Swiss Initiative to Commemorate the 60th Anniversary of the UDHR

Protecting Dignity: An Agenda for Human Rights

RESEARCH PROJECT ON STATELESSNESS:

"Statelessness and the Benefits of Citizenship: A Comparative Study"

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The year 2008 marked the 60th Anniversary of the Universal Declaration of Human Rights. To commemorate this occasion, and in order to make a meaningful contribution to the protection of human rights, the Swiss Government decided to launch "An Agenda for Human Rights". The initiative aims to explore new ways of giving human rights the weight and place they deserve in the 21st century. It is designed as an evolving and intellectually independent process.

The text *Protecting Dignity: An Agenda for Human Rights* was authored by a Panel of Eminent Persons, co-chaired by Mary Robinson and Paulo Pinheiro. This *Agenda* and the Swiss Initiative are designed to achieve two objectives: firstly, to set out some of the main contemporary challenges on the enjoyment of human rights, and secondly, to encourage research and discussion on a number of separate topics linked to the *Agenda*. These include: Human Dignity – Prevention – Detention – Migration – Statelessness – Climate Change and Human Rights – the Right to Health – and A World Human Rights Court.

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STATELESSNESS AND THE BENEFITS OF CITIZENSHIP
A COMPARATIVE STUDY

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Cover illustration: Bihari youth gather at a rally in Talab Camp, Dhaka, Bangladesh.

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Brad K. Blitz and Maureen Lynch

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ACRONYMS

ARC	Autonomous Republic of the Crimea
BPP	British Protected Person
CEMIRIDE	Centre for Minority Rights Development
CERD	United Nations Committee on the Elimination of Racial Discrimination
CIS	Commonwealth of Independent States
CRC	United Nations Convention on the Rights of the Child
CTD	Convention Travel Document
CUKC	Citizens of the United Kingdom and Colonies
ECtHR	European Court of Human Rights
ERT	Equal Rights Trust
FCO	Foreign and Commonwealth Office
GCC	Gulf Cooperation Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IPCC	Intergovernmental Panel on Climate Change
NGO	Non-Governmental Organization
NIC	National Identity Card
OSCE	Organisation for Security and Cooperation in Europe
OSI	Open Society Institute
SFRY	Socialist Federal Republic of Yugoslavia
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
URSR	Ukrainian Soviet Socialistic Republic
USSR	Union of Soviet Socialist Republics
YAP	Youth Advocate Program International

CHAPTER 1

STATELESSNESS: THE GLOBAL PROBLEM, RELEVANT LITERATURE, AND RESEARCH RATIONALE

Brad K. Blitz and Maureen Lynch

Definitions

In a strictly legal sense, 'statelessness' describes people who are not considered nationals by any state.[1] Although statelessness is prohibited under international law, the United Nations High Commissioner for Refugees (UNHCR) presently estimates that there may be as many of 12 million stateless people in the world (UNHCR 2009). The existence of stateless populations challenges some of the central tenets of international law and the human rights discourse that have developed over the past sixty years. Most importantly, the reality of statelessness is at odds with the right to nationality which is explicitly recorded in the Universal Declaration of Human Rights (UDHR). Article 15 of the UDHR implicitly acknowledges the principle whereby an individual's nationality is linked to his or her identity, and it states that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality" (UN General Assembly 1948).

The right to nationality has been further elaborated in two key international conventions which have brought the concept of statelessness into the United Nations framework and that will be explored in greater detail in Chapter 2: the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The 1954 Convention relating to the Status of Stateless Persons was initially conceived as a protocol on stateless persons that was to be included as an addendum to the 1951 Convention relating to the Status of Refugees but was later made into a convention in its own right and is now the primary international instrument that aims to regulate and improve the status of stateless persons. A second convention was introduced in 1961 with provisions to avoid statelessness at birth. While the 1961 Convention on the Reduction of Statelessness reiterates the main concerns of the 1954 instrument, in practice it defers to states and asserts that nationality shall be granted by 'operation of law to a person born in the State's territory' to anyone who would otherwise be stateless (UN General Assembly 1975).[2] One important failing of this convention is that it does not prohibit the possibility of revocation of nationality under certain circumstances nor does it address the subject of retroactively granting citizenship to all currently stateless persons; hence, the problem of statelessness has not been resolved.

Few states have ratified the stateless conventions, and the problem of disenfranchised groups and individuals being left without nationality has multiplied.[3] Some advocates have described the plight of stateless people as a matter of 'human security' (UNDP 1994) since, while stateless people enjoy many human rights under international law, in practice, those who nationality live have great difficulty in exercising their rights and therefore enjoy a precarious existence (Blitz 2009; Lynch 2005).[4] Research by *Refugees International* has highlighted the innumerable barriers which stateless people contend with, including the denial of opportunities to: establish a legal residence, travel, work in the formal economy, send children to school, access basic health services, purchase or own property, vote, hold elected office, and enjoy the protection and security of a country (Southwick and Lynch 2009). All too often the births, marriages, and deaths of stateless people are not certified and,

as a result, many stateless persons lack even basic documentation. This lack of identification means that they are often powerless to seek redress through the courts (Goldston 2006). Significant numbers of stateless people therefore face extortion from state and non-state agents as well as arbitrary taxation.

Under the 1954 Convention relating to the Status of Stateless Persons, individuals who have not received nationality automatically or through an individual decision under the operation of any state's laws are known as *de jure* stateless persons. There are also countless others who cannot call upon their rights to nationality for their protection and are effectively stateless or *de facto* stateless persons. Often *de facto* stateless people are unable to obtain proof of their national identity, residency or other means of qualifying for citizenship and as a result may be excluded from the formal state.

Under international law, *de facto* stateless persons are not covered by the provisions of the 1954 Convention relating to the Status of Stateless Persons even though it includes a non-binding recommendation that calls upon states to 'consider sympathetically' the possibility of according *de facto* stateless persons the treatment which the Convention offers to *de jure* stateless people. Most governmental reporting on this issue concentrates on *de jure* stateless populations although there is a growing awareness that *de facto* stateless people are unable to realise their human rights and may be equally vulnerable for lack of effective protection from the state to which they have a formal connection (Van Waas 2008).

Until recently, statelessness remained a minor interest within UNHCR, despite the agency's mandate and the fact that the global population of stateless people is counted in the millions. However, over the past five years, influential international NGOs and monitoring bodies have actively campaigned to raise the profile of stateless populations and have supported the expansion of UNHCR's efforts in this area (UNHCR 2007). To this end, they have been supported by UN Committees, including the Committee on the Elimination of Racial Discrimination and other UN agencies, including the Office of the High Commissioner for Human Rights (OHCHR).

During Kofi Annan's first term as UN Secretary-General, there was considerable examination of the scope of the Committee on the Elimination of Racial Discrimination and the exploration of ways in which the protection of human rights could be achieved through collaborative actions. These highlighted the relevance of social and economic factors for development, safety and security. One consequence of this activity was the 2003 report on the Rights of Non-Citizens drafted by the UN Special Rapporteur on the rights of non-citizens.[5] While non-citizens and stateless people are not coterminous, the report affirmed that non-citizens—and in this instance also stateless people—enjoy universal human rights and concluded that international law grants non-citizens virtually all rights to which citizens are entitled, except the rights to vote, hold public office, and exit and enter at will (Weissbrodt 2003). However, Weissbrodt also identified a "large gap between the rights that international human rights law guarantees to non-citizens and the realities they must face" and noted that in many countries there were institutional and endemic problems confronting non-citizens (Weissbrodt 2003). The report served to set an agenda for reform that was later picked up by US-based activists and human rights monitoring organisations working closely with UNHCR, such as the Open Society Institute's (OSI) Justice Initiative, Amnesty International and Human Rights Watch as well as the UN Independent Expert on Minorities.[6]

For academics and practitioners, the issue of statelessness raises several concerns. First, the subject has received scarce attention from scholars or monitoring bodies, and there is relatively little comparative research on the causes, patterns and consequences of statelessness in the international system. Even less attention has been paid to the value of acquiring or re-acquiring citizenship.

Second, for development agencies, the concept of statelessness introduces an essential power-dynamic which is particularly challenging for the design and delivery of effective pro-poor social development programmes (Farzana 2008). Most stateless people are the victims of discrimination by the states in which they live; yet, these national governments remain key interlocutors for multilateral agencies and non-governmental bodies, which are tasked with delivering aid. Arguably, stateless groups are not prioritised in social assistance programmes and are further disadvantaged as a result of aid policies which do not succeed in reaching them (Blitz 2009).

Third, there is an inherent problem in the recourse to international law as a means of reigning in human rights violating states. It is a long recognised norm of international law that states have the sovereign right to determine how nationality, and hence citizenship, is acquired (League of Nations 1930). However, in the case of stateless people, the state's prerogative of determining formal membership is often at odds with the protection of human rights (Van Waas 2008; Weis 1979; Weissbrodt and Collins 2006; Weissbrodt 2008). Indeed, the very notion of statelessness exposes the essential weaknesses of our political system, which relies on the state to act as the principal guarantor of human rights. As Hannah Arendt noted more than fifty years ago, those who are left outside the state are vulnerable to abuse, poverty, and marginalisation in all its forms (Arendt 2004).

In light of the problems associated with statelessness, the right to nationality and citizenship takes on added significance, especially when one considers how those who lack citizenship live and what effect their disenfranchisement has on society at large. It is an irrefutable fact that the denial and deprivation of citizenship and the creation of statelessness undermines the promotion of human security understood in the broadest sense as not only violent threats to individuals but also in the context of vulnerabilities caused by poverty, lack of state capacity and various forms of socio-economic and political inequity (Human Security Commission 2003; Sokoloff 2005; UN General Assembly 2008; UNDP 1994). The negative effects of denying people their rights to nationality and citizenship are illustrated across the globe where by disenfranchising significant populations, states have sown the seeds for underdevelopment and unrest as, for instance, in Bangladesh and the Great Lakes region of Africa as well as in Palestine and Israel and the surrounding states. Under such conditions, states lose in terms of lower economic output and a reduced fiscal base. The greatest losers, however, remain the individuals who are unable to pursue their daily existence free from interference and who have difficulties actualising their rights, including the rights to work, and educate their children and access heath care services.

Arguably, the granting of citizenship may undo many of the harmful acts associated with the denial and deprivation of citizenship as described above. Yet, surprisingly, in spite of the significance of this area of investigation, few scholars have sought to uncover concrete evidence of the benefits of citizenship as a means of countering human rights violations and social, economic and political instability. It is precisely this gap that the proposed research seeks to address.

Several thousand Rohingya work as bonded labourers and are trapped into debt to local Bangladeshi boat owners. A group of Rohingya men in southern Bangladesh push their fishing boat out for another days work.

