No. 212/1998, African Commission on Human and Peoples' Rights, decision of 5 May 1999, para. 33; *Union interafricaine des droits de l'Homme and others v. Angola*, Communication No. 159/1996, 11 November 1997, <https://www.refworld.org/jurisprudence/caselaw/achpr/1997/en/63295>, African Commission on Human and Peoples' Rights, decision of 11 November 1997, para. 19; *Organisation Mondiale Contre la Torture and others v. Rwanda*, Communications No. 27/89, 46/91, 49/91, 99/93; African Commission on Human and Peoples' Rights, decision of 31 October 1996, *Rencontre Africain pour la Défense des Droits de l'Homme v. Zambia*, Communication No. 71/1992, 31 October 1996. <https://www.refworld.org/jurisprudence/caselaw/achpr/1996/en/92802>, para. 30; *Anudo Ochieng Anudo v. United Republic of Tanzania (merits)* supra n 109, paras 112–116.

³⁰⁵ *OSJI v. Côte d'Ivoire*, supra n 166, para. 132.

The risk of statelessness increases the likelihood that deprivation may be seen as arbitrary, even if it is not a necessary element. The 2004 ruling of the Eritrea-Ethiopia Claims Commission (established under the Permanent Court of Arbitration to determine claims for loss and damage relating to the war between the two states that broke out in 1998) stated that:

[I]nternational law limits States' power to deprive persons of their nationality. In this regard, the Commission attaches particular importance to the principle expressed in Article 15, paragraph 2, of the Universal Declaration of Human Rights, that "no one shall be arbitrarily deprived of his nationality." In assessing whether deprivation of nationality was arbitrary, the Commission considered several factors, including whether the action had a basis in law; whether it resulted in persons being rendered stateless; and whether there were legitimate reasons for it to be taken given the totality of the circumstances.³⁰⁶

Deprivation on grounds of fraud or criminal offences

Deprivation of nationality on the grounds that it was fraudulently acquired is also subject to limits. The UNHCR Guidelines on Statelessness No. 5, commenting on Article 8(2)(b) of the 1961 Convention in relation to deprivation of nationality on grounds of fraudulent acquisition, note that:

[T]here is a clear implication that the misrepresentation or fraud must have been a key causal factor in the person concerned acquiring nationality in the first place. Deprivation of nationality is not permissible if the nationality would have been acquired even if the misrepresentations or concealment had not occurred. In addition, fraud or misrepresentation in the acquisition of nationality should be distinguished from fraudulent acquisition of documents that may be submitted as part of the process to acquire nationality. Fraudulent documents are not in themselves evidence of fraudulent acquisition of nationality, as persons may in certain situations be forced to obtain documents by irregular means even if they have a legal entitlement to nationality.³⁰⁷

Moreover, provisions on loss and deprivation should be proportionate to a legitimate aim.³⁰⁸

Whether sufficient consideration has been given to these principles will be a question of fact.

- The European Court of Human Rights refused to strike down Malta's decision to revoke acquisition of nationality that had allegedly been fraudulently acquired, on the basis that the decision had had a clear legal basis under the relevant national law, hearings and remedies had been consistent with procedural fairness, and the person had not shown that he was rendered stateless.³⁰⁹

The Court of Justice of the European Union (CJEU) has separately developed a line of jurisprudence on the criteria that must be considered in such cases.³¹⁰

- In the *Rottmann* case, concerning withdrawal of nationality on the grounds that naturalisation had been fraudulently obtained, the CJEU found that such a withdrawal could potentially be justified, even if the person is rendered stateless, but it required an evaluation of proportionality in relation to the particular facts of the case.³¹¹
- In *Tjebbes*, the CJEU set out procedural requirements for a case-by-case consideration in denationalisation cases, rather than allowing automatic loss (in this case, for residence outside of the country).³¹²
- In *JY*, the CJEU developed the arguments on proportionality, finding that the decision of the Austrian authorities to revoke nationality acquired by naturalisation on the grounds of traffic offences was not proportionate.³¹³

National courts have also considered the question of disproportionality. In the *Rottmann* case, the German Federal Administrative Court subsequently found that the administrative decision to withdraw the German nationality was proportional, despite the uncertainty about the restoration of the Austrian nationality of the applicant.³¹⁴ In 2008, however, the German Federal Administrative Court ruled that the withdrawal of nationality granted to stateless minors

³⁰⁶ Award of the Eritrea-Ethiopia Claims Commission in *Partial Award (Civilian Claims)*, 44 ILM 601 (2005) at para. 60, <https://pca-cpa.org/en/cases/71/>.

³⁰⁷ UNHCR, Guidelines on Statelessness No. 5, supra n 103, para. 51. Compare the Convention relating to the Status of Refugees, 1951, art 31, in relation to "illegal entry or presence".

³⁰⁸ *Ibid.*, para. 52 & 94.

³⁰⁹ *Ramadan v. Malta* (application no. 76136/12), 21 June 2016.

³¹⁰ For a survey of the development of this jurisprudence, see Gerard-René de Groot and Ngo Chun Luk, "Twenty Years of CJEU Jurisprudence on Citizenship", *German Law Journal* Vol. 15, no. 5 (2014), pp 821–34.

³¹¹ *Janko Rottmann v. Freistaat of Bayern*, Case C-135/08, Court of Justice of the European Union, Judgment of 2 March 2010, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62008CJ0135>. The case was then sent back to the national courts for consideration based on this ruling.

³¹² *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken*, Case C-221/17, Court of Justice of the European Union (Grand Chamber) Judgment of 12 March 2019, <https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C&num=C-221%252F17>.

³¹³ *JY v Wiener Landesregierung*, Case C-118/20, Court of Justice of the European Union (Grand Chamber), Judgment of 18 January 2022, <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-118/20&jur=C>.

³¹⁴ Judgment 5 C 12.10, German Federal Administrative Court (Bundesverwaltungsgericht), 11 November 2010, case summary at <https://caselaw.statelessness.eu/caselaw/germany-federal-administrative-court-judgment-5-c-1210-rottman>.

based on false information was only valid if done promptly, within a maximum of five years after the nationality had been granted.³¹⁵ In recognition of the disproportionality between the impact of loss of nationality and the standard procedural protections afforded in civil cases, the US Supreme Court has emphasised the importance of access to a court before deportation (in the context of deprivation of naturalised citizenship, for example on grounds of having committed a serious criminal offence).³¹⁶

Deprivation on grounds of national security

In recent years, a number of governments have made increasing use of powers to deprive a person of nationality on national security grounds. While the legal frameworks vary, the use of these powers is sometimes highly secretive, making challenging the power more difficult.³¹⁷ Deprivation of nationality on such grounds is permitted by the 1961 Convention, but only in case of “conduct seriously prejudicial to the vital interests of the Contracting State” (Article 8[3][a][ii]). This condition establishes, as UNHCR notes, “a very high threshold for deprivation of nationality resulting in statelessness.”³¹⁸

National courts have generally been hesitant to challenge executive discretion in these cases, including if a person deprived of nationality appears to have been rendered stateless. (► [section 7.1 The definition of stateless person and the determination that a person is stateless](#)).

However, there are cases where national apex courts have restored nationality that was deprived on national security grounds:

- In 2022, Australia’s High Court issued a landmark ruling that found to be unconstitutional the powers given to the Minister for Home Affairs under the Australian Citizenship Act 2007 to revoke citizenship on grounds that the person’s acts demonstrated “repudiation of allegiance to Australia.” The central argument of the judgment was that the law improperly gave the minister “the exclusively judicial function of adjudging and punishing criminal guilt.” The court restored the Australian citizenship of the plaintiff in the case, which had been revoked in 2017 on grounds that he had travelled to Syria to fight with Islamic State.³¹⁹
- Also in 2022, the Dutch Council of State reversed the decision of the Minister of Justice and Security to remove the Dutch nationality of a woman who had joined Islamic State in Syria. Central to the case was the consequential impact of nationality deprivation for her children. The court found that the Minister had failed to apply the best interests of the child principle in this case, as protected under the European Convention of Human Rights.³²⁰

A handful of national security cases have reached the European Court of Human Rights, which has proved reluctant to challenge the decisions and procedures of national authorities. Although the Court considers that arbitrary denial or revocation of nationality might in some circumstances raise an issue under Article 8 of the Convention, it has refused to consider cases against the United Kingdom and Denmark on grounds that they were “manifestly unfounded”.³²¹ In a deprivation case involving naturalised French citizens who were dual nationals, the court found no violation of Article 8, because the consequences for their private life were not disproportionate to the seriousness of the offense, and they were not made stateless.³²² However, the court has taken a stand in the more egregious cases.

³¹⁵ Judgment 5 C 32/07, German Federal Administrative Court (Bundesverwaltungsgericht), 30 June 2008. Case summary at: <https://caselaw.statelessness.eu/caselaw/germany-federal-administrative-court-judgment-5-c-3207>.

³¹⁶ Laura Bingham and Natasha Annpriester, *Unmaking Americans: Insecure Citizenship in the United States* (Open Society Justice Initiative, 2019), pp.88-89, <https://www.justiceinitiative.org/publications/unmaking-americans>.

³¹⁷ *Instrumentalising Citizenship in the Fight Against Terrorism: How Have Deprivation Powers Evolved since 9/11?* (Institute on Statelessness and Inclusion & GLOBALCIT, 2022), https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf.