The central premise of this research is that elements of discrimination and inequality are common to all forms of statelessness, and it is therefore necessary to develop an understanding of the mechanisms which not only create statelessness but also perpetuate deprivation. For analytical purposes, we may distinguish between *direct discrimination* on the basis of nationality, which is formally recorded in law, and *structural discrimination* which may be indirect but nonetheless denies individuals the opportunities to benefit from citizenship. Statelessness may be caused by the denial and deprivation of citizenship; equally, it may be caused by the withdrawal of citizenship. Additional causes relate to the context in which national policies are designed and implemented and include political restructuring and displacement, gender discrimination which denies women the right to pass on their nationality to their children, and administrative barriers which prevent people from accessing their rights.

Causes of Statelessness

There are several explanations for the pervasiveness of the arbitrary denial and deprivation of citizenship. In general, denial or deprivation of citizenship takes place as a result of a specific state action. This may include the introduction of discriminatory laws that target specific communities, the carrying out of a census of selected populations, or the introduction of onerous provisions that make it virtually impossible for certain groups and individuals to

access their rights to citizenship, including establishing a legal identity by means of formal registration of births, marriages, and voting.

One of the central concerns for the prevention and reduction of statelessness is the degree to which race and ethnicity are prioritised over civic criteria, or vice-versa, in the design of exclusive nationality and citizenship laws. In practice, nationality policies built on the principle of blood origin (*jus sanguinis*) rather than birth on the territory (*jus soli*) have made the incorporation of minorities, especially children of migrants, particularly difficult. In several parts of the world from Cote d'Ivoire to the Dominican Republic to the former Soviet Union to Germany and Italy, the principle of membership on the basis of blood origin has locked many minority groups out of the right to citizenship in their habitual state of residence.

During periods of national homogenisation, ethnic membership may be associated with loyalty. This has been be a major factor in the denial and granting of citizenship; for example, in the 1990s, Croatia introduced several barriers that prevented ethnic Serbs from obtaining citizenship even though they had resided on Croatian territory prior to Croatia's independence and met the criteria for nationality. The discrimination against ethnic Serbs born in Croatia was compounded by the policy of granting citizenship to ethnic Croats from Bosnia who had recently been invited to settle in parts of Croatia. For more than thirty years, the Bihari community in Bangladesh has been segregated from the major Bengali population amid accusations that the Bihari were collectively disloyal and favoured the regime based in Islamabad during Bangladesh's break from Pakistan. Similarly, in parts of Central and East Africa, minority populations have been denied citizenship because they have been identified with colonial powers or historic 'enemy' groups, notably the Nubian population in Kenya. In some instances, the persistent denial of citizenship may relate to both a positive action by the state and the lack of infrastructure to implement the action, as illustrated by the case of Kazakhstan where, in the 1990s, returning ethnic Kazaks ('Oralman') were encouraged to settle in large numbers before they had received any nationality status (UNDP 2006).

The withdrawal of citizenship applies principally to *de jure* stateless populations and, although less common than the denial of citizenship, this practice has affected large numbers of minorities. One activating factor leading to the withdrawal of citizenship is the influence of exclusive nationalist ideologies during periods of political restructuring. During and shortly after the First World War, foreign-born citizens who had been naturalised were stripped of their citizenship by France, Belgium, Turkey and the Soviet Union. Racist laws have similarly been used to advance denationalisation campaigns, most famous of which is the 1935 Nazi Law on the Retraction of Naturalizations and the De-recognition of German Citizenship which stripped Jews in Germany of their citizenship. More recently, former migrants from West Africa who had settled in Cote d'Ivoire were denaturalised during a programme of ethnic homogenisation and intense xenophobia.

In other contexts, particular minority groups have been singled out such as the Bidoon in Kuwait and Banyamulenge in the Democratic Republic of Congo. The process of exclusion often begins with the formal designation of minority groups. Forced migrations during periods of political development may generate new minority groups and give rise to subsequent stateless populations. Many citizenship issues in Russia and Central Asia are directly related to former Soviet policies; mass deportations conducted in the 1940s created large minorities whose citizenship status is still uncertain—for example, Ossetians in

Georgia, Crimean Tatars in Uzbekistan and Kazakhstan, Ingushetians and Meskhetian Turks in Southern Russia, to name a few (Ginsburgs 1966; Helton 1996).

While the process of exclusion often occurs during periods of state creation or state transformation, it should be noted that the ways in which states determine membership and access is fluid. Historical migrations are often the first link in the causal chain that gives rise to statelessness. For example, as P.P. Sivapragasam discusses in Chapter 5, large numbers of Tamils were brought to work in Sri Lanka in the late 19th Century and kept isolated on plantations where they were later denied citizenship in Sri Lanka post-independence. More recent migrations have similarly created nationality problems, which, if left unaddressed, could also give rise to situations of statelessness. One case of reform is Germany, a country that for more than 40 years has played host to hundreds of thousands of people of Turkish origin, mostly guest workers and their descendants, who had settled there but few acquired the right to German citizenship until the law was amended in 2000.

State succession, which is often but not necessarily a consequence of war, is another explanation for the prevalence of discriminatory treatment of people who may not be migrants but who may find themselves living under a different jurisdiction. The break-up of the Austro-Hungarian and Ottoman Empires and, later, the Soviet Union fomented numerous nationality contests which left millions stateless and forced them to live as minorities in new political contexts. Since 1992, the de-federation and division of Czechoslovakia has left thousands of Roma in a precarious situation while their citizenship status was challenged and questioned by both successor states.

Another example of state succession—state restoration—is found in the case of the ethnic Russians in Estonia and Latvia where individuals of Slavic origin who moved to the country during the Soviet occupation were not given automatic citizenship (nor were their descendents) when these countries regained their sovereignty in 1991. In the case of Latvia, citizenship was granted only to those who were Latvian citizens before 17 June 1940 and their descendants. As a result, 30 per cent of the population was left without nationality. The government has since only recognised as 'stateless' fewer than 1,000 individuals who do not have a claim to foreign citizenship and are not eligible to apply for naturalization in Latvia; the rest of the non-Latvian population, approximately 350,000—400,000, have been considered as non-citizens and presumed members of another state (Southwick and Lynch 2009).

In addition to political restructuring, statelessness may be caused by climate and environmentally induced displacement, a fact that was emphasised most recently at the 2009 UN Conference on Climate Change. The Intergovernmental Panel on Climate Change (IPCC) report identified the Netherlands, Guyana, Bangladesh, and a number of oceanic islands as being especially threatened by a rising sea level (IPCC 2008). Press reports, however, publicised the claim that approximately 600 million people could be affected by the effects of rising sea levels before the end of the 21st Century and might be forced to leave their countries of origin, suggesting that statelessness might be caused as a result of the physical disintegration of the state (Adam 2009).

The absence of gender equality and contemporary forms of gender-based discrimination, including citizenship laws based exclusively on patrilineal descent, contribute to the creation of statelessness. In several Arab states, children of mixed parentage—especially in cases

where the mother is married to a non-national—may be denied nationality in their country of residence and may be left stateless (Lynch 2008).

Another matter of serious concern is the impact that non-registration of births may have on minority populations. It should be noted that while lack of birth registration does not equate to statelessness, lack of documentation has been used to deny people access to citizenship and state services. For many vulnerable people, the first hurdle to overcome is the registration of their child's birth. The United Nations Convention on the Rights of the Child (CRC) calls upon states to register children at birth (Article 7) but, according to *Plan International,* millions of births are not recorded. Approximately 36 per cent of the total births (48 million births each year) are not registered. The most affected regions are South Asia and Sub-Saharan Africa where more than half of all births are not registered. Children's advocates claim that birth registration provides the first legal recognition of the child and is generally required for the child to obtain a birth certificate which provides permanent, official and visible evidence of a state's legal recognition of his or her existence as a member of society. Birth registration is central to the campaign to reduce statelessness and inequality since states rely on birth registration and other means of documentation to grant access to basic services which are vital for the promotion of human security (Goldston 2006).[7]

The Literature on Statelessness

General Themes

There is an emerging body of research that is related to the problem of statelessness and which has several intellectual sources. Some of the most widely cited publications include reports and articles on human security and specifically the rights of non-citizens (Aurescu 2007; Bhabha 1998; Frelick and Lynch 2005; Goldston 2006; Human Security Commission 2003; Lynch 2005; Weissbrodt 2003) (Sokoloff and Lewis 2005; Southwick and Lynch 2009). Within the world of academia, one of the most influential writers on human security, Amartya Sen, has drawn attention to the problems associated with the lack of citizenship for personal and social development. Sen (2001) argues that citizenship is integrally connected with the possible enhancement of human capabilities; hence, the granting of citizenship removes some of the 'unfreedoms' that place people at risk from want and fear. Others, however, challenge Sen's claims and note that human security is often undermined by other domestic factors that operate at the sub-national level. One important counter argument is that in both weak and strong states where political divisions are defined by gender, ethno-national, religious, tribal, and party affiliations, there are many layers of discrimination that dilute the potency of citizenship by reinforcing discriminatory structures (Elman 2001).[8] Thus, rather than consider citizenship to be a unifying force, one may speak of several classes of citizenship and a range of entitlements (Cohen 1989).[9]

The vast majority of writing on statelessness and related issues, however, has not introduced theoretical considerations but has taken the form of descriptive reports which have sought to set an agenda at critical times. In the late 1990s, a precursor to the discourse on statelessness —primarily a discourse on the rights of non-citizens who were not necessarily stateless— centred on issues of equality and were justified on the grounds that exclusion fosters inequality and hence, insecurity. Indeed, this was one of the central premises of the UNDP's 1994 Human Development Report and the more influential Human Security Commission report entitled *Human Security Now: Protecting and Empowering People* (2003). The

reasons why this discourse was important to the emergence of a new and explicit discourse on statelessness lie in the fact that through these publications the UN had identified a causal connection between developmental concerns such as poverty and deprivation, the protection of human rights, and problems of governance—all of which directly relate to statelessness:

> In the final analysis, human security is a child who did not die, a disease that did not spread, a job that was not cut, an ethnic tension that did not explode in violence, a dissident who was not silenced. Human security is not a concern with weapons-it is a concern with human life and dignity (UNDP 1994:22).

Over the past five years, the policy language has shifted from a development focus to a rights-based theme and, in addition to UNHCR, a number of UN monitoring bodies and NGOs have drawn particular attention to the practice of denying and revoking rights to citizenship and the related problem of linking minority rights, namely the rights to enjoy and practice one's culture, language, or religion, to citizenship status (Goldston 2006; Open Society Justice Initiative 2006; UN Human Rights Council 2009; UNHCR 2007). In 2008, the UN Independent Expert on Minorities devoted a section of her annual report to the arbitrary denial and deprivation of citizenship (UN General Assembly 2008). The United Nations Human Rights Council recently adopted a resolution on the human rights and arbitrary deprivation of nationality which named statelessness as a human rights issue and reaffirmed that the right to a nationality of every human person is a fundamental human right (UN Human Rights Council 2009).

To date, the most comprehensive studies on statelessness include the 2008 publication, *Nationality Matters: Statelessness under International Law* by Laura Van Waas and the 2009 report by Katherine Southwick and Maureen Lynch on behalf of *Refugees International*, 'Nationality Rights for All: A Progress Report and Global Survey on Statelessness'. Van Waas dissects the two statelessness conventions and related international instruments and examines the legal provisions for stateless people and the need for reform in key areas including conflict of laws, state succession, and arbitrary deprivation of nationality, birth registration and migration. The report, 'Nationality Rights for All: A Progress Report and Global Survey', like the 2005 *Refugees International* study 'Lives on Hold: the Human Cost of Statelessness', provides a wide-ranging overview of the political and human rights challenges that stem from the lack of nationality and offers a useful global survey of the problem on a country-by-country basis. The publications produced by *Refugees International* include interview data gathered during field visits to the region. The value added of the reports and field studies by Refugees International lies in the inclusion of historical details and micro-level descriptions of the way in which repression and the denial of human rights affects individuals on the ground.

Another influential publication is James Goldston's 2006 article in *Ethics and International Affairs*.[10] Goldston acknowledges that while there is growing consensus that nationality laws and practice must be consistent with general principles of international law above all human rights law, there is a clear protection gap. He then illustrates how the denial of citizenship excludes people from the enjoyment of rights and pays particular attention to 'indirect discrimination' which occurs when "a practice, rule, requirement, or condition is neutral on its face but impacts particular groups disproportionately, absent objective and reasonable justification" (Goldston 2006:328). He concludes that the growing divide between citizens and non-citizens in practice is "primarily a problem of lapsed enforcement of existing norms" (Goldston 2006:341) and offers a set of useful recommendations to remedy this situation.

In addition to the above experts, several academics have touched on the issue of statelessness in their philosophical and sociological studies; interpretations of international law; examinations of regional conventions and treaty systems; research on children, gender issues and birth registration; and most recently, through their investigations of the effects of the war on terror, for individuals held in detention. These are briefly discussed below.

Philosophical and Sociological Studies

Within the fields of social and political theory, there has been a growing interest in Hannah Arendt's work, which has led to a re-examination of her brief writings on statelessness included in *The Origins of Totalitarianism* (2004). In Arendt's account, statelessness was symptomatic of the hollowness of human rights that could only be guaranteed by states. However, only a few scholars have linked Arendt's work to the failure of the human rights regime to provide protection for today's stateless populations (Leibovici 2006; Parekh 2004; Tubb 2006). One notable exception is Richard Bernstein (2005; 2008), a peer and colleague of Arendt. In general, one may observe that the issue of statelessness has not been addressed squarely among contemporary authors—only indirectly in the context of alienage (Benhabib 2004; Carens 2005). For example, Gillian Brock and Harry Brighouse (2005) make an important contribution to contemporary political theory and cosmopolitan claims to citizenship by bringing together scholars who examine the moral obligations to foreigner residents on the basis of national identity; but the authors do not single out those who are excluded from participating on account of their nationality status. More influential is the work of Seyla Benhabib (2004) who goes further than Brock and Brighouse in her condemnation of the denial of access to aliens, a term which is open to both foreign non-citizens and *de facto* stateless persons.

Others who have approached the issue of nationality have often addressed the subject not from the perspective of rights per se but from a pragmatic problem of the politics of integration which has implicitly drawn attention to *de facto* stateless persons. For example, Rainer Bauböck (2006) records in his study on acquisition and loss of nationality that political pressure from pro or anti-immigrant forces has been especially significant in helping to define the situation for non-citizens, some of whom have been regularised as a result of activist campaigns. Arguably, the primary contribution of scholars writing on citizenship has not been in defining the problem of statelessness but rather in pushing some of the boundaries of liberal political theory and articulating challenges to realist constants of sovereignty, fixed notions of membership, and the conceptual division of state responsibility between domestic and external arenas as recorded in the literature on cosmopolitanism.

Legal Analyses

Within the field of International Law, some older texts provide an interesting historical account of the development of UN legislation on statelessness and the impact of the conflict of nationality laws on the creation of stateless populations (Aleinikoff 1986; Brownlie 1963; Ginsburgs 1966; Loewenfeld 1941; Samore 1951). While these publications are set in the context of Cold War divisions, and have been supplemented by more recent writings that reflect contemporary geo-political realities in newly independent states (Bowring 2008a; Craven 2000), one of the most comprehensive treatments of this subject from a rights-based

perspective remains Paul Weis's 1979 *Nationality and Statelessness in International Law*. Weis's book addresses the conceptual challenge of placing nationality in the context of international law and examines conditions under which it may be withdrawn, and multiple nationality granted. Among the most useful chapters is his study of nationality in composite states and dependencies which pays particular attention to the operations of the British Commonwealth in the context of nationality rights; the chapter on conflict rules also offers an initial attempt to set out typologies of statelessness (Weis 1979).

Several well-known legal experts have further evaluated the right to nationality and the principle of non-discrimination within international human rights law (Aurescu 2007) (Adjami and Harrington 2008; Doek 2006; Donner 1994; Goldston 2006; Weissbrodt 2001, 2003, 2008). Most important of these is David Weissbrodt's (Weissbrodt 2008) *The Human Rights of Non-citizens*. Weissbrodt reiterates his conclusion from his 2003 report and argues that regardless of their citizenship status, non-citizens should enjoy all human rights just as formal citizens unless exceptional distinctions serve a legitimate state objective. Further relevant studies have appeared as a result of examinations of related international instruments including the Convention on the Rights of the Child (Buck 2005; Detrick 1999). Many of these studies are cited by (Van Waas 2008; Weissbrodt 2008) who also includes a detailed review of the literature on the above-mentioned aspects of law.

One central theme which links the studies on international instruments to the broader problem of human security and the practical aspects of protection is the issue of implementation and the identification of a gap between the rights that international human rights law guarantees to non-citizens and the realities they face (Batchelor 1995; Gyulai 2007; Hodgson 1993). Also relevant is the distinction between the treatment of refugees and stateless people under law and the human rights obligations of states to both populations (Anderson 2005; Batchelor 1995; Boyden and Hart 2007; Grant 2005; Weissbrodt and Collins 2006; Weissbrodt 2008). In recognition of these obligations, some practitioners have sought to examine the possibility of transforming international legal principles into law (Batchelor 2006; Gyulai 2007; Van Waas 2008). For example, Van Waas presents an interpretation of the existing international framework to explore the scope of the civil and political as well as the economic, social and cultural rights of stateless populations under international human rights laws.

Regional Studies

There have been some notable studies of regional conventions and the commitments of regional treaty bodies with respect to stateless persons and non-citizens. Several have focused in particular on the European region with an emphasis on the European Union (Batchelor 2006; Dell'Olio 2005; Shaw 2007) and the Council of Europe's Convention on Nationality; others have examined the problems of dual nationality and the challenges of state succession, most notably in the Baltic states and former Soviet Union (Barrington 1995; Bowring 2008a) (Brubaker 1992; Gelazis 2004). Other regions have featured as well, for example, the Open Society Institute has published the influential Africa Citizenship and Discrimination Audit (OSI 2004). Most international legal studies that do not focus either on the development of international instruments or the expansion of European-specific jurisprudence tend to focus on selected regions. These are briefly described below.

Africa

While Africa has been the site of considerable international advocacy on issues of nationality (Blitz 2009), until recently relatively few academics have written on the subject. The most widely reported include articles on state failure and related country-specific reports on the conflict between Ethiopia and Eritrea (Human Rights Watch 2003) and the internal conflict and state collapse in Somalia (Menkhaus and Prendergast 1995; Menkhaus 1998). These writings describe the context in which nationality laws were designed and focus on issues of governance alongside discrimination and citizenship. For example, the 2003 report by *Human Rights Watch* documents how the expulsion of people from Ethiopia, who had not taken up Eritrean citizenship, led to multiple instances of statelessness. Also relevant are writings on specific communities which highlight particular problems of citizenship in Kenya where stateless people are included among refugees (Bartolomei et al. 2003) and Southern Africa where there are large populations of *de facto* stateless people (Crush and Pendleton 2007).

Americas

Historically, in the Americas where most states operate on the basis of *jus soli*, nationality issues have been less contested than in other regions. Nonetheless, certain human rights issues have attracted attention. These include important writings on racial discrimination and denial of citizenship in the Dominican Republic (Baluarte 2006; Human Rights Watch 2002; Wooding 2008). The USA has also come under scrutiny for its historical and current treatment of non-citizens (Aleinikoff and Klusmeyer 2000; Ansley 2005; Camerota 2005; Kerber 2005, 2007). In other parts of the Americas, contemporary flows of asylum seekers from the conflict in Colombia have also been the subject of academic investigation (Korovkin 2008).

Asia

There have been several important studies on stateless populations in Asia. Most of them relate to protracted situations. For example, the Biharis (Farzana 2008; Lynch and Cook 2006; Paulsen 2006; Sen 2001) and Rohingya in Bangladesh and Myanmar have featured in major investigative reports (Amnesty International 2004; Arakan Project 2008; Refugees International 2008a); the Estate Tamils in Sri Lanka have also been the subject of research (Phadnis 1967; Van Waas 2008). The expulsion of ethnic Nepalese from Bhutan has also been noted (Amnesty International 2000) (Hutt 2003) and fate of Tibetans (Hess 2006). Some studies have also highlighted the relationship between trafficking and statelessness in South Asia (Lee 2005) in addition to the particular vulnerability of women, children and other forced migrants from Burma, many of whom are Rohingya who have been coerced at the hands of criminal organisations to transit through Thailand and the neighbouring states (Anderson 2005; Arakan Project 2008; Mydans 2009; Nyo 2001; Refugees International 2004). Recently some parliamentarians have drawn attention to the several hundred ethnic minorities in Hong Kong who hold British Nationals Overseas Passports but have been unable to register themselves in Hong Kong and now remain *de facto* stateless (Avebury 2009).