³¹⁸ UNHCR, Guidelines on Statelessness No. 5, supra n 103, para. 61 et seq. The Institute on Statelessness and Inclusion led the process of developing Principles on Deprivation of Nationality as a National Security Measure, accompanied by commentary that provides additional guidance on legal arguments that could be made before national or international courts and other fora—especially, but not only, in a national security context. “Principles on Deprivation of Nationality as a National Security Measure” (Institute on Statelessness and Inclusion, 2020), <https://files.institutesi.org/PRINCIPLES.pdf>; “Commentary to the Principles on Deprivation of Nationality as a National Security Measure” (Institute on Statelessness and Inclusion, 2022), https://files.institutesi.org/Principles_COMMEN-TARY.pdf.

³¹⁹ *Alexander v. Minister for Home Affairs* [2022] HCA 19, Judgment of 8 June 2022, S103/2021, <https://eresources.hcourt.gov.au/downloadPdf/2022/HCA/19>. See also Rayner Thwaites, “Citizenship deprivation as banishment: The High Court of Australia in Alexander’s case” (blogpost), GLOBALCIT, 11 July 2022, <https://globalcit.eu/citizenship-deprivation-as-banishment-the-high-court-of-australia-in-alexanders-case/>. Australia case also summarised with the Netherlands case by the Institute on Statelessness and Inclusion at: <https://www.institutesi.org/news/courts-reverse-nationality-deprivation-decisions-australia-netherlands>.

³²⁰ AB Raad van State 29 juni 2022, Uitspraak 202006910-1/V1 & 202006913-1/V6 ECLI:NL:RVS:2022:1722, <https://www.raadvanstate.nl/actueel/nieuws/@131779/202006910-1-v1-en-202006913-1-v6/>. See case summary at <https://caselaw.statelessness.eu/caselaw/netherlands-ab-council-state-raad-van-state>.

³²¹ *K2 v. the United Kingdom*, Application no. 42387/13, European Court of Human Rights, 7 February 2017 (decision on admissibility); *Johansen v. Denmark*, Application no. 27801/19, European Court of Human Rights, 1 February 2022 (decision on admissibility) Case summaries in: “Factsheet–Deprivation of Citizenship”, ECHR, March 2022, https://www.echr.coe.int/documents/fs_citizenship_deprivation_eng.pdf.

³²² *Ghoumid and Others v. France*, Application nos. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16 (consolidated), European Court of Human Rights, Judgment of 25 June 2020.

- In a case against Russia, the European Court of Human Rights found that deprivation of nationality had been grossly disproportionate to the wrongdoing alleged (failure to include family members on an application to naturalise) and no national security grounds had been shown.³²³
- The African Commission ruled in a case brought against Zambia on behalf of opposition politicians deported to Malawi on the grounds that they were not nationals and were “a danger to peace and good order”, that an exception to freedom of movement permitted by the African Charter in relation to “the protection of national security, law and order, public health or morality” does not pre-empt the right to have a case heard, and that the arbitrary removal of citizenship could not be justified.³²⁴

Arbitrary deprivation of nationality as persecution or inhuman treatment

A number of national courts have held that deprivation of nationality in itself constitutes persecution for the purposes of the 1951 Refugee Convention or the prohibition on *non-refoulement*, although no regional or international body has yet ruled on this point.³²⁵ Most famously, deprivation of nationality by the US authorities was condemned by the US Supreme Court in 1958 as “a form of punishment more primitive than torture”.³²⁶

7.6. Acquisition of nationality based on habitual residence

KEY MESSAGE

- While naturalisation remains highly discretionary in most countries, and there is limited international law assistance for arguments that an application for nationality based on long residence should be granted, there is a trend towards a more rights-based approach with regard to due process, supported by jurisprudence from some countries.

International law does not require any state to provide a general right for long-term residents not born on its territory to acquire nationality. This is an area where human rights norms have only made limited inroads on the discretion of states. Nonetheless, there appears to be a gradual strengthening of the principle that naturalisation should be at least made possible and even facilitated for stateless persons; while certain types of discrimination in naturalisation have faced disapproval from human rights treaty bodies.³²⁷ (For rights based on marriage ► [section 7.3 Discrimination based on sex and gender.](#))

In case of stateless persons, Article 32 of the 1954 Convention relating to the Status of Stateless Persons provides (in similar terms to Article 34 of the 1951 Convention Relating to the Status of Refugees) that states parties “shall as far as possible facilitate the assimilation and naturalisation of stateless persons,” by such measures as expediting proceedings and reducing the costs of naturalisation.³²⁸ UNHCR has published guidance on the protection of stateless persons which includes discussion of measures to facilitate naturalisation.³²⁹

The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa does not include a similar provision on naturalisation. However, its requirement (Article II.1) that countries of asylum should use their best endeavours to “secure the settlement” of refugees who are unable to return home could be interpreted in the same way. Countries of Latin America and the Caribbean have made similar commitments.³³⁰ The Committee of Ministers

³²³ *Usmanov v. Russia*, Application no. 43936/18, European Court of Human Rights, judgment of 22 December 2020.

³²⁴ *Amnesty International v. Zambia*, Communication No. 212/1998, 5 May 1999, <https://www.refworld.org/jurisprudence/caselaw/achpr/1999/en/96899>, paras 50 & 52.

³²⁵ The principles and decisions in refugee cases at national level are extensively discussed in: Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (Oxford University Press, 2019), chapter 5, “Statelessness as Persecution”; Hélène Lambert, “Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status”, *International and Comparative Law Quarterly* Vol. 64, no. 1 (2015), pp.1–37; Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing, 2016), chapter 6 “Persecution by Denial of Nationality”.

³²⁶ *Trop v. Dulles*, 356 U.S. 86, at p.101.

³²⁷ Tamás Molnár, “Addressing Statelessness through the Rights to Equality and Non-Discrimination”, in *Solving Statelessness*, ed. Laura van Waas and Melanie Khanna (Wolf Legal Publishers, 2017), pp.225–58; supra n 302, Spiro, “A New International Law of Citizenship” supra n 286.

³²⁸ Convention relating to the Status of Stateless Persons, 1954, art 32.

³²⁹ Draft Articles on the Protection of Stateless Persons and the Facilities for their Naturalisation, UNHCR, February 2017, <https://www.refworld.org/legal/modellaw/unhcr/2017/en/118198>.

³³⁰ In 2014, the Brazil Declaration and Plan of Action committed the 28 signatories among states and territories in Latin America and the Caribbean to “facilitate the change of the migratory status of refugees from temporary residents to permanent residents and naturalisation processes, when so requested, through streamlined, accessible and low-cost procedures”, Brazil Declaration and Plan of Action: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean, Brasília, 3 December 2014, <https://www.acnur.org/fileadmin/Documentos/BDL/2014/9865.pdf?file=t3/fileadmin/Documentos/BDL/2014/9865>.

of the Council of Europe has adopted a recommendation that provides more detail on what facilitated naturalisation may require in the context of statelessness, including relaxation of conditions and fees in certain circumstances.³³¹

The only treaty establishing general norms on acquisition of nationality based on habitual residence is the 1997 European Convention on nationality, which requires that states parties provide for “the possibility of naturalisation of persons lawfully and habitually resident on its territory”, and establishes a maximum period of ten years’ residence. The Protocol to the African Charter on the Right to a nationality establishes that acquisition based on legal residence should be possible, including for children born and resident in the territory during childhood, but does not specify a time limit.

There is no agreed definition of the nature of the habitual residence that would qualify a person to apply for naturalisation. The European Convention on nationality and the Protocol to the African Charter on the Right to a nationality permit the requirement for such residence to be lawful, as provided in the laws of many states. However, this condition may be impossible to fulfil for those without identity documents or a recognised existing nationality. Article 1 of the 2006 European Convention on the Avoidance of Statelessness in relation to State Succession defines “habitual residence” differently, as “stable factual residence”; this interpretation is endorsed by the UNHCR Guidelines, which note that the 1961 Convention does not permit an application for the acquisition of nationality by individuals who would otherwise be stateless to be conditional upon lawful residence.

In some contexts of statelessness, habitual residence may also be factually difficult to determine. In its guidelines on avoiding statelessness among children, UNHCR notes that:

It follows from the factual character of “habitual residence” that in cases where it is difficult to determine whether an individual is habitually resident in one or another State, for example due to a nomadic way of life, such persons are to be considered as habitual residents in both States.³³²

The Protocol to the African Charter on the Right to nationality includes a specific article on the situation of people whose habitual residence is in doubt, including those who follow a pastoralist or nomadic lifestyle and whose movements cross borders, or who are members of cross-border communities, setting out a range of “appropriate connections” on the basis of which nationality might be recognised.

In general, preferential naturalisation provisions facilitating acquisition by certain population groups are not regarded as problematic.³³³ Some language and cultural assimilation requirements for naturalisation are also seen as reasonable. International treaty bodies have, however, criticised some states for imposing discriminatory conditions for naturalisation, including onerous language requirements, or exclusions based on race or ethnicity.³³⁴ In its General Recommendation on discrimination against non-citizens, the CERD Committee urged states to “ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalisation, and to pay due attention to possible barriers to naturalisation that may exist for long-term or permanent residents.”³³⁵

■ The Human Rights Committee found that Denmark’s refusal of naturalisation to a person with learning disabilities who could not fulfil the language test was in violation of article 26 of the ICCPR on non-discrimination and equality before the law, stating that:

[N]either the Covenant nor international law in general spells out specific criteria for the granting of citizenship through naturalisation and that States are free to decide on such criteria. However, when adopting and implementing legislation, States parties’ authorities must respect the applicants’ rights enshrined in article 26. The Committee recalls in this respect that article 26 requires reasonable and objective justification and a legitimate aim for distinctions that relate to an individual’s characteristics enumerated in article 26, including “other status” such as disability.³³⁶

■ In a case brought against Latvia by a “Latvian non-citizen”—a status granted to former Soviet citizens who remained resident in the territory after the break-up of the Soviet Union and who did not acquire Latvian citizenship automatically—the European Court of Human Rights found that the denial of his application for

³³¹ Council of Europe Committee of Ministers Recommendation No. R(99)18 on the avoidance and reduction of statelessness, 15 September 1999, <https://www.refworld.org/docid/510101e02.html>.