Europe

Within the field of European studies, there has been renewed interest in the problems of nationality and the incorporation of non-nationals. One major tendency within a number of these studies has been their primary emphasis on legal residents (Beckman 2006) (Dell'Olio 2005; Pattie et al. 2004; Shaw 2007; Soysal 1994) and established ethno-national minorities (Minahan 2002). That said, the fate of undocumented migrants and the revision of nationality laws has featured in some excellent work. This includes reports on the resettlement of deported persons, principally Crimean Tatars, and evaluations of the Ukrainian government's efforts to reduce statelessness (Ablyatifov 2004; Uehling 2004, 2008), as well as critical studies on the barriers which Roma have faced as a result of discriminatory naturalisation requirements in the Czech and Slovak Republics (Linde 2006; Perić 2003; Struharova 1999). In addition, it is important to highlight some comparative studies (Hansen and Weil 2000) and work on nationality issues in advanced states such as Germany (Green 2000; Groenendijk and Hart 2007), Hungary (Magocsi 1997) and, in particular, Bauböck's research on ethnic Turks, the descendants of former guest workers in Germany and Austria and recent pan-European investigations of membership rights in Europe (Bauböck 2006, 2007). Research on the problem of refused asylum seekers in the United Kingdom is also serving to fill an important gap (Blitz and Otero forthcoming; Coventry Peace House 2008; Equal Rights Trust 2009a, 2009b); (London Detainee Support Group 2007, 2008, 2009; Sawyer and Turpin 2005).

The most relevant studies that relate to the problem of statelessness tend to highlight the nationality problems associated with state restoration and the treatment of ethnic Russians in Estonia and Latvia (Barrington 1995; Bowring 2008a; Fehervary 1993; Ginsburgs 2000; Hughes 2005; Kionka and Vetik 1996; Vetik 1993, 2001, 2002; Wiegandt 1995). Studies also discuss the case of the 'erased' in Slovenia – the non-ethnic Slovenes who saw their residency rights cancelled shortly after Slovenia declared independence from the Socialist Federal Republic of Yugoslavia (Andreev 2003; Blitz 2006; Dedić et al. 2003; Jalušič and Dedić 2008; Zorn 2005).

Middle East

Research on statelessness in the Middle East has identified some important instances of discrimination on the basis of nationality. Curtis Doebbler (2002) and Abbas Shiblak (2009) argue that there has been a systematic failure to apply international human rights instruments to alleviate the plight of stateless people in the Middle East. The most widely researched groups include the Bidoon (Ali 2006; Barbieri 2007; Rizzo et al. 2007) and, to a much lesser extent, the denationalised Kurds of Syria (Bryce and A.J. & Toynbee 2000; Lynch and Ali 2006). The issue of Palestinian rights to nationality features prominently, not only in regard to Israel and international law (Feldman 2008; Peled 2005, 2008; Takkenberg 1988) but also to a much lesser extent in the context of historic discrimination by Arab host states (Knudsen 2009; Mavroudi 2008; Shiblak 2006, 2009).

New Dimensions of Statelessness

Global issues and challenges have given rise to important publications that have increased understanding not only about some of the causes of statelessness but also previously under-researched populations. For example, trafficking and children have recently featured in important studies by academics and advocacy organisations such as *Refugees International* and *Youth Advocate Program International* (YAP) (Berezina 2004; Bhabha 2003; Lynch 2008). An additional global issue concerns the war on terror. Since 2001, the relationship between statelessness and the war on terror has attracted the attention of some notable scholars and journalists on both sides of the Atlantic, not least because of the practice of placing foreign nationals in indefinite detention (Bowring 2008; Brouwer 2003; Equal Rights Trust 2009a, 2009b; Hegland 2007; London Detainee Support Group 2008, 2009; Stevens 2006; Wright 2009).

Research Design and Rationale

The above literature review highlights some important gaps and provides a useful context for further investigation. This study explores the above themes to investigate the practical benefits of citizenship and the degree to which basic human rights are currently enjoyed by formerly stateless populations. It is motivated by three main research questions:

1) Has the granting of citizenship enabled individuals to access rights and resources?
2) How has the granting of citizenship enabled individuals to enhance the quality of their lives?
3) What barriers prevent people who have been granted citizenship from the full enjoyment of their rights?

The empirical basis for this study is derived from semi-structured interviews (n=60) conducted with formerly stateless individuals and a small number of policy and human rights experts as well as representatives of social service organisations in five countries: Kenya, Kuwait (and neighbouring Gulf states), Slovenia, Sri Lanka, and Ukraine. Reaching vulnerable populations is notoriously difficult, and, therefore, the research team relied upon community bodies, NGOs and social service organisations to gain access to individuals who might have been classified as effectively stateless. In order to build up a network of potential research participants, team members drew upon personal contacts in social service organisations where they were able to establish personal relationships and build up trust with potential participants, some of whom then agreed to take part in the research.

Interviewees were asked to assess the changes that the granting of citizenship brought to formerly stateless individuals. The five countries were selected as a set of diverse illustrations of sites where both domestic and geo-political considerations have shaped national policies regarding the granting of citizenship to non-citizens. In each of the five countries, indicative interviews were primarily conducted with selected individuals who had received citizenship. The purpose of the interviews was exploratory, and the questions simply sought to identify obstacles that participants had faced and to highlight what provisions might increase their sense of security.

In Kenya the research focused on the treatment of the longstanding Nubian population in and around Nairobi. In the Gulf States, principally Kuwait, interviews were conducted with representatives of the Bidoon population. In Slovenia, the research focused on the 'erased', some of the thousands of former Yugoslav nationals who did not opt for Slovene citizenship in 1992 and lost their residency rights and with that other essential rights following their removal from the Register of Permanent Residents. In Sri Lanka and Ukraine, the emphasis was placed on populations that have had many of their rights restored and these states have been hailed as success stories by UNHCR. In the Asian context, the communities concerned include some of the lower caste Dalit who are known as plantation Tamils, the descendants of former Indian labour migrants who had been brought in to Sri Lanka during colonial rule to work on the tea plantations in the centre and north of the country. In the case of Ukraine, the focus was on the return and repatriation of Crimean Tatars from Central Asia, above all Uzbekistan, to Ukraine during the 1990s. Individuals included the descendants of those who had been deported to Central Asia in the 1940s and whose nationality status was left in question following the demise of the Soviet Union.

This study proceeds through three sections: a critical review of the development of international law and the establishment of human rights instruments to prevent and reduce statelessness followed by an analysis of the gaps in the international legal framework relating to the protection of stateless persons; presentation of five case studies; an evaluation of the benefits of citizenship with further recommendations to ensure that the human right to a nationality and associated social and economic rights can be enjoyed by all.

Notes

[1] See UN General Assembly, 'Convention Relating to the Status of Stateless Persons', (1954).
[2] See UN General Assembly, 'International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families', (1961).
[3] To date, 63 countries have become party to the 1954 Convention relating to the Status of Stateless Persons, and 35 countries have acceded to the 1961 Convention on the Reduction of Statelessness.
[4] The term "Human Security" appeared in mainstream development circles as a result of the 1994 Global Human Development Report. It was the subject of a 2003 Global Commission study co-chaired by Sadako Ogata and Amartya Sen who popularized the concept through his writings, above all the Nobel Prize winning book *Development as Freedom*.
[5] http://www1.umn.edu/humanrts/demo/noncitizenrts-2003.html
[6] See also the report on denial of citizenship for the *Advisory Board on Human Security and European Policy Centre,* C. Sokoloff, 'Denial of Citizenship: A Challenge to Human Security', (New York: The Advisory Board on Human Security, 2005).
[7] Other means of documentation are also increasingly important and may act as substitutes in some developing country contexts. See C. Vandenabeele, 'Establishing Legal Identity for Inclusive Development: Bangladesh, Cambodia, Nepal', (Cambridge, Massachusetts: Kennedy School of Government, Carr Center for Human Rights Policy and Committee on Human Rights Studies Harvard University, 2007) and C. Vandenabeele and C.V. Lao (eds.), *Legal Identity for Inclusive Development* (Manila: Asian Development Bank, 2007).
[8] See, for example, R.A. Elman, 'Testing the Limits of European Citizenship: Ethnic Hatred and Male Violence', *NWSA Journal,* 13/3 (2001), 49-69.
[9] See the widely cited R. Cohen, 'Citizens, Denizens and Helots: The Politics of International Migration Flows in the Post-War World', *Hitotsubashi Journal of Social Studies* 21/1 (1989), 153-65.
[10] See J.A. Goldston, 'Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens', *Ethics & International Affairs,* 20 (2006), 321-47.

CHAPTER 2

NATIONALITY AND RIGHTS

Laura Van Waas

Introduction

In the autumn of 2003, a law was passed by the Sri Lankan parliament that promised to change the lives of several hundred thousand of the country's inhabitants: the *Grant of Citizenship to Persons of Indian Origin Act*. This impressive piece of legislation aspired to bring an end to the marginalisation, disenfranchisement and exclusion of the 'Hill Tamils', who had lived in a condition of statelessness for many decades, by granting them Sri Lankan nationality.[1] In time, reports came in of people who had benefited from the new law, and who explained in their own words what this policy meant:

> I was really thankful when my national identity card arrived because it allowed me to travel to Colombo and find work here. I am earning much more than I would have if I stayed on the estate.[2]

The resolution of cases of statelessness through the (re)instatement of the bond of nationality with a state can evidently have a positive impact upon the individual's enjoyment of rights and quality of life; it can put an end to years, even a lifetime, of exclusion and abuse. But is this always the case? And to what extent does the formal acquisition of a nationality put an end to the difficulties experienced by previously stateless persons? These are the questions that guide the case studies in the chapters to come, where the situation of these new citizens of Sri Lanka and that of other populations whose statelessness has been addressed, is investigated in detail.

However, another question underlies those that were presented above; a more fundamental question about nationality and rights: in the contemporary human rights environment, to what extent is nationality (still) relevant to the enjoyment of rights? In order to better understand the findings of the case studies that are presented later in this book, it is important to be aware of the role that international law actually attributes to nationality today—the extent to which the stateless fall into a 'protection gap' that is, or should be, remedied by the acquisition of a nationality. This subject is the focus of the present chapter which looks at the trend towards the denationalisation of protection that is apparent in the development of modern human rights law, analyses how this same international legal framework addresses the specific plight of the stateless and discusses those areas in which the stateless may, indeed, find themselves excluded from the enjoyment of rights until their actual *statelessness* is resolved.

The Development of Human Rights Laws and the Denationalisation of Rights

Following the atrocities of the Second World War, the newly formed United Nations determined that the responsibility for the protection of people's rights and freedoms could no longer be wholly entrusted to domestic legislation and institutions. Historically, states have

bestowed certain privileges—as well as duties— upon their citizens.[3] Until World War II, it was generally left to each state to delineate and guarantee such rights through their own domestic arrangements.[4] However, the acts committed by the Nazi government in Germany were proof that municipal law could, all too readily, be manipulated to become a weapon of persecution and that state authorities could become the agents of such persecution. The United Nations therefore set itself an *international* agenda for protection, committing time and resources to the agreement of a catalogue of rights that were to be respected by *all* governments alike. This marked the birth of the contemporary human rights framework.