³³² UNHCR, Guidelines on Statelessness No. 4, supra n 102, para. 42.

³³³ *Proposed Amendments to the Naturalisation Provision of the Constitution of Costa Rica*, Inter-American Court of Human Rights, Advisory Opinion OC-4/84, 19 January 1984, <https://www.refworld.org/cases,IACRTHR,44e492b74.html>.

³³⁴ Spiro, “A New International Law of Citizenship”, supra n 286, at pp.725-728.

³³⁵ General Recommendation XXX of the Committee on the Elimination of Racial Discrimination on Discrimination against Non-citizens, 5 August 2004, <https://www.refworld.org/docid/45139e084.html>, included within the report *The Rights of Non-citizens*, Office of the UN High Commissioner for Human Rights, 2006, <https://www.ohchr.org/en/publications/special-issue-publications/rights-non-citizens>.

³³⁶ *Q. v. Denmark*, Communication No. 2001/2010, Human Rights Committee, Views of May 19, 2015, UN Doc CCPR/C/113/D/2001/2010, para. 7.3., <https://digitallibrary.un.org/record/795228?ln=en>.

Latvian citizenship on grounds that he had not demonstrated allegiance to the Republic of Latvia did not violate the Convention. The Court deferred to the domestic law of the state in relation to the acquisition of citizenship, and held that “the requirement of loyalty to the State and its Constitution cannot be regarded as a punitive measure capable of interfering with freedom of expression and of assembly.”³³⁷

Studies on acquisition of nationality based on long-residence among member states of the European Union, have reported that Belgium and Germany provide for naturalisation as a right, if the conditions established by law are met, and that in a majority of the states naturalisation follows a rights-based approach even if there is residual discretion.³³⁸ Even in countries where naturalisation remains discretionary in law and a refusal is without a right of appeal, it may nonetheless be possible to argue under national law that basic due process requirements apply, so that naturalisation decisions should be heard within a reasonable time, be reasoned, and not consider irrelevant factors. These elements have been upheld in South Africa and Kenya among African states, for example.³³⁹ Depending on the jurisdiction it may also be possible to bring an application to force the relevant department to make a decision (a *mandamus* order), if it has been pending for an unreasonable amount of time.

► [section 7.4 Discrimination based on race, religion, or ethnicity](#)

7.7. State succession



KEY MESSAGES

- Succession of states is a key danger-point for the creation of stateless populations.
- Extensive guidance on the rules that should be applied is provided by the Draft Articles adopted by the International Law Commission.
- The European Convention on Statelessness in the Context of State Succession, and the Protocol to the African Charter on Human and Peoples' Rights relating to the Right to a nationality and the Eradication of Statelessness in Africa also provide comprehensive guidance.

State succession, when sovereignty over a territory is transferred from one state to another, creates well-recognised challenges in relation to determination of the legal membership of the successor states. Whether in the context of decolonisation in Africa, the breakup of federal territories, or the secession of a part of a state to form its own new country, the transfer of legal authority creates multiple risks for people caught between different rules to find themselves stateless.³⁴⁰

Article 10 of the Convention on the Reduction of Statelessness, 1961, states that treaties providing for the transfer of territory should “include provisions designed to secure that no person shall become stateless as a result of the transfer”, and that in the absence of a treaty the state to which territory is transferred should confer its nationality on persons who would otherwise be stateless.

The most authoritative detailed elaboration of principles on nationality in the context of state succession are the Draft Articles on nationality of Natural Persons in Relation to the Succession of States adopted in 1999 by the International Law Commission (ILC). Article 1 states that:

³³⁷ *Petropavlovskis v. Latvia*, Application no. 44230/06, European Court of Human Rights, judgment of 13 January 2015, <https://hudoc.echr.coe.int/en-g?i=001-150232>.

³³⁸ Rainer Bauböck and Sara Wallace Goodman, “Naturalisation”, EUDO Citizenship Policy Brief No. 2, European University Institute, 2011, <https://cadmus.eui.eu/handle/1814/51625>; European Migration Network, “Study on Pathways to Citizenship in the EU”, June 2020, section 4.4, https://migrant-integration.ec.europa.eu/library-document/emn-study-pathways-citizenship-eu_en.

³³⁹ This was the finding of the Public Protector in South Africa in Report No. 32 of 2017/18 on an investigation into allegations of undue delay to finalise the improper adjudication of applications for naturalisation as a South African citizen by the Department of Home Affairs, Public Protector of South Africa, 26 February 2018, <http://www.pprotect.org/?q=content/report-no-32-201718-investigation-allegations-undue-delay-finalise-improper-adjudication>. The Kenyan courts have ordered the Ministry of the Interior to consider applications for registration as a citizen within a reasonable time, in line with a constitutional requirement for fair administrative action: *Samira Tariq Qureshi v. Cabinet Secretary for Ministry of Interior and Co-ordination of National Government and 2 others*, High Court of Kenya (Nairobi) Miscellaneous Civil Application 406 of 2018, Judgment of 7 November 2019, eKLR, <http://kenyalaw.org/caselaw/cases/view/188025>.

³⁴⁰ Paul Weis, *Nationality and Statelessness in International Law*, 2nd ed. (Leiden: Brill, 1979), chap. 11; Ruth Donner, *The Regulation of Nationality in International Law* (Irvington-on-Hudson, N.Y: Transnational Publishers Inc., 1994), chap. V; Jeffrey L. Blackman, “State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law”, *Michigan Journal of International Law* Vol. 19 (1997-98), pp.1141–94; Laura van Waas, *Nationality Matters: Statelessness under International Law* (Antwerp ; Portland: Intersentia, 2008), chap. VI; Francesco Costamagna, “Statelessness in the Context of State Succession: An Appraisal under International Law”, in *The Changing Role of Nationality in International Law*, ed. Alessandra Annoni and Serena Forlati (Basingstoke: Routledge, 2013); Ineta Ziemele, “State Succession and Issues of Nationality and Statelessness”, in *Nationality and Statelessness under International Law*, ed. Alice Edwards and Laura van Waas (Cambridge: Cambridge University Press, 2014).

Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned.

Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession. (Article 5)

Further articles provide that states must take “all appropriate measures” to prevent statelessness arising from state succession (Article 4), and that persons shall not be denied the right to retain or acquire a nationality through discrimination “on any ground” (Article 15).

The assumption outlined by the ILC Draft Articles is that the nationality of a successor state will be attributed to persons on the basis of habitual residence in that state. But in addition, states “shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.” In particular, a state shall grant a right to opt for its nationality to persons who have an “appropriate connection” with that state—especially, but not only, if they would otherwise be stateless (Articles 23 and 26). An “appropriate connection” can mean habitual residence, a legal connection with one of the constituent units of the predecessor state (this refers primarily to membership of one of the units of a former federal state that is being split up), or birth in the territory of a state concerned.³⁴¹

State succession has been provided for with more binding force within the Council of Europe system. The 1997 European Convention on nationality provides that:

In deciding on the granting or the retention of nationality in cases of State succession, each State Party concerned shall take account in particular of:

- a) the genuine and effective link of the person concerned with the State;
- b) the habitual residence of the person concerned at the time of State succession;
- c) the will of the person concerned;
- d) the territorial origin of the person concerned.³⁴²

In 2006, the Council of Europe supplemented this provision with a specific Convention on the Avoidance of Statelessness in Relation to State Succession that elaborates on these rules, again based on the principle that everyone who had the nationality of the predecessor state should have the right to nationality of one or another of the successor states if they would otherwise become stateless.³⁴³ It creates specific obligations for predecessor and successor states, prohibiting the predecessor state from withdrawing nationality if the person would become stateless, and requiring that:

A successor State shall grant its nationality to persons who, at the time of the State succession, had the nationality of the predecessor State, and who have or would become stateless as a result of the State succession if at that time:

- (a) they were habitually resident in the territory which has become territory of the successor State, or
- (b) they were not habitually resident in any State concerned but had an appropriate connection with the successor State.

“Appropriate connection” is then defined, broadly following the ILC Articles, to include:

- (a) a legal bond to a territorial unit of a predecessor State which has become territory of the successor State;
- (b) birth on the territory which has become territory of the successor State;
- (c) last habitual residence on the territory of the predecessor State which has become territory of the successor State.³⁴⁴

The Protocol to the African Charter on Human and Peoples’ Rights on the Right to a nationality adopted in 2024 includes an article on state succession that broadly follows these principles.

Many of the cases referenced in this Guide have concerned the attribution of nationality on state succession, and the

³⁴¹ *Ibid.* Paragraph 10 of the Commentary on Article 11.

³⁴² European Convention on Nationality, 1997, art. 18.

³⁴³ Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, art. 2—Right to a Nationality. “Everyone who, at the time of the State succession, had the nationality of the predecessor State and who has or would become stateless as a result of the State succession has the right to the nationality of a State concerned in accordance with the [provisions of the treaty].” See also the Declaration on the Consequences of State Succession for the Nationality of Natural Persons (the Venice Declaration), adopted in 1980.

³⁴⁴ Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, art. 18.

status of people who migrated to the territory before the transfer of sovereignty who are not recognised by the newly formed states: for example, in relation to the break-up of the former Yugoslavia or the Soviet Union, the status of migrants within the European empires in Africa at the time of decolonisation, or the creation of the new states of South Sudan or Eritrea.

- Among the most notorious cases where state succession has resulted in statelessness is the secession of Eritrea from Ethiopia in 1993, following a referendum agreed between the two territories. Just five years later, in 1998, a border dispute escalated into war. Ethiopia forcibly expelled tens of thousands of people of Eritrean heritage, arguing that those who had registered to take part in the referendum on Eritrean independence in 1993 had thereby lost their Ethiopian nationality. In 2004, an independent Claims Commission established to adjudicate claims by each state against the other held that Ethiopia's actions in denying recognition of Ethiopian nationality to those who had become dual nationals had been arbitrary and unlawful.³⁴⁵

On the particular context of alleged dual nationality in case of a person who should rather be considered stateless see discussion of the term statelessness ► [section 2.1](#) and ► [section 7.1](#).

7.8. Birth registration and legal identity



KEY MESSAGES

- The right to birth registration for all children is well established in international human rights law and has been repeatedly confirmed by international and regional treaty bodies and courts.
- Registration and recognition of other civil status events and legal identity more generally, including issue of necessary identity documents, does not have such an explicit foundation in the treaties. However, there is significant jurisprudence holding that registration and recognition of legal identity is a component of the right to dignity in the human rights treaties.
- Litigation is challenging aspects of new biometric identification systems in relation not only to data protection and privacy but also the potential discriminatory impacts of such systems.

Birth registration

Birth registration is critical for the prevention of statelessness. Birth certificates are a key form of evidence of a person's right to nationality under a national law because they are legal recognition of the identity of a child's parents, and the place and date of birth.³⁴⁶ (Birth registration is not, however, a complete solution to statelessness, which depends also on the necessary protections being established in national law and policy) ► [section 7.2](#)

Birth registration is a right in international law³⁴⁸, and in many countries also a right at national level. Universal birth registration is, even if not a right, the avowed target of almost all governments—established as such by the Sustainable Development Goals.³⁴⁹

The right to birth registration has been repeatedly stressed in general comments and other guidance on treaty interpretation by the UN human rights institutions.³⁵⁰ The African Charter on the Rights and Welfare of the Child also provides for the right to birth registration, and a General Comment of the African Committee of Experts provides

³⁴⁵ Partial Award (Civilian Claims: Eritrea's Claims 15, 16, 23, and 27–32), Eritrea-Ethiopia Claims Commission, 28 April 2004, paras 71–78, available at the website of the Permanent Court of Arbitration. <https://pca-cpa.org/en/cases/71/>.

³⁴⁶ UNHCR, "Good Practices Paper Action 7: Ensuring birth registration for the prevention of statelessness" 2017, <https://www.refworld.org/reference/them-report/unhcr/2017/en/122586>.

³⁴⁷ See also, Bronwen Manby, "Legal Identity for All" and Statelessness: Opportunity and Threat at the Junction of Public and Private International Law", *Statelessness & Citizenship Review* Vol. 2, no. 2 (2020), pp. 248–71.

³⁴⁸ ICCPR, Art. 24; CRC, Art. 7; CMW Art. 29; CRPD Art. 18.

³⁴⁹ SDG Target 16.9: Provide legal identity for all, including birth registration, <https://indicators.report/targets/16-9/>.

³⁵⁰ UN Human Rights Council, Resolution 19/9: Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law (United Nations 2012) A/HRC/RES/19/9; UN Committee on the Rights of the Child, General Comment No 11: Indigenous Children and Their Rights under the Convention (United Nations 2009) CRC/C/GC/11; UN Committee on the Rights of the Child, General Comment No. 21: Children in Street Situations (United Nations 2017) CRC/C/GC/21; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment No. 2: The Rights of Migrant Workers in an Irregular Situation and Members of Their Families (United Nations 2013) CMW/C/GC/2; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, Joint General Comment No. 4 and No.23: State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return (United Nations 2017) CMW/C/GC/4-CRC/C/GC/23. A complaint was submitted in 2019 to the UN Human Rights Committee on the right to birth registration and a name under Article 24 of the ICCPR, based on the refusal of the Albanian authorities to accept a Greek birth certificate which did not record the names of the children because they were in irregular migration status at the time. The case was not yet decided at the time of publication of this report. *Rexha and Fasliu v. Albania*, UN Human Rights Committee, Case No. 3602/2019, case summary at: <https://caselaw.statelessness.eu/caselaw/human-rights-committee-rexha-and-fasliu-v-albania>.

detailed guidance on the implementation of the right.³⁵¹ The League of Arab States' Declaration on Belonging and Legal Identity adopted in 2018 also provides for universal birth registration,³⁵² as does the Covenant on the Rights of the Child in Islam adopted by the Organisation of the Islamic Conference.³⁵³ In 2023, the Inter-American Commission highlighted the right to birth registration and identity documents in a detailed resolution on the right to a nationality.³⁵⁴

The regional human rights courts and treaty bodies have repeatedly underlined these rights in their decisions on individual cases.

- In the leading case of *Yean and Bosico*, the Inter-American Court of Human Rights condemned the fact that the two complainants had been placed "in fear of being expelled by the State of which they were nationals and separated from their families owing to the absence of a birth certificate."³⁵⁵ The Court went on to provide detailed instructions to the Dominican Republic on the reform of civil registration procedures.³⁵⁶ Similar recommendations were made in the case of the *Expelled Dominicans and Haitians*.³⁵⁷
- In a case concerning a surrogate parent and the right of the intended parents to register the child, the European Court of Human Rights stated that "respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship ... an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned."³⁵⁸
- The African Committee of Experts on the Rights and Welfare of the Child has emphasised the importance of birth registration and the right to a nationality in cases against Kenya³⁵⁹ and Sudan,³⁶⁰ and in a comprehensive General Comment.³⁶¹ In the Kenyan Nubian Children's case, the Committee stated that its view was that "the obligation of the State Party under the African Children's Charter in relation to making sure that all children are registered immediately after birth is not only limited to passing laws (and policies), but also extends to addressing all de facto limitations and obstacles to birth registration."³⁶²
- The Inter-American Court decision in the *Yean and Bosico* case has been cited by both the Colombian and the Ecuadorian constitutional courts in cases relating to the registration and status of children of Venezuelan and other migrants, emphasising the importance of immediate registration.³⁶³
- In the case of *G.T.B. v Spain*, the European Court of Human Rights found that "it was incumbent on the authorities to act in the best interests of the child whose birth registration was being sought in order to compensate for the mother's failings and to prevent the child from being left unregistered and hence, without identity documents." The authorities were thus under a positive obligation to act with due diligence in order to assist the applicant.³⁶⁴

Civil registration generally

Birth registration alone may be insufficient to document the legal relationships necessary for acquisition of nationality. Registration and certification of marriage will in most countries be required for acquisition of nationality based on marriage (though there are countries that recognise marriages under customary or religious law); and registration of divorces to enable the creation of new links. Registration of the death of a father may be essential in certain countries for women to transmit nationality to their children. Registration of adoption is necessary to establish the legal parent-child relationship on which a claim to nationality may be based.

³⁵¹ ACERWC General Comment on Article 6, supra n 55.

³⁵² League of Arab States, Arab Declaration on Belonging and Legal Identity, 28 February 2018. States should "ensure, without exception, that all children, including unaccompanied children are registered upon birth and are able to acquire a nationality, in particular by promoting laws enabling women to pass their nationalities to their children in compliance with the relevant international Conventions and Covenants." <https://www.refworld.org/docid/5a9ffbd04.html>.

³⁵³ Organization of Islamic Cooperation (OIC), Covenant on the Rights of the Child in Islam, June 2005, available at: <https://www.refworld.org/docid/44eaf0e4a.html>.

³⁵⁴ Resolution on the right to nationality, prohibition of arbitrary deprivation of nationality and statelessness, Inter-American Commission on Human Rights 23 - EN.

³⁵⁵ *Case of the Girls Yean and Bosico*, supra n 52, para. 173.

³⁵⁶ *Ibid.*, paras 240-242.

³⁵⁷ *Expelled Dominicans and Haitians*, supra n 64, paras 461-465.

³⁵⁸ *Mennesson v. France*, supra n 162, para. 96.

³⁵⁹ *Kenyan Nubian children's case*, supra n 35.

³⁶⁰ *ACJPS & PLACE (Benjamin) v. Sudan*, supra n 42.

³⁶¹ ACERWC General Comment on Article 6, supra n 55.

³⁶² *Kenyan Nubian Children's Case*, supra n 35, para. 40.

³⁶³ *Sentencia T-006/20*, supra n 29, pp.22-23, 52; *Sentencia No. 2185-19-JP y acumulados/21*, Inscripción del nacimiento de hijas e hijos de adolescentes migrantes, Corte Constitucional del Ecuador, Judgment of 1 December 2021, para. 149, <https://www.refworld.org.es/docid/61b2d8204.html>.

³⁶⁴ *G.T.B. v. Spain*, application no. 3041/19, European Court of Human Rights, Judgment of 16 November 2023, para 124, <https://hudoc.echr.coe.int/?i=001-228837>.