The earliest instrument to be promulgated was the Universal Declaration of Human Rights, which continues to inspire the contours of universal and regional human rights regimes to this day. The Declaration opens with the important proclamation that "all human beings are born free and equal in dignity and rights".[5] While this powerful sentiment is not new, its inclusion in the Declaration is an affirmation that this philosophy lies at the heart of international human rights protection. This means that the Declaration is not only a compilation of rights that all governments pledge to respect, it also houses rights to which we are *all* entitled on the grounds of our membership of the 'human family'.[6] For instance, *no one* shall be held in slavery or servitude; *no one* shall be subjected to arbitrary arrest, detention or exile; *everyone* has the right to freedom of thought, conscience and religion; and *everyone* has the right to a standard of living adequate for the health and well-being of himself and his family.[7] These are just some examples of how, from the starting point of "all human beings are born free and equal in dignity and rights" the international community elaborated a catalogue of standards to be enjoyed by everyone, everywhere, on the basis of the simple fact that they are human beings.

In other words, the development of human rights law heralded both a move towards universally recognised rights as well as the possible *denationalisation* of rights. Previously, states were largely concerned with the enjoyment of rights by their own citizens—be it through domestic legal arrangements or the exercise of diplomatic protection abroad. The advent of human rights law initiated an uncoupling of nationality and rights. Instead of citizenship being the basis for the enjoyment of rights, "the principles of human rights would maintain that being human is the right to have human rights".[8]

The diminished relevance of nationality and the broad notion that *citizen's* rights have made way for *human* rights is reflected across the full spectrum of human rights instruments. Thus, the UN Human Rights Committee commented that:

> the rights set forth in the [International Covenant on Civil and Political Rights] apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.[9]

Other bodies have echoed this observation in their own statements on the application of human rights instruments. The UN Committee on the Rights of the Child, for instance, has declared that:

> the enjoyment of rights stipulated in the [Convention on the Rights of the Child] is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children…irrespective of their nationality, immigration status or statelessness.[10]

Herein lies the first signs that, thanks to the influence modern human rights law has had on the relationship between nationality and rights, the position of those individuals who lack any nationality – the stateless – is far less precarious than it once was.

Indeed, there is now case law confirming this development. For example, over the past decade the European Court of Human Rights has had numerous complaints brought before it by stateless persons. In each case, the Court opens the description of the facts by noting that the applicant is stateless. This finding has no subsequent impact on the admissibility of the claim since the Court need only determine that the violation occurred within the jurisdiction of a state party to the European Convention on Human Rights. The nationality of the applicant is not deemed relevant.[11] Thus, in the case of *Al-Nashif v. Bulgaria,* the stateless Mr Al-Nashif makes a successful appeal against the violation of his right to be free from arbitrary detention, his right to the enjoyment of family life and his right to an effective remedy.[12] Moreover, alongside such opportunities for stateless persons to access individual complaints procedures in order to effectuate their rights, human rights supervisory bodies have taken an active interest in monitoring the treatment of stateless persons in countries across the globe. There are countless examples in which the enjoyment of rights by non-nationals generally, as well as stateless persons specifically, has been subjected to scrutiny and commented upon, for instance, in the context of periodic reporting by states to the UN treaty bodies and other human rights supervisory apparatus.[13] In sum, the protection of the stateless has become an integral part of overall human rights protection and stateless individuals can rely on the international legal framework in the same way as persons who do hold a nationality.

Statelessness and the 'Human' in Human Rights

So far in this section, a very positive picture has been painted of the human rights framework as a tool for the protection of the rights of stateless persons. However, as suggested in the introduction, this is not the full story. While the majority of human rights are, indeed, guaranteed under law to everyone, regardless of nationality, this is not the case across the board. There are a number of standards that have been formulated in such a way as to call into question the inclusiveness of the term 'human rights'—suggesting that the denationalisation of rights remains an incomplete process. There are, in fact, still a number of *citizens* rights dressed up as *human* rights.

The first and most evident example of this phenomenon is the right to participate in government. For instance, in article 21 of the Universal Declaration, this political right—which includes the right to vote, to stand for election and to work in public service—is formulated as follows: "everyone has the right to take part in the government of his own country". While the norm addresses itself to 'everyone', this provision still stands out from other human rights standards, because it is only guaranteed with respect to one's 'own country'. And since the notion of 'own country' is generally deemed to refer to the country of nationality, this proviso that pretends to be merely a jurisdictional technicality, actually operates as an exclusion clause for those who have no country, the stateless.[14] Thus, human rights law as it stands today does not provide the stateless with any claim to the right to participate in government.

The human rights regime admits a similar limitation of the enjoyment of rights by the stateless in relation to the freedom of movement, which includes the right to leave, the right

to (re)enter and the right to remain in a state. In a number of human rights instruments, such as the European and American conventions, the right to (re)enter and the right to remain are granted to everyone with respect to the territory of "the state of which he is a national".[15] Elsewhere, individuals are guaranteed the right to (re)enter and remain in their 'own country' —which is again, in principle, understood to refer to the country of citizenship. So, while citizens enjoy the right to (re)enter and remain in their country of nationality, states remain free to "set the conditions for entry and residence of aliens [and retain] the right to expel them".[16] An individual may, therefore, be refused admittance to—or be expelled from—a state of which he is not a national.[17] Where the stateless are concerned, that is, *every* state. The stateless are, once more, the victims of a hidden exclusion clause and find themselves without any automatic and unqualified right to (re)enter or remain on the soil of *any* state. Moreover, in the absence of a right of (re)entry, the third component of the freedom of movement – the right to leave – also becomes a practical impossibility. The stateless are left without the ability to travel internationally as well as without a country that they can rightfully call home.

A third area in which human rights law plainly allows for restrictions to be placed on the enjoyment of rights by the stateless is that comprised of 'economic rights'. In one of its opening articles, the International Covenant on Economic, Social and Cultural Rights (ICESCR) proclaims that developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.[18]

Developing states are hereby expressly permitted to restrict the *economic* rights of non-citizens, including stateless persons, on their territory. Neither the expression 'developing country' nor the phrase 'economic rights' are explained—not elsewhere in the Covenant nor in the comments and jurisprudence of the Committee on Economic, Social and Cultural Rights—which leaves questions about the scope and application of this article. Nevertheless, this provision is another example of how, in spite of the overall trend towards denationalisation of rights under human rights law, there are areas in which the stateless may still be excluded from the full enjoyment of rights.

Furthermore, even where the human rights framework *does* espouse rights that can and must be enjoyed by everyone, including the stateless, there is no guarantee that nationals, non-nationals and stateless persons will always enjoy such rights on equal terms. Indeed, although the general principles of non-discrimination, equality before the law and equal protection of the law are absolutely central to the human rights system as a whole, distinctions between citizens and non-citizens are not necessarily outlawed under these standards. On the one hand, for instance, the Convention on the Elimination of Racial Discrimination does not cover "distinctions, exclusions, restrictions or preferences…between citizens and non-citizens".[19] On the other hand, the Committee charged with overseeing the Convention has declared that:

> under the Convention, differential treatment based on citizenship…*will* constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of that aim.[20]

Whether a distinction based on citizenship would pass muster or not therefore depends on the specific circumstances at hand—which instrument, which right, which facts. Such

distinctions are not by definition prohibited, and the leeway that is thereby left to states may have a far-reaching impact on the (equal) enjoyment of rights by stateless persons.

In view of the foregoing observations, it is fair to conclude that the notion of human rights as rights belonging to *all* human beings, regardless of nationality or statelessness, is not beyond question when the human rights framework is subjected to a more thorough analysis. In particular, the situation of the stateless—the lack of a bond of nationality with any state—places some doubt on the inclusiveness of the term 'human' in human rights. Interestingly, the human rights framework itself recognises this apparent flaw and attempts to remedy it by promulgating, among the rights to be enjoyed by everyone, the right to a nationality.[21] This is, in itself, a confirmation of the enduring role of nationality in the exercise of rights, even in the contemporary human rights era. If the right to a nationality were fully realised, then no one would be without this legal bond and unable to access the related rights. Yet statelessness is an enduring—if not growing—phenomenon, afflicting many millions of individuals worldwide. For them, the incomplete denationalisation of rights under the human rights framework, as presented above, may pose a serious threat to the enjoyment of the full range of human rights. Thus, the (re)acquisition of a nationality, putting an end to their actual *statelessness*, may indeed be the only real remedy to their vulnerability.

Stateless-specific Protection under International Law

Fortunately, the fact that, even under current human rights law, the stateless are in an anomalous and potentially highly vulnerable position has not escaped the attention of the international community. On the contrary, the United Nations has long taken an interest in statelessness and developed a pair of specialised instruments to address the issue.[22] One of these documents, the 1954 Convention relating to the Status of Stateless Persons, is devoted in its entirety to improving the standard of living of individuals who find themselves without any nationality. The other instrument, the 1961 Convention on the Reduction of Statelessness, attempts to definitively resolve the issue of the stateless as a vulnerable group by laying down concrete rules for the realisation of the right to a nationality and thereby the prevention of statelessness. In the present chapter, the 1954 Convention will be the main focus of discussion as the analysis of the relationship between nationality and rights continues.[23]

The 1954 Convention relating to the Status of Stateless Persons introduces the concept of 'stateless person' as an internationally acknowledged legal status. Thus, in its article 1, the convention determines that a stateless person is "a person who is not considered as a national by any state under the operation of its law". If an individual meets this definition—and is not disqualified from protection by one of the exclusion clauses included in the convention[24]—he is entitled to the enjoyment of the rights and freedoms set forth in the instrument. A total of 30 successive articles cover a wide variety of concerns from the freedom of religion to the right to work; from the right to housing to the protection of intellectual property. In other words, this document touches upon a large number of human rights issues, in each case providing tailor-made guarantees for the stateless.

However, it is important to be aware that in delineating the rights to be enjoyed by stateless persons, the 1954 Convention adopts a very particular technique. The convention recognises five different 'levels of attachment' that a stateless person may attain, noted here in order of strengthening attachment to the state: subject to the state's jurisdiction, physical presence,

lawful presence, lawful stay and durable residence. With increasing attachment comes access to more rights. Thus, stateless persons who enjoy the weakest form of attachment to a contracting state—those who are simply subject to the state's jurisdiction—are accorded, among other things, certain entitlements relating to access to courts and to education. The enjoyment of freedom of religion is guaranteed as soon as a person is physically present but only when such presence is also lawful is the freedom of movement within the state protected. Once lawful stay or even durable residence is achieved, the stateless person will gain access to additional rights; for example, those relating to wage-earning employment and travel documents. The enjoyment of rights therefore varies according to the relationship between the stateless person and the state in question.