Both the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons include provisions on “administrative assistance” intended to govern the recognition (Article 12) or substitution (Article 25) of personal status documents relating to events that took place in another country, including delivery of “such documents or certifications as would normally be delivered to aliens by or through their national authorities.” This would presumably include such measures as “re-certification” of marriages and other civil status events.

Although there is extensive guidance on the best practices in establishing civil registration systems, there is almost nothing in international law on the *right* to registration of civil status events other than births.³⁶⁵ There is also little guidance on the practical steps required to fulfil the obligations for “administrative assistance” under the refugee and stateless persons conventions.³⁶⁶

For the right to registration of other civil status events necessary for proof of nationality, it may be necessary to call on the concepts of legal identity and recognition as a person before the law.

Dignity, (legal) identity and recognition as a person before the law

A range of international human rights standards, starting from Article 6 of the Universal Declaration of Human Rights, reinforced by Article 16 of the International Covenant on Civil and Political Rights, establish that everyone has the right to recognition as a person before the law. The terminology used to describe this right varies in different international and regional instruments, but includes juridical personality, (legal) identity, or legal status.

Article 8 of the CRC establishes the child’s right “to preserve his or her identity, including nationality, name and family relations as recognised by law.” It also places an obligation on states to re-establish identity if “a child is illegally deprived of some or all of the elements of his or her identity.”³⁶⁷

- In communications concerning Article 8, the Committee on the Rights of the Child has stated that Denmark could not deport a child to China because the child would not be able to establish recognition of identity in China through enrolment in the household registration system known as *hukou*.³⁶⁸
- In cases against Spain, it has found violations of Article 8 in connection with the incorrect recording of a child’s age.³⁶⁹
- In a concurring opinion in the *DZ* case before the UN Human Rights Committee, the particular seriousness of a violation of Article 16 of the ICCPR was emphasised by committee member Achour: “The State party’s behaviour in the present case is of such gravity as to fall within the scope of article 16 of the Covenant, for it amounts almost to denial of recognition as a person before the law.”³⁷⁰

The three regional human rights systems have all held that nationality and other forms of legal status in a country are important components of the right to legal identity.

In the case of the Inter-American Court on Human Rights, this is supported by the inclusion of nationality within the American Convention on Human Rights, in addition to the right to “juridical personality”, recognition as a person before the law (Articles 2 and 20). The Inter-American Court has emphasised that “a stateless person, *ex definitione*, does not have recognised juridical personality, because he has not established a juridical and political connection with any State”; thus for a stateless individual, “the failure to recognise juridical personality harms human dignity”.³⁷¹

The right to a nationality is not explicitly included in either the European Convention on Human Rights, nor the African Charter on Human and Peoples’ Rights (although it is included in the African Charter on the Rights and Welfare of the Child). Nevertheless, the responsible treaty bodies consider that legal status in a country may be a

³⁶⁵ See Bronwen Manby, “‘Legal Identity for All’ and Statelessness: Opportunity and Threat at the Junction of Public and Private International Law”, *Statelessness & Citizenship Review* Vol. 2, no. 2 (2020), pp.248–71.

³⁶⁶ See James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), chap. 3.2.4 and 4.10; article 25 is also considered in UNHCR, Summary Conclusions on the Right to Family Life and Family Unity in the Context of Family Reunification of Refugees and Other Persons in Need of International Protection (Geneva: United Nations, 2017), <https://www.refworld.org/docid/5b18f5774.html>; Frances Nicholson, “The ‘Essential Right’ to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification” (Geneva: UNHCR, 2018), <https://www.unhcr.org/protection/globalconsult/5a8c413a7/36-essential-right-family-unity-refugees-others-need-international-protection.html>.

³⁶⁷ Manby, “Legal Identity for All” supra 13. See also Jaap E. Doek, “Article 8: The Right to Preservation of Identity; Article 9: The Right Not to Be Separated from His or Her Parents”, in *A Commentary on the United Nations Convention on the Rights of the Child*, ed. André Alen et al. (Leiden: Martinus Nijhoff Publishers, 2006), <https://doi.org/10.1163/ej.9789004148642.i-32>.

³⁶⁸ *WMC v. Denmark*, Communication No. 31/201, Committee on the Rights of the Child, views adopted 3 November 2020, CRC/C/85/D/31/2017, <https://juris.ohchr.org/Search/Details/2748>.

³⁶⁹ *COC v. Spain*, Communication No. 63/2018, Committee on the Rights of the Child, views adopted 24 February 2021, CRC/C/86/D/63/2018, <https://juris.ohchr.org/Search/Details/2948>. The Committee has adopted a number of similar decisions in relation to age assessment -- see list of cases concerning Article 8 available at <https://juris.ohchr.org/search/results/2?sortOrder=Date&typeOfDecisionFilter=3&countryFilter=0&treatyFilter=0>.

³⁷⁰ Individual opinion of Committee member Yadh Ben Achour (concurring), in *DZ v. The Netherlands*, supra n 53.

³⁷¹ *Case of the Girls Yean and Bosico*, supra n 52, paras 178 and 179.

sufficiently important element of identity that it must be included within interpretations of the right to private and family life (Article 8 of the ECHR) and the right to the respect for dignity and recognition of legal status (Article 5 of the ACHPR).

The European Convention on Human Rights also does not include a specific provision on legal identity. Nonetheless, in a concurring opinion to the European Court of Human Rights Grand Chamber decision in the case of *Kurić and others v. Slovenia*, Judge Vučinić stressed the “absolutely fundamental” importance of the right to legal personality and its close relationship to dignity, such that the right to legal personality must be “indirectly and tacitly included within the ambit of Article 8.1 of the Convention” on the right to private and family life.³⁷² (► [section 7.9 Consequential violations, heading on the right to family life.](#))

This connection is reinforced in the African Charter on Human and Peoples’ Rights by the inclusion of the respect for dignity and recognition of legal status within the same article (Article 5). In 2013, the African Commission adopted a resolution on the Right to nationality, based on its jurisprudence in a number of cases, in which it re-stated that the right to nationality is implied within the provisions of Article 5 of the African Charter on Human and Peoples’ Rights on the right to dignity and legal status.

■ In a decision against Côte d’Ivoire adopted in 2015, the African Commission reinforced this resolution:

[T]he Commission considers that failure to grant nationality as a legal recognition is an injurious infringement of human dignity. Such an infringement seriously affects the legal security of the individual, particularly due to the undermining of a set of consubstantial rights and privileges to the enjoyment of fundamental legal and socio-economic privileges. Ultimately, it is the very existence of the victim which is vitally compromised.³⁷³

■ Building on this jurisprudence, the African Court on Human and Peoples’ Rights confirmed in the case of *Penessis v. Tanzania* that “the right to nationality is a fundamental aspect of the dignity of the human person.”³⁷⁴

Digitalisation of identity

The adoption of new population registers and identification systems is a known danger-point for the creation of stateless populations. The rapid digitalisation and biometricisation of identification systems across the world is thus creating new risks of exclusion—even as they are also asserted to be creating new opportunities for inclusion. Digitalisation of systems can, if not carefully designed, render administrative decision-making less transparent. In addition to the usual historical risks, data protection and privacy are coming to the fore as human rights concerns³⁷⁵ and as the focus for litigation.

■ In India, a series of cases challenged the Aadhaar biometric identification system, in which the Supreme Court ultimately found in 2018 that the Targeted Delivery of Financial and Other Subsidies, Benefits, and Services Act, 2016 (the “Aadhaar Act”) was constitutional, while striking down certain provisions of the act and holding that that private companies could not require citizens to provide their Aadhaar numbers for the provision of services.³⁷⁶

■ In 2019, the Supreme Court of Jamaica by unanimous decision declared the entire National Identification and Registration Act void because the mandatory requirement of biometric identification violated the constitutional right to privacy, and the requirements placed on Jamaicans in relation to proof of identity were disproportionate and discriminatory.³⁷⁷

■ In 2020, the Kenyan High Court held in a case brought by the Nubian Rights Forum that the newly instituted and biometric National Integrated Identity Management System should proceed only if subject to the prior adoption of an appropriate regulatory framework.³⁷⁸ A case launched against biometric technology company

³⁷² Partly Concurring, Partly Dissenting Opinion of Judge Vučinić, *Kurić and Others v. Slovenia*, supra n 133 (judgment of 26 June 2012).

³⁷³ *OSJI v. Côte d’Ivoire*, supra n 166, para. 142.

³⁷⁴ *Penessis v. Tanzania*, application no. 013/2015, African Court on Human and Peoples’ Rights, judgment of 28 November 2019, para. 87, <https://www.african-court.org/cpmt/details-case/0132015>. See also Bronwen Manby and Clement Bernardo Mubanga, “Case Note: Robert John Penessis v United Republic of Tanzania (Judgement) (African Court on Human and Peoples’ Rights, App No.013/2015, 28 November 2019)”, *Statelessness and Citizenship Review* Vol.2, no. 1 (2020), pp. 172–78.

³⁷⁵ See the webpage of the Office of the UN High Commissioner for Human Rights on privacy in the digital age: <https://www.ohchr.org/en/privacy-in-the-digital-age>.

³⁷⁶ *Justice K.S. Puttaswamy and others v. Union of India and others*, Case No. WP (C) 494/2012, Supreme Court of India, judgment of 26 September 2018, (2019) 1 SCC 1, https://main.sci.gov.in/supremecourt/2012/35071/35071_2012_Judgement_26-Sep-2018.pdf.

³⁷⁷ *Robinson v. Attorney General*, No. 2018HCV01788, Supreme Court of Jamaica, judgment of 12 April 2019 [2019] JMFC Full 04, <https://supremecourt.gov.jm/content/robinson-julian-v-attorney-general-jamaica>.

³⁷⁸ *Nubian Rights Forum and Others v. Attorney General and Others*, Consolidated Petitions No. 56, 58 & 59 of 2019, Kenya High Court, Nairobi, Judgment of 30 January 2020, <http://kenyalaw.org/caselaw/cases/view/189189/>; see also *Republic v. Joe Mucheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 others; ex parte Katiba Institute & Yash Pal Ghai*, Judicial Review Application E1138 of 2020, High Court of Kenya (Nairobi), judgment of 14 October 2021 [2021] KEHC 122, <http://kenyalaw.org/caselaw/cases/view/220495/index.html>.

IDEMIA in the French courts also led to a settlement in which the company agreed to take stronger measures to provide safeguards against adverse impacts of the use of its products, such as the exclusion of already marginalised communities.³⁷⁹ (► [focus box D](#))

7.9. Consequential violations

KEY MESSAGES

- Statelessness or the arbitrary denial/deprivation of nationality often leads to violations of several other human rights, including freedom of movement, participation in public affairs, the right to family life, and the prohibition of inhuman and degrading treatment.
- The choice to focus on these “consequential” violations, or on the lack of recognized nationality from which they arise, should depend on the legal arguments available in the specific forum and be a key element in strategy discussions for framing litigation.

The two most evident consequential violations stemming from the lack of nationality and/or identity documents are restrictions on freedom of movement and on political rights—both of which are permitted in some contexts under the ICCPR and other treaties in relation to non-citizens, including stateless persons.

Denial or deprivation of nationality, creation (and perpetuation) of statelessness and denial of access to a secure legal status can also amount to an interference with the right to private and family life. Denial or deprivation of nationality, or immigration enforcement proceedings against stateless persons may even, in some circumstances, constitute cruel or inhuman or degrading treatment or punishment.

In addition to these impacts, denial of nationality and/or identity documents frequently impedes access to other rights such as access to health care, education, housing, freedom of expression or association, or even the right to legal representation. Whether to frame a case as primarily about one of these consequential rights, or about the underlying right to nationality and to identity documents, will be a strategic decision in the preparation of litigation (► [section 5.1 Issue framing](#)).

Freedom of movement and the right to enter and remain in one’s “own country”

Article 12 of the ICCPR guarantees freedom of movement, but places restrictions relating to lawful residence. Stateless people may be unable to acquire lawful residence in any country, in the absence of a procedure to recognise stateless person status. In many circumstances, therefore, a consequence of statelessness will be a violation of the right to freedom of movement.

Article 12(4) of the ICCPR states that “No one shall be arbitrarily deprived of the right to enter his own country.” In a General Comment on freedom of movement, the UN Human Rights Committee has considered the interpretation of “own country”:

The scope of “his own country” is broader than the concept “country of his nationality.” It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them....³⁸⁰

In the case of *Stewart v. Canada*, the UN Human Rights Committee noted that the concept of “own country” could encompass “stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.”³⁸¹

³⁷⁹ NGO Data Rights Files Case Against Biometric Tech Giant IDEMIA in France for Failure to Consider Human Rights Risks (Press Release), Data Rights, 29 July 2022, <https://datarights.ngo/news/2022-07-29-kenya-due-diligence-biometric-id-case/>; NGOs and IDEMIA agree to Vigilance Plan Improvements in Settlement over Kenyan Digital ID Human Rights Challenge (Press Release), Data Rights, 24 July 2023, <https://datarights.ngo/news/2023-07-24-ngos-and-idemia-agree-to-vigilance-plan-improvements/>.

³⁸⁰ Committee on Human Rights, General Comment No. 27: Freedom of movement (Art.12), 1999, para. 20.

³⁸¹ *Stewart v. Canada*, CCPR/C/58/D/538/1993, UN Human Rights Committee, 1 November 1996, <https://www.refworld.org/cases,HRC,584a90807.html>. See also: *Nystrom v. Australia* CCPR/C/102/D/1557/2007, UN Human Rights Committee, 19 July 2011, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2F102%2FD%2F1557%2F2007; *Warsame v. Canada*, CCPR/C/102/D/1959/2010, UN Human Rights Committee, 1 September 2011, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2F102%2FD%2F1959%2F2010.

Sub-articles 12(1) to (3) of the ICCPR provide for freedom of movement within a state for those who are lawfully present there and for freedom to leave any country, subject to limits related to national security, and public order, health or morals, so long as they are consistent with other rights in the ICCPR. Article 13 provides that “an alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law.” The right to a nationality and to freedom of movement are explicitly linked by the Convention on the Rights of Persons with Disabilities, which places them in the same article (article 18).³⁸²

Although the rights to freedom of movement within a state and limitation on expulsion is restricted by these treaty provisions to a person who is lawfully present, the question of lawful presence is itself subject to due process requirements and the right to challenge both the reasons for expulsion and the allegation that a person is in fact a foreigner. Arbitrary deprivation or denial of nationality is not a legitimate reason for expulsion. Thus, the International Law Commission Articles on the Expulsion of Aliens provide that “a State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.”³⁸³

■ The International Court of Justice ruled in favour of Guinea in a case brought against what was then Zaire, finding that Zaire had not provided available and effective remedies enabling an individual to challenge an expulsion, because the decision (which was technically to “refuse entry”) could not be appealed.³⁸⁴

The right to due process in relation to expulsion of (alleged) non-nationals has been repeatedly confirmed by the African Commission on Human and Peoples’ Rights.

■ Considering Article 12 of the African Charter on free movement, the Commission has ruled against both Angola and Zambia in cases relating to individual deportations or mass expulsions on the basis of ethnicity, commenting that mass expulsions “constitute a special violation of human rights” (specifically condemned by Article 12(5) of the Charter).³⁸⁵

■ The Commission has also ruled that the exception in Article 12(2) of the Charter relating to “the protection of national security, law and order, public health or morality” does not pre-empt the right to have a case heard, and that it is for the state to prove the threat to national security, law and order, public health or morality.³⁸⁶ Non-nationals are also entitled to a fair hearing.³⁸⁷

■ In the *Anudo* case before the African Court on Human and Peoples Rights, similar principles were endorsed, including with reference to the provisions of the ICCPR.³⁸⁸

Participation in public affairs

Access to nationality on an equal basis is foundational to the right to participate in public affairs, to vote and to hold public service positions, guaranteed by Article 25 of the ICCPR. Thus, in its General Comment on this article, the UN Human Rights Committee stated that:

No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalisation may raise questions of compatibility with article 25 [to vote and participate in public affairs].³⁸⁹

Many of the cases brought to the African Commission on Human and Peoples’ Rights cited in this Guide have related to politicians whose nationality was asserted to have been fraudulently acquired. Among other violations, including

³⁸² The UN Committee on the Rights of Persons with Disabilities has criticized discriminatory provisions and practices in relation to nationality, as have other treaty bodies, but without making this explicit connection. Committee on the Rights of Persons with Disabilities, Concluding Observations: Myanmar, CRPD/C/MMR/CO/1, 22 October 2019, para. 36; Committee on the Rights of Persons with Disabilities, Concluding Observations: Guatemala, CRPD/C/GTM/CO/1, 30 September 2016, para. 52. For other references to disability by treaty bodies, see the Institute on Statelessness and Inclusion database on statelessness and human rights: <https://database.institutesi.org/>.

³⁸³ Expulsion of aliens: Texts and titles of the draft articles adopted by the Drafting Committee on second reading, International Law Commission Sixty-sixth session, UN General Assembly, A/CN.4/L.797, 24 May 2012.

³⁸⁴ Legislative Order No. 83-033 of 12 September 1983, concerning immigration control, expressly ruled out a right of appeal in case of refusal of entry. *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Preliminary Objections, International Court of Justice, 24 May 2007, para. 46.

³⁸⁵ *Union Interafricaine des Droits de l’Homme and Others v. Angola*, supra n 326, para. 16. See also Communication No.292/2004, *Institute for Human Rights and Development in Africa v. Angola*, Communication No. 292/2004) decision of 22 May 2008; *Rencontre Africain pour la Défense des Droits de l’Homme v. Zambia* supra n 304; African Commission on Human and Peoples’ Rights decision *Malawi Africa Association and others v. Mauritania*, Communication Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (consolidated), 11 May 2000, <http://hrlibrary.umn.edu/africa/comcases/Comm54-91.pdf>.

³⁸⁶ *Amnesty International v. Zambia*, supra n 324, para. 42.

³⁸⁷ *Kenneth Good v. Republic of Botswana*, Communication No. 313/05, 26 May 2010, <https://achpr.au.int/index.php/en/decisions-communications/kenneth-good-republic-botswana-31305>.

³⁸⁸ *Anudo v. Tanzania* supra n 109.

³⁸⁹ Human Rights Committee, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service, 1996.

the right to dignity and legal status, the Commission has found violations of the right to participate in public affairs. For example, considering provisions inserted in 2000 into the constitution of Côte d'Ivoire that required the president both to be Ivorian by birth him or herself and to have parents who were both Ivorian by birth, the African Commission found that:

[T]he requirement that an individual can only exercise the right to stand for the post of a President not only if he/she is born in Côte d'Ivoire, but also that his parents must be born in Côte d'Ivoire unreasonable and unjustifiable, and find this an unnecessary restriction on the right to participate in government guaranteed under Article 13 of the African Charter. [The constitutional provision] is also discriminatory because it applies different standards to the same categories of persons, that is persons born in Côte d'Ivoire are now treated based on the places of origin of their parents, a phenomenon which is contrary to the spirit of Article 2 of the African Charter.³⁹⁰

The right to family life

The right to family life may be especially important as a foundation for litigation in jurisdictions where the right to nationality is not explicitly protected—for example, in litigation before the European Court of Human Rights.