A second distinctive and noteworthy characteristic of the 1954 Convention relates to the formulation of the substantive rights themselves. The standard of protection offered also differs from one right to another. The convention employs three different standards, the weakest of which is treatment at least as favourable as that accorded to non-nationals generally. This is, in fact, the minimum standard of treatment that is always to be enjoyed by stateless persons under the 1954 Convention:

> except where this Convention contains more favourable provisions, a Contract State shall accord to stateless persons the same treatment as is accorded to aliens generally.[25]

This means that, even in areas in which the convention does not provide for specific protection, stateless persons can always invoke this minimum standard. Importantly though, many of the rights that are explicitly outlined in the 1954 Convention are offered at a higher standard of treatment—either providing for treatment on a par with nationals or in the form of absolute rights (rather than a contingent standard). For instance, stateless persons are to enjoy the right to public relief on the same terms as nationals, and they are to enjoy an absolute right to legal personhood. In some cases then, the 1954 Convention resolves any potential difficulties that the stateless may experience as a result of their lack of nationality by placing them on a par with nationals or by directly attributing them certain rights.

Meanwhile, one of the other *absolute* rights elaborated in the 1954 Convention relating to the Status of Stateless Persons is also one of the instrument's most significant provisions. Article 27 determines that identity papers are to be issued to any stateless person in the territory of a state party who does not possess a valid identity document. Such papers are envisaged to fulfil two vital purposes: to establish certain facts relating to the identity of the individual and to vouch for his status as a stateless person. By providing for the documentation of identity and status in this way, the 1954 Convention ensures that stateless individuals are able to prove their eligibility to the entitlements bestowed upon them by virtue of their stateless person status (as well as their personal status). This is a critical factor in the enjoyment of rights in practice. Moreover, in the subsequent provision, article 28, the Convention also provides for the issuance of travel documents, this time to stateless persons who are *lawfully staying* in the territory of a contracting state. The so-called Convention Travel Document (CTD) is designed to function in lieu of a passport—a document that is generally unavailable to stateless persons since it is usually issued by the country of nationality. The CTD also offers proof of the stateless individual's identity and status, but it may, in addition, entitle the holder to re-enter the issuing state.[26] In providing for the issuance of CTDs—and the recognition of such papers by other state parties—the 1954 Convention takes an important

step towards the facilitation of travel by stateless persons as well as helping to ensure access to the privileges that accompany the status of the stateless person when he is abroad.

It is clear that the establishment, on the periphery of the human rights framework, of a convention to deal specifically with the rights of stateless persons is further confirmation of their position as a vulnerable group. As discussed above, the development of human rights law brought about a progressive denationalisation of rights but stopped short of rendering nationality entirely irrelevant for the enjoyment of rights. With this in mind, the international community set out specific protective measures for stateless persons in the 1954 Convention relating to the Status of Stateless Persons. The hope is that, together, the traditional human rights framework and the specialised regime of the 1954 Convention will provide an adequate legal foundation for the full and effective enjoyment of rights by stateless individuals across the globe. And indeed, with this initial perusal of the 1954 Convention, it quickly becomes apparent that the instrument covers a wide array of substantive issues and boasts a number of provisions that are absolutely key to effectively protecting the rights of the stateless. However, concerns also surface as to the adequacy of many of the substantive guarantees, especially in view of the very particular way in which these rights have been formulated. To what extent the overall international legal framework relating to the protection of stateless persons still exhibits gaps is a question that will be discussed in greater detail below.

Gaps in the International Legal Framework Relating to the Protection of Stateless Persons

The preceding sections highlighted two parallel developments within international law: the denationalisation of rights under human rights law to the effect that stateless persons are, to a large extent, able to rely on this regime in the same way as those who do hold a nationality and the establishment of stateless-specific guarantees to further promote the enjoyment of rights by the stateless. Laying these two components of the international legal framework relating to the protection of stateless persons alongside one another, it becomes possible to identify gaps that remain and thereby pinpoint those areas in which nationality continues to play a part in access to rights today.

In particular, there are the three concrete, problematic issues raised in the discussion of the contemporary human rights framework. According to that analysis, there is no guarantee that stateless persons will have the opportunity to participate in government, enjoy freedom of movement—i.e., the right to (re)enter and remain in a state—and be entitled to economic rights in developing countries. It is time to consider whether each of these questions is resolved by the stateless-specific protection offered under the 1954 Convention relating to the Status of Stateless Persons and, if not, whether there are any other relevant developments pointing the way forward.

The enjoyment, by stateless persons, of political rights is one of the topics that came up for discussion during the drafting of the 1954 Convention relating to the Status of Stateless Persons. However, rather than being focused on ensuring that stateless persons are not rendered at a disadvantage due to their lack of any nationality and coming to some agreement on an appropriate mode of political participation for the stateless, the state delegations deliberately chose not to include political rights in the Convention. Indeed, not only were rights relating directly to participation in government absent from the draft, but all attempts

to codify even the freedom of opinion and expression, or the freedom of (political) assembly—rights that can be exercised to the benefit of political activity in the broadest sense and are critical to individual empowerment—were also beaten back. States were, instead, keen to retain the right to restrict the political activity of stateless persons.[27] But this stance no longer seems tenable in the contemporary human rights environment. The possession of a nationality is certainly not a condition for the enjoyment of the freedom of opinion, expression and of political assembly. These rights are all attributed to everyone and, although the political activities of both nationals and non-nationals may be subject to restrictions in order to protect other esteemed values such as the rights of others or national security, a blanket denial of these rights to stateless persons could not be legitimated under these limitation clauses.[28]

Moreover, there are a number of persuasive arguments for giving renewed thought to finding a suitable way to offer stateless persons the right to participate in government—not least the fact that the lack of empowerment and denial of an opportunity to effect political processes through regular channels creates a breeding ground for dissent that may take a more destructive form.[29] Plus, the traditional view that allowing non-nationals to participate in government would constitute a threat to national security because of their conflicting allegiance is no longer defensible—both because the stateless do not owe allegiance to another state because they lack *any* nationality and because the dislocation of political rights from citizenship is a trend already in evidence in a number of countries around the world.[30] Nevertheless, although the human rights community is receptive to the development of what is commonly described as *denizenship*,[31] as international law currently stands, the stateless cannot rely on a right to participate in government since nationality is still a central factor in the enjoyment of this right.

The failure to settle questions related to the freedom of movement for stateless persons in the 1954 Convention relating to the Status of Stateless Persons betrays an even greater weakness of the instrument. As discussed above, the 1954 Convention attributes different rights at different levels of attachment—physical presence, lawful presence, lawful stay, etc. The opportunity to (lawfully) gain access to a state's territory and to take up residence there is therefore critical to the enjoyment of the full catalogue of rights housed in the 1954 Convention. Yet the convention omits any mention of the right to enter a state, leaving contracting parties free to refuse, detain or expel any stateless person seeking access to their soil without the proper authorisation.[32] The convention does offer certain guarantees against expulsion, protecting the right to remain and to a limited extent also the right to re-enter on the basis of a CTD, but only if the stateless person is in the country lawfully.[33] It would therefore seem that, without any nationality and the associated automatic right of entry and residence in the country of citizenship, the stateless may be passed from one state to another, kept in indefinite detention pending the possibility of deportation or be forever informally 'tolerated' without achieving a lawful status (the essential precondition for access to many of the rights housed in the 1954 Convention). In this also, there are signs of change—positive developments within the modern human rights framework that may offer a solution. The work of the UN Human Rights Committee to expand and come to a more appropriate interpretation of the notion of 'own country' when assessing a person's right to enter a state is of particular interest:

> the scope of 'his own country' is broader than the concept 'country of his nationality'…it embraces, at the very least, an individual who, because of his or her

special ties to or claims in relation to a given country, cannot be considered a mere alien.[34]

The examples that are subsequently elaborated by the Human Rights Committee include various scenarios that may arise in the context of statelessness. Thus, in cases where nationality was lost through an act of denationalisation that ran counter to a state's international obligations, where state succession created statelessness or where statelessness is prolonged due to the enduring denial of citizenship by the country of residence, the stateless person will be entitled to (re)enter or remain in that state regardless of the loss of citizenship. The main crux of the matter is establishing which state is 'responsible' for a person's (prolonged) statelessness—a task that also requires a further clarification of the international legal framework for the prevention of statelessness since these rules are key to the identification of the 'responsible' state. By further crystallising and applying this flexible interpretation of the concept of 'own country', the human rights framework can offer the answer to one of the major outstanding issues in the protection of stateless persons. This will, in turn, boost the enjoyment of other human rights guarantees and, more particularly, the effectiveness of the 1954 Convention relating to the Status of Stateless Persons.

Now to whether the 1954 Convention relating to the Status of Stateless Persons addresses concerns regarding the potential restriction of the economic rights of stateless persons by developing countries. The 1954 Convention does not decide the matter one way or the other. Developing countries do not receive any special attention under the convention, nor is a separate group of economic rights recognised. However, the convention does outline the minimum standard of treatment to be enjoyed by stateless persons with regard to a number of subjects that may be considered to fall within this category, namely the right to work, the freedom of association, the right to social security and other labour rights.[35] Of these provisions, the first two offer only the most basic standard of treatment—the stateless are to enjoy the right to work and the freedom of association on terms at least as favourable as those granted to non-nationals generally. In the event that a developing country has opted to limit the extent to which it bestows such rights on non-nationals, invoking the clause elaborated in the International Covenant on Economic, Social and Cultural Rights, the 1954 Convention relating to the Status of Stateless Persons does not stand in the way of the application of these restrictions to stateless persons.[36] However, with regards to the right to social security and a variety of other labour-related rights (such as the minimum age of employment and the enjoyment of the benefits of collective bargaining), the stateless are to be accorded the same treatment as nationals – provided that they are lawfully staying in the state. Although, again, it is unclear whether these are considered to be 'economic rights' and under which circumstances developing countries could invoke any limitations against non-nationals in their enjoyment, the 1954 Convention would seem to ensure that such restrictions are not imposed against stateless persons. In view of this mixed picture and the ambiguity of the relevant provision in the International Covenant on Economic, Social and Cultural Rights, an interpretative comment by the Committee on Economic, Social and Cultural Rights— including an explanation of the position of the stateless under this clause— is the best way to elucidate its terms and to ensure that it is not invoked to the detriment of stateless persons.

Lastly, it is necessary to consider whether the 1954 Convention relating to the Status of Stateless Persons offers clarity as to the extent to which stateless persons may be disadvantaged by a differentiation in treatment between nationals and non-nationals. Thanks to the technique adopted in the formulation of rights under the 1954 Convention, this

instrument only provides some of the answers. Thus, where the 1954 Convention determines that stateless persons are to be treated on a par with nationals—for instance with regard to the enjoyment of education, the freedom of religion and the protection of intellectual property—distinctions between nationals and stateless persons are clearly outlawed.[37] Where the 1954 Convention promulgates absolute rights—such as the right to identity papers, to recognition of legal personhood and to certain protections against expulsion—these are to be granted to stateless persons regardless of whether nationals enjoy the same protection. Distinctions between nationals and non-nationals in these areas are, therefore, not necessarily prohibited, but the 1954 Convention does demand that a certain substantive protection is offered to the stateless.[38] Finally, where the 1954 Convention provides for treatment at least as favourable as non-nationals generally—for example in the case of property rights, the freedom of association and the right to work—the standard of treatment to be enjoyed by the stateless is contingent upon the overall treatment offered to non-nationals. Such guarantees have no impact on the margin of discretion that states are afforded to treat nationals and non-nationals differently. Nevertheless, it is important to recall that under human rights law, states may only distinguish between nationals and non-nationals when they have legitimate cause to do so. Thus, even where the 1954 Convention relating to the Status of Stateless Persons does not call for protection on a par with nationals, it may not always be easy for states to justify differential treatment. In correctly applying the principle of non-discrimination, states may in fact be required to take affirmative action in favour of stateless persons:

> in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population.[39]

The uniquely vulnerable position of the stateless—as for non-nationals *everywhere*—may call for such positive measures. Therefore, whereas a distinction between nationals and non-nationals in the enjoyment of certain rights may generally be considered to be both legitimate and proportional, where this distinction affects stateless persons, the reasonableness test may have a different outcome.[40] The specific circumstance of statelessness, as it differs from the situation of nationals *and* that of other non-nationals, must be taken into account in determining the standard of treatment owed to stateless persons. To date, human rights bodies have paid too little attention to the specific plight of the stateless when elaborating on the substance of rights. It would be helpful and appropriate if, for instance, the UN treaty bodies made an effort to clarify the treatment owed to stateless persons in their thematic comments. In the meantime, the aforementioned reasonableness test, taking into account the particularities of the situation of the stateless, presents a pragmatic, flexible and fair approach to questions regarding differential treatment of stateless persons in the enjoyment of rights.

It is clear that the 1954 Convention relating to the Status of Stateless Persons does not offer easy answers to the difficult questions that the human rights framework presents with regards to the enjoyment of rights by stateless persons. In fact, the 1954 Convention skirts around many of these issues—such as the problem of determining which country is to be deemed 'home' for a stateless individual, thereby ensuring a right to live somewhere and protection from the ping-pong effect of being passed from one state to another, indefinitely. So, there are still a number of critical gaps in the normative regime for the protection of stateless persons. However, as discussed in this section, there are many clues within the overall human rights framework as to an appropriate way to resolve these issues. Until these are properly

consolidated and further developed to ensure the full and effective enjoyment of rights by stateless persons, it seems that the stateless will remain significantly disadvantaged. Only the (re)acquisition of a nationality brings with it the guarantee of access to the entire gamut of human rights.

Implementation and Enforcement of Norms Relating to the Protection of Stateless Persons

The circumstances in which stateless persons live vary greatly from one country to another, yet an impaired ability to exercise an assortment of rights remains a common complaint. Stateless persons may, for instance, be unable to go to school or university, work legally, own property, get married or travel. They may find it difficult to enter hospital, impossible to open a bank account and have no chance of receiving a pension. If someone robs them or rapes them, they may find they cannot lodge a complaint because legally they do not exist, and the police require proof that they do before they can open an investigation. They are extremely vulnerable to exploitation as cheap or bonded labour, especially in societies where they cannot work legally.[41]

This extensive range of problems that stateless persons have reportedly experienced is cause for serious concern because it does not just point to a few incidental gaps in the international legal framework where the specific protection needs that accompany statelessness have yet to be adequately addressed. Instead, it suggests a much more comprehensive crisis whereby the implementation and enforcement of the normative framework is failing. Obviously, finding ways to effectively implement and enforce human rights norms is a difficulty that is inherent in the system as a whole with violations continuing to occur ——and going unresolved— every day. Yet, in meeting the challenge of implementation and enforcement of the rights of stateless persons, there are several additional issues that cannot be ignored.

Arguably, the most influential factor in problems of both implementation and enforcement of norms relating specifically to the protection of the stateless is the absence of agreement on the *identification* of individuals as 'stateless persons'. Neither the 1954 Convention relating to the Status of Stateless Persons, nor any other international instrument, contains guidelines for the task of identification. Yet, this task is undeniably complex. In order to establish that an individual is stateless, it is necessary to substantiate that he *does not* possess any nationality—in effect, to prove a negative. This, in turn, requires coming to some understanding about the procedures to be followed and the (weighing of) types of evidence that can be submitted. And without internationally agreed upon guidelines, states are left to devise procedures and principles unilaterally, leading to a wide diversity in identification practices. Indeed, states do not have any mechanism in place for determining an individual's status as a stateless person.[42] This is likely to seriously impede actual recognition as a stateless person and subsequently the enjoyment of any rights emanating from the 1954 Convention and other relevant areas of international law.[43] Moreover, when it comes to the enforcement of the rights of the stateless by (international) supervisory bodies, the lack of clear consensus on the identification of stateless persons will also present problems for the examination and appraisal of state practice.

There are a number of avenues that could be pursued in an effort to elaborate suitable tools for the identification of statelessness. For example, a few cases have already come before international bodies in which a determination of the nationality—or statelessness—of the

applicant was necessary.[44] Although such jurisprudence is still limited, these cases offer a basic insight into how an independent authority is able to rule on the nationality status of an individual, including by looking at documentary evidence and at the content of the relevant nationality acts. Furthermore, both UNHCR and individual states are conducting nationality determinations every day in the context of Refugee Status Determination under the 1951 Convention relating to the Status of Refugees.[45] Procedures and principles for the identification of stateless persons—'Stateless Person Status Determination'—could be extracted from existing guidelines and practices in the area of refugee protection. Thus, for instance, in the context of Refugee Status Determination, the burden of proof lies in principle with the applicant, but the duty to ascertain and evaluate all relevant facts is shared between the applicant and the examiner [and] in some cases, it may be necessary for the examiner to use all means at his disposal to produce the necessary evidence in support of the application.[46] A similar principle could be adopted in guidelines for the identification of stateless persons.

A third field of international law that may prove useful is that of international claims jurisprudence. In order to decide on the admissibility of an international claim, whereby a state exercises diplomatic protection and raises a complaint against another state on the basis of an injury sustained by one of its citizens, the court or commission must determine whether the so-called 'nationality of the claim' is satisfied. According to jurisprudence in this field, (at least) four types of evidence have been allowed in the determination of the nationality of the injured party. These include not only direct proof—documentary evidence that the person is recognised as a national by the state in question—but also, for instance, proof of peripheral facts from which it can be inferred that the person is deemed to be a national by a competent state authority.[47] This existing international practice relating to the determination of nationality is another relevant source of information on how the identification of cases of statelessness could be regulated. Combined with the other areas mentioned above, and best practices derived from a study of current state mechanisms for the identification of stateless persons (where these do exist), guidelines could be extracted and laid down in an international handbook for the identification of statelessness. The elaboration and implementation of such a handbook would have a significant impact on the protection of stateless persons.

Another factor that is still seriously impeding the enjoyment of rights by stateless persons is the absence of a supervisory agency tasked with monitoring and enforcing the proper treatment of the stateless. Indeed, the specialised statelessness regime which emerged from the 1954 Convention relating to the Status of Stateless Persons has always led a somewhat isolated existence. Outside the general United Nations human rights system, it has not attracted the same type of supervisory apparatus. Whereas the International Convention on the Rights of All Migrant Workers and Members of Their Families, for instance, has its own treaty body with a broad supervisory mandate,[48] the 1954 Convention relating to the Status of Stateless Persons, has no equivalent. Each of the UN treaty bodies may consider situations of statelessness within their own substantive mandate—and many have actively promoted the enjoyment of rights by stateless populations where the opportunity has arisen, including by encouraging states to ratify the 1954 Convention relating to the Status of Stateless Persons—but none are tasked with focussing specifically on the treatment of the stateless. Meanwhile, UNHCR has been bestowed with a universal mandate on statelessness, allowing the agency to get involved wherever situations of statelessness (threaten to) arise around the world. The agency actually now has a four-dimensional mandate, working on the identification, prevention and reduction of statelessness as well as the protection of stateless persons.[49]

Nevertheless, UNHCR's operational capacity to engage in promoting the rights of stateless persons is limited, and there is no formalised procedure in place for supervising the full and correct implementation of the 1954 Convention or for the receipt of individual complaints by stateless persons. The fact that jurisprudence does already exist in which a determination of nationality status and statelessness was made,[50] as well as the existence of a plethora of mechanisms for monitoring and enforcing human rights law, is evidence that a supervisory body for the protection of the rights of stateless persons would fit in with overall developments under international law. Further consideration, therefore, evidently needs to be given to the question of international supervision of the norms relating to the protection of the stateless.

A final point to note with regard to the implementation and enforcement of the rights of the stateless relates to the doctrine of diplomatic protection. As briefly touched upon above, there is a body of international jurisprudence involving claims made by one state against another on the basis of an injury incurred by one of its nationals. Thus, if a national of country A suffers an injury to person or property at the hands of country B, then country A can bring an international claim against country B to seek some form of redress. Traditionally, the bond of nationality has formed the basis for the right of country A to exercise diplomatic protection in this manner. As a result, the stateless are typically unable to benefit from the doctrine of diplomatic protection because they can never satisfy the 'nationality of the claim' and the defendant state can call for a dismissal of the case on this jurisdictional technicality.[51] This situation is regrettable because the exercise of diplomatic protection by a state can contribute to the enforcement of international norms and thereby to the enjoyment of individual rights.[52]

One of the provisions in a series of Draft Articles on Diplomatic Protection that is currently being considered by the UN General Assembly would address this problem by establishing the legal basis for diplomatic protection of stateless persons—to be exercised by the state in which the stateless individual is lawfully and habitually resident.[53] If these articles were adopted in their present form—either as a declaration of a convention—another opportunity would be created for the effective enforcement of the rights of the stateless. Until that time, it remains within the power of a defendant state to have a claim submitted on behalf of a stateless person declared inadmissible.