Although the European Court of Human Rights has declined to find that the right to nationality is implied within the provisions of the European Convention,³⁹¹ it does consider that denial of nationality may in some contexts violate the right to family life.

■ In the case of *Genovese v. Malta*, relating to discrimination in transmission of nationality based on birth in or out of wedlock, the Court stated:

Even in the absence of family life, the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person's social identity. While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of Article 8, the Court considers that its impact on the applicant's social identity was such as to bring it within the general scope and ambit of that Article.³⁹²

This position was reaffirmed in the case of *Mennesson v. France*.³⁹³

A number of other cases before the European Court have touched on similar principles, albeit focused on stable residence rights rather than specifically calling for grant of nationality.³⁹⁴

■ In the case of *Kurić v. Slovenia*, the Court ruled that the “erasure” of the registration of a group of stateless persons as residents and the destruction of their identity documents had “deprived the applicants of their legal status” and accordingly violated their right to private and family life.³⁹⁵

■ In *Hoti v. Croatia*, a case brought by a stateless person of Albanian descent unable to regularise his status in Croatia over 40 years, the European Court of Human Rights determined that the complainant was in fact stateless, expressed its surprise that the Croatian authorities had not done the same, and found a violation of Article 8.³⁹⁶

■ In a similar case from Hungary, the Court stated that Hungary had not “complied with its positive obligation to provide an effective and accessible procedure ... enabling the applicant to have the issue of his status in Hungary determined with due regard to his private life interests under Article 8.”³⁹⁷

The European Network on Statelessness and the AIRE Centre have published a legal briefing with guidance on states' obligations under the European Convention to protect the right to respect for private and family life of stateless persons.³⁹⁸

³⁹⁰ *MIDH v. Côte d'Ivoire* supra n 299, para. 86.

³⁹¹ The Court will not, for example, insist on grant of nationality as a solution for a stateless person threatened with deportation as a non-citizen, so long as a regularized residence status is available enabling family life to be protected. *Sisojeva and Others v. Latvia*, Application no. 60654/00, European Court of Human Rights, Grand Chamber, Judgment of 15 January 2007, <https://hudoc.echr.coe.int/eng?i=001-79022>.

³⁹² *Genovese v. Malta*, Application no. 53124/09, European Court on Human Rights, Judgment of 11 October 2011, para. 33, <https://hudoc.echr.coe.int/eng?i=001-106785>.

³⁹³ *Mennesson v. France*, supra n 162, para. 97.

³⁹⁴ See also the summaries in the *Litigation Toolkit on Statelessness for Legal Practitioners*, Volume 2, European Network on Statelessness and AIRE Centre, 2022.

³⁹⁵ *Kurić and Others v. Slovenia*, supra n 133; see also *Smirnova v. Russia*, application no. 46133/99 and 48183/99, European Court of Human Rights, 24 July 2003).

³⁹⁶ *Hoti v. Croatia*, supra n 132; case summary at: <https://caselaw.statelessness.eu/caselaw/ecthr-hoti-v-croatia>; Katja Swider, “*Hoti v. Croatia*—a Landmark Decision by the European Court of Human Rights on Residence Rights of a Stateless Person (blog post), European Network on Statelessness, 3 May 2018, <https://www.statelessness.eu/updates/blog/hoti-v-croatia-landmark-decision-european-court-human-rights-residence-rights>.

³⁹⁷ *Sudita Keita v. Hungary* (application no. 42321/15), European Court of Human Rights, judgment of May 12, 2020. Case summary at: <https://caselaw.statelessness.eu/caselaw/ecthr-sudita-keita-v-hungary>.

³⁹⁸ “Legal briefing: Statelessness and the right to respect for family and private life”, European Network on Statelessness and the AIRE Centre (Centre for Advice on Individual Rights in Europe), October 2024, <https://www.statelessness.eu/updates/publications/legal-briefing-statelessness-and-right-respect-family-and-private-life>.

The African Charter on Human and Peoples' Rights also does not contain an explicit provision on the right to nationality. The African Commission on Human and Peoples' Rights has found, however, that the right to nationality is implied within the protection of legal status provided for in Article 5 of the African Charter (► [section 7.8 Birth registration and legal identity, subheading on Dignity, \(legal\) identity and recognition as a person before the law](#)). In addition, the Commission has found violations of the right to family life in multiple cases relating to arbitrary deprivation of nationality.³⁹⁹

Inhuman treatment and the right to a remedy in the context of immigration detention and precarious status

Stateless people all too often find themselves caught up in repeated or perpetual immigration proceedings, including indefinite detention, unable to fulfil the requirements placed on them to demonstrate their connection to a country of nationality—whether the state of residence or another state to which they can be deported—or to a country of origin which would provide a basis to claim refugee status.⁴⁰⁰ In other cases, stateless persons are denied a secure residence status and threatened with deportation to a country where they have no recognised nationality, despite risks of inhuman treatment in that country, and their stronger connections to the country where they live.

Immigration detention and inhuman treatment of migrants and the right to a remedy for such treatment has been a frequent subject of litigation⁴⁰¹ and is not generally considered here.⁴⁰² Cases relating specifically to detention of or attempts to deport stateless persons include:

- In the case of *Kim v. Russia* decided in 2014, the European Court of Human Rights found, unanimously, that there had been violations of the prohibition on cruel and inhuman treatment and of the right to liberty and security on account of the stateless applicant's conditions of detention and the lack of adequate review procedures for detention pending expulsion. The Court considered that Russia had to introduce a mechanism to permit persons detained for expulsion to challenge their detention, and to take steps to prevent the applicant from being re-arrested and detained because of his status as a stateless person.⁴⁰³
- In the case of *Shoygo v. Ukraine* the European Court of Human Rights considered the obligations of the state to take steps to confirm the nationality of a person who had never held any identity documents but claimed to be Russian, and who had been held in immigration detention for almost a year, finding that Ukraine had violated the right to a remedy under Article 5 of the European Convention on Human Rights.⁴⁰⁴
- In 2019, the Committee on the Rights of the Child considered the case of a stateless child of a Palestinian mother with irregular migration status in Switzerland, finding that the best interests of the child had not been respected when considering the mother's asylum request in Switzerland, where her brother had a legal residence status, and that the child ran a real risk of being subject to inhuman and degrading treatment in case of a return to Bulgaria, where his mother had previously held a subsidiary protected status but they had been detained in very bad conditions. The child would not have access to appropriate measures for physical and psychological rehabilitation in case of return to Bulgaria.⁴⁰⁵
- In 2014, the Austrian Constitutional Court found that it would be a violation of Article 3 of the European Convention on Human Rights to expel a stateless person of Roma ethnic origin, with parents from former Yugoslavia, who was born, grew up, and worked his entire life in Austria.⁴⁰⁶
- In a 2023 judgment concerning a stateless Rohingya man who was born in Myanmar in the mid-1990s, the

³⁹⁹ *Amnesty International v. Zambia*, supra n 324; *Modise v. Botswana*, supra n 296; *Legal Resources Foundation v. Zambia* supra n 277; *Kenneth Good v. Republic of Botswana*, supra n 387.

⁴⁰⁰ Amal de Chickera, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons* (London: Equal Rights Trust, 2010), <https://www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf>; *Handbook on Protection of Stateless Persons*, supra n 2; UNHCR, 'Stateless Persons in Detention: A Tool for Their Identification and Enhanced Protection', 2017, <https://www.refworld.org/docid/598adacd4.html>. See also UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, <http://www.refworld.org/docid/503489533b8.htm>.

⁴⁰¹ See, for example, the landmark case of *Khlaifia and others v. Italy*, Application no. 16483/12, European Court of Human Rights [GC], Judgment of 15 December 2016: <https://hudoc.echr.coe.int/eng/?i=001-170054>.

⁴⁰² For guidance on immigration detention, see UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, www.refworld.org/policy/legalguidance/unhcr/2012/en/87776; UNHCR, Stateless Persons in Detention: A tool for their identification and enhanced protection, June 2017, www.refworld.org/policy/opguidance/unhcr/2017/en/117659; and UNHCR, Unlocking rights: towards ending immigration detention for asylum-seekers and refugees, September 2024, <https://www.refworld.org/policy/polrec/unhcr/2024/en/148655>.

⁴⁰³ *Kim v. Russia*, Application no. 44260/13, European Court of Human Rights, judgment of 17 July 2014 <https://hudoc.echr.coe.int/fre/?i=002-9579>; Case summary at European Network on Statelessness case law database: <https://caselaw.statelessness.eu/caselaw/ecthr-kim-v-russia>.

⁴⁰⁴ *Shoygo v. Ukraine*, Application no. 29662/13, European Court of Human Rights, judgment of 30 September 2021 <https://hudoc.echr.coe.int/eng/?i=001-212003>. Case summary at European Network on Statelessness case law database: <https://caselaw.statelessness.eu/caselaw/ecthr-shoygo-v-ukraine>.

⁴⁰⁵ *A.M. (on behalf of M.K.A.H.) v. Switzerland*, CRC/C/88/D/95/2019, UN Committee on the Rights of the Child views adopted 6 October 2021, <https://juris.ohchr.org/casedetails/2957/en-US>.