Concluding Observations: Nationality and Rights According to International Law Today

As mentioned in the introduction to this chapter, when a new nationality act was adopted in Sri Lanka with a view to ending the statelessness of a sizeable segment of the population, this was heralded as an affirmative measure that would bring an end to the marginalisation and exclusion that had marked their years of statelessness. Many of the case studies presented in this book illustrate the harsh reality of statelessness, which has been summed up as follows:

> for many stateless people around the world, it is a corrosive, soul-destroying condition that colours almost every aspect of their lives.[54]

In practice then, the lack of any bond of citizenship can have a severe impact on the enjoyment of rights. As a corollary of this fact, the possession or reinstatement of a nationality brings with it the promise of improved access to rights—of an enhanced standard of living. But this study poses the question: in the contemporary human rights environment,

to what extent is nationality (still) relevant to the enjoyment of rights? In other words, is *statelessness* the crux of the problem and what difference should the (re)acquisition of a nationality make in the access to rights for those involved?

In the past, nationality has been described as the 'right to have rights' and statelessness as tantamount to the "total destruction of an individual's status in organised society".[55] In such a world, the resolution of statelessness through the (re)attribution of nationality is a decisive act that restores the 'right to have rights' and paves the way for full (re)integration into society through the exercise of these rights. However, with the advent of human rights law, the relationship between nationality and rights has grown in complexity—indeed, the very concept of universally acknowledged human rights grew from the failings of national authorities to guarantee the rights of their own citizens. The denationalisation of rights through the elaboration of *human* rights norms presents new opportunities for the stateless to access various rights, proving the traditional view of the stateless as *right*less to be outdated.

Nevertheless, the foregoing analysis of the position of the stateless within the contemporary human rights framework has demonstrated that the stateless remain, in some respects, uniquely vulnerable. Indeed, the human rights system itself seems to abhor their very existence since it severely challenges the ambition of universal enjoyment of human rights: stateless persons are, by definition, unable to enjoy those rights that are presently accorded only in relation to the country of nationality, such as key political rights and the right to (re)enter and reside in a state. Moreover, although citizenship is no longer a pre-condition for the attribution of most human rights, in practice it is often still a practical requirement for the *exercise* of such rights, for example, due to the lack of any official 'home country' in which residence rights are guaranteed or as a result of problems relating to an overall lack of documentation. Thus, where states are failing—individually or collectively—to ensure that everyone enjoys the bond of citizenship somewhere,[56] the human rights regime's assertion of universality begins to crumble unless special provision is made for those persons who find themselves excluded by the system: the stateless.

Notes

[1] The group is commonly referred to as “Hill Tamils” or “Estate Tamils” because the population is comprised largely of tea-pickers brought over by the British from India, when both countries were still ruled by the crown, to work on the plantations in Sri Lanka’s hill country. Their statelessness – and that of their descendents - springs from the independence of Sri Lanka from India and a failure, at the time to resolve their nationality status in the legislation enacted following partition. See UNHCR’s dedicated website on *Statelessness in Sri Lanka,* accessible via http://www.unhcr.lk/protection/statelessness/.
[2] Words of a formerly stateless “Hill Tamil”, as cited in S. Perara, 'Sri Lankan Success Story', *Refugees Magazine,* 147/September 2007 (2007), 20-23.
[3] Consider, for example, the concepts of freedom, equality and rights as laid down in the United States Declaration of Independence (1776) and the French Declaration of the Rights of Man and of the Citizen (1789).
[4] In fact, the only circumstance in which the protection of an individual became a question of international concern was when an injury was considered to have been committed against that individual’s person or property by a *foreign* state. In such cases, the international legal regime relating to state responsibility allowed the state of nationality of the individual to exercise so-called “diplomatic protection” and demand some form of redress for this injury. See D. Elles, *International Provisions Protecting the Human Rights of Non-Citizens: Study* (New York: United Nations, 1980).
[5] Article 1 of the UN General Assembly, 'Universal Declaration of Human Rights', (1948)
[6] So it is proclaimed in the preamble to the Universal Declaration of Human Rights.
[7] Articles 4, 9, 18 and 25 of the Universal Declaration of Human Rights.
[8] D. Weissbrodt and C. Collins, 'The Human Rights of Stateless Persons', *Human Rights Quarterly,* 28/1 (2006), 245-76
[9] UN Human Rights Committee, 'CCPR General Comment No. 15: The Position of Aliens under the Covenant', (Geneva, 1986).
[10] UN Committee on the Rights of the Child, 'General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin', (Geneva, 2005).
[11] See European Court of Human Rights, 'Slavov v. Sweden', (Application No. 44828/98, 29 June 1999, European Court of Human Rights, Strasbourg, 1999), European Court of Human Rights, 'Okonkwo v. Austria', (Application No. 35117/97, 22 May 2001, European Court of Human Rights, Strasbourg, 2001), European Court of Human Rights, 'Al-Nashif v. Bulgaria', (Application No. 50963/99, 20 June 2002, European Court of Human Rights, Strasbourg, 2002).
[12] European Court of Human Rights, 'Al-Nashif v. Bulgaria', .
[13] For instance, the Committee on the Rights of the Child reminded Iran of its obligation to “ensure that all children, including refugee children, have equal opportunities on all levels of the education system without discrimination based on gender, religion, ethnic origin, nationality or statelessness” in Committee on the Rights of the Child, 'Concluding Observations: Iran', *Committee on the Rights of the Child* (CRC/C/146; Geneva, 2005a), paragraph 496. Another example can be found in a report by the UN Special Rapporteur on contemporary forms of racism where great concern is expressed at restrictions placed on the freedom of movement of stateless Rohingya in Myanmar. See D. Diène, 'Report by the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Addendum – Summary of Cases Transmitted to Governments and Replies Received', (2007), paragraph 126.
[14] This interpretation is confirmed by the article on the right to political participation in the International Covenant on Civil and Political Rights which confers this right explicitly and exclusively to “citizens”. See also UN Human Rights Committee, 'CCPR General Comment No. 15: The Position of Aliens under the Covenant', and UN 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', (Geneva: UN Human Rights Committee, 1996a).
[15] See, for instance, article 13 of the Universal Declaration of Human Rights and article 12 of the International Covenant on Civil and Political Rights.
[16] M. Kamto, 'Preliminary Report on the Expulsion of Aliens', (New York: UN General Assembly, 2005), pages 6-7.
[17] Note that a number of other human rights norms may offer individuals a right to (re)enter or remain in a state that is not their country of nationality under certain circumstances. For example, the right to family life and the principle of non-refoulement both have an impact on the freedom of states to expel non-nationals. These provisions may also be invoked by stateless individuals but none offers the stateless a blanket right to (re)entry or residence in a state.
[18] Article 2, paragraph 3 of the International Covenant on Economic, Social and Cultural Rights.
[19] Article 1, paragraph 2 of the Convention on the Elimination of All Forms of Racial Discrimination.

[20] Emphasis added. UN Committee on the Elimination of Racial Discrimination, 'United Nations Committee on the Elimination of Racial Discrimination 2004. General Recommendation 30: Discrimination against Non-citizens', (Geneva: Office of the High Commissioner for Human Rights, 2004), paragraph 4. See also UN Human Rights Committee, 'CCPR General Comment No. 15: The Position of Aliens under the Covenant', and Human Rights Committee, 'Guye et al. v. France', *Geneva* (Comm. No. 196/1985, Decision of the Human Rights Committee Under Article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, Thirty-fifth Session Geneva, 1989).
[21] See, for example, article 15 of the Universal Declaration of Human Rights.
[22] The UN's interest in statelessness can be traced back as far as the late 1940s when a study was conducted to assess the need to adopt measures to tackle the issue, UN, 'A Study of Statelessness', (New York: United Nations, 1949).
[23] As mentioned in the previous section, statelessness remains a widespread problem – evidence that the 1961 Convention on the Reduction of Statelessness has not been fully effective. For a detailed analysis of the strengths and weaknesses of the 1961 Convention on the Reduction of Statelessness, as well as other sources of norms pertaining to the right to a nationality and the avoidance of statelessness, see Part 2 of L. Van Waas, *Nationality Matters: Statelessness Under International Law* (Antwerp: Intersentia, 2008).
[24] Similarly to the 1951 Convention relating to the Status of Refugees, the 1954 Convention relating to the Status of Stateless Persons excludes, for example, persons who are already receiving protection from a UN agency other than UNHCR and persons have committed one of a variety of serious crimes. Note that this is not the only parallel between the refugee and stateless person instruments – the two documents were developed together and adopt the same approach to the elaboration of rights. They are also substantively highly similar.
[25] Article 7, paragraph 1 of the 1954 Convention relating to the Status of Stateless Persons. Note that states are free, even encouraged, to extend additional rights and protection to stateless persons beyond the terms of the minimum standard of treatment provided for in the 1954 Convention. See article 5 of the 1954 Convention relating to the Status of Stateless Persons.
[26] Paragraph 13, section 1 of the schedule to article 28 of the 1954 Convention relating to the Status of Stateless Persons.
[27] Note that article 2 of the 1954 Convention relating to the Status of Stateless Persons – where the general obligations of stateless persons are set out – was also introduced with a particular view to affording states the opportunity to curtail the political activities of these individuals. N. Robinson, *Convention Relating to the Status of Stateless Persons: Its History and Interpretation* (Geneva: UNHCR, 1955).
[28] See article 19 of the International Covenant on Civil and Political Rights as well as, for instance, UN Human Rights Committee, 'Concluding Observations: Estonia', (Geneva: United Nations Human Rights Committee, 1996b), paragraph 120.
[29] See D. Walker, 'Statelessness: Violation or Conduit for Violation of Human Rights?' *Human Rights Quarterly,* 3/1 (1981), 107-08 and Sokoloff, 'Denial of Citizenship: A Challenge to Human Security', , page 20.
[30] In reaction to increasing levels of international migration, and thereby an expanding population of non-nationals in many countries, a growing number of states grant non-national residents the right to vote or be elected in local elections. Examples include Israel, Paraguay and Argentina. Furthermore, within the European Union, political participation is, to a certain extent, now offered on the basis of EU rather than national citizenship. C. Tiburcio, *The Human Rights Of Aliens Under International And Comparative Law* (The Hague: Kluwer Law International, 2001), pages 181-182; T.A. Aleinikoff and D Klusmeyer (eds.), *From Migrants to Citizens: Membership in a Changing World* (Washington, DC: Carnegie Endowment for International Peace, 2000), pages 51-54.
[31] See the concluding observations of the Committee on the Elimination of Racial Discrimination, 'Sweden', *Concluding Observations of the Committee on the Elimination of Racial Discrimination* (A/52/18; New York, 1997), paragraph 499 and Anonymous, 'Lithuania', *Concluding Observations of the Committee on the Elimination of Racial Discrimination* (A/57/18; New York, 2002a), paragraph 167; as well as those of the UN Human Rights Committee, 'Portugal', (Geneva: United Nations