⁴⁰⁶ Judgment of 6 March 2014, in case U2131/2012. Case summary at: <https://caselaw.statelessness.eu/caselaw/austria-constitutional-court-case-6-march-2014>.

Australian High Court (the apex court in Australia) overturned two decades of executive practice of indefinite immigration detention for persons who could not be deported to any country. The Court ruled that the constitutionally permissible period of detention comes to an end when there is no real prospect of removal of the person from the country in the reasonably foreseeable future.”⁴⁰⁷

Other rights

There will often be opportunities to link the importance of identity documents to broader patterns of exclusion, especially based on discrimination in access to other rights—such as access to health care, education, housing or measures of social protection—and the particular vulnerability of stateless persons (compared to other non-citizens).

- The European Court of Human Rights found that Latvia had unjustifiably discriminated in allocation of pension rights to a “permanently resident non-citizen” of Latvia, who had lived and worked in Latvia since the age of twelve, but received a lower pension based solely on her lack of Latvian nationality (and held no other nationality).⁴⁰⁸

Lack of identity documents may often be at the heart of such discrimination.

- in a case brought by the European Roma Rights Centre to the UN Committee on the Elimination of All Forms of Discrimination Against Women on behalf of six Roma women evicted from their houses by North Macedonia, the CEDAW Committee stated:

The Committee notes that neither the authors nor their parents hold identity documents, nor are they covered by the public (or private) health insurance system of the State party. As the authors are undocumented and without insurance, they have no access to adequate health-care facilities and are not entitled to any free primary, secondary or maternal health care.⁴⁰⁹

“Without litigation, we would still be struggling to show that nationality is the kind of right that can be violated in a particular case—that there is a duty side to the right.”

-- Laura van Waas, *Institute on Statelessness and Inclusion, The Netherlands*

⁴⁰⁷ NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs [2023] HCA 37, discussed in Hannah Gordon, “NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs”, *Statelessness & Citizenship Review*, 6(1), (2024), pp.143-150.

⁴⁰⁸ *Andrejeva v. Latvia*, Appl. No. 55707/00, European Court of Human Rights, Judgment of 18 February 2009, <https://hudoc.echr.coe.int/?i=001-91388>; Case summary at: <https://caselaw.statelessness.eu/caselaw/ecthr-andrejeva-v-latvia>.

⁴⁰⁹ *S.N. and E.R. v. North Macedonia*, CEDAW/C/75/D/107/2016, CEDAW Committee, views adopted 24 February 2020, <https://juris.ohchr.org/Search/Details/2703>. An application to the ECtHR based on the same facts was declared inadmissible: *Erdjan Bekir and Others v. North Macedonia* (application no. 46889/16), European Court of Human Rights, Decision of 24 June 2021, <https://biroescp.gov.mk/wp-content/uploads/2021/07/BEKIR-AND-OTHERS-v.-NORTH-MACEDONIA.pdf>.

8. OTHER RESOURCES

8.1. General resources on statelessness and nationality:

- Refworld webpage on statelessness <https://www.refworld.org/thematic-area/statelessness>
- Institute on Statelessness and Inclusion <https://www.institutesi.org/>
- Stateless Hub (Institute on Statelessness and Inclusion) <https://www.statelesshub.org/>
- GLOBALCIT Country Profiles <https://globalcit.eu/>
- European Network on Statelessness <https://www.statelessness.eu/>
- Citizenship Rights Africa Initiative <http://citizenshiprightsafrika.org/>

8.2. Databases of jurisprudence on nationality and statelessness:

- Refworld database of caselaw : <https://www.refworld.org/cases.html>
- Institute on Statelessness and Inclusion UN treaty body database: <https://database.institutesi.org/>
- European Network on Statelessness, Statelessness Caselaw database: <https://caselaw.statelessness.eu/>
- GLOBALCIT database of caselaw: <https://globalcit.eu/citizenship-case-law/>
- Citizenship Rights Africa collection of cases and decisions: https://citizenshiprightsafrika.org/advanced-search/?fwp_media_type=cases-and-decisions

8.3. Comparative law:

- GLOBALCIT Citizenship Law Datasets on modes of acquisition & loss <https://globalcit.eu/databases/globalcit-citizenship-law-dataset/>
- GLOBALCIT Global nationality Law database
- Citizenship Rights Africa collection of national laws and regulations: http://citizenshiprightsafrika.org/advanced-search/?fwp_media_type=national-laws-and-regulations
- European Network on Statelessness, Statelessness Index: <https://index.statelessness.eu/>

8.4. Comparative reports:

Africa

- Bronwen Manby, [Citizenship Law in Africa: A Comparative Study](#) Open Society Foundations, 3rd ed. 2016

Americas

- Diego Acosta [Regional Report on Citizenship: The South American and Mexican cases](#), GLOBALCIT, European University Institute, 2016
- Kirsty Belton, [Comparative Regional Report on Citizenship Law: Anglophone Caribbean](#), GLOBALCIT, European University Institute, 2020
- Olivier W. Vonk, [Nationality Law in the Western Hemisphere: A Study on Grounds for Acquisition and Loss of Citizenship in the Americas and the Caribbean](#) (Brill, 2015).

Asia-Pacific

- Anna Dziedzic, [Comparative Regional Report on Citizenship Law: Oceania](#), GLOBALCIT, European University Institute, 2020
- Olivier Vonk, [Comparative Report: Citizenship in Asia](#) GLOBALCIT, European University Institute, 2017

Europe

- Costica Dumbrava, [Comparative Report: Citizenship in Central and Eastern Europe](#) GLOBALCIT, European

University Institute, 2017

- Merve Erdilmen & Iseult Honohan [Trends in Birthright Citizenship in EU 28 2013-2020](#), GLOBALCIT, European University Institute, 2020

Middle East

- Zahra Albarazi, [Regional Report on Citizenship: The Middle East and North Africa](#), GLOBALCIT, European University Institute, 2017.

8.5. Litigation resources

- European Network on Statelessness and AIRE Centre, Litigation Toolkit on Statelessness for Legal Practitioners; Volume 1 “Impact Litigation and Judicial Mechanisms to Effect Change”; Volume 2 “Jurisprudence” (updated 2024), <https://www.statelessness.eu/updates/publications/litigation-toolkit-statelessness-legal-practitioners>

8.6. List of cases by jurisdiction

INTERNATIONAL AND REGIONAL CASES

Permanent Court of International Justice (PCIJ) (League of Nations)

Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion No. 4, PCIJ, Ser. B, No. 4 (1923). <https://www.refworld.org/jurisprudence/caselaw/pcij/1923/en/20991>

International Court of Justice (ICJ)

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo), Preliminary Objections, I.C.J. Reports 2007 582, 24 May 2007. <https://www.icj-cij.org/case/103>

Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase), ICJ Reports 1955 4, 6 April 1955. <https://www.icj-cij.org/sites/default/files/case-related/18/018-19550406-JUD-01-00-EN.pdf>

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 7 States intervening) (pending). <https://www.icj-cij.org/case/178>

Permanent Court of Arbitration (PCA)

Award of the Eritrea-Ethiopia Claims Commission, Partial Award—Civilian Claims—Eritrea's Claims 15, 16, 23 & 27-32, 28 April 2004 <https://pcacases.com/web/sendAttach/755>

UN TREATY BODIES

UN Committee on the Elimination of Discrimination Against Women (CEDAW)

Bekir and Others v. North Macedonia (Pending), Case Summary, ERRC, 8 November 2016. <https://www.errc.org/cikk.php?cikk=4531>

S.N. and E.R. v. North Macedonia, CEDAW/C/75/D/107/2016, 24 February 2020. <https://juris.ohchr.org/casedetails/2703/en-US>

UN Committee on the Rights of the Child (CRC)

A.M. (on behalf of M.K.A.H.) v. Switzerland, CRC/C/88/D/95/2019, 6 October 2021. <https://www.refworld.org/jurisprudence/caselaw/crc/2021/en/123932>

COC v. Spain, Communication No. 63/2018, CRC/C/86/D/63/2018, 24 February 2021. <https://documents.un.org/access.nsf/get?OpenAgent&DS=CRC/C/86/D/63/2018&Lang=E>

F.B. et al. and D.A. et al. v. France, CRC/C/89/D/77/2019, CRC/C/89/D/79/2019, and CRC/C/89/D/109/2019, 9 March 2022. <https://documents.un.org/access.nsf/get?OpenAgent&DS=CRC/C/89/D/77/2019-CRC/C/89/D/79/2019&Lang=E>

WMC v. Denmark, Communication No. 31/2017, CRC/C/85/D/31/2017, 3 November 2020. <https://doc->

store.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhskyyPvmqg1XAb6zxcL-SOy8Jq0J4GXFQfBjCGqryHp5utBWlo5g6LtQXd8KQeCyGtUS03dStCjd4YjJQHTN5SJs9leoFcnMo6o9MP-WE%2Bvs5lp

UN Human Rights Committee (HRC)

A. v. Australia, CCPR/C/59/D/560/1993, 30 April 1997. <https://juris.ohchr.org/casedetails/469/en-US>

DZv. The Netherlands, CCPR/C/130/D/2918/2016, 20 January 2021. <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhstmolju%2F14z6o8I4G3YTJPkxgZbjfVoFnUxDYN-f5e2B5e%2BzpsOxE43guYFPKxUJGRB6fV0qixA4nVIZpg%2Btup1LygYiRhx7J256K6D9A3U7xG6bSBD-v9g4CwKwj6QZzVA%3D%3D>

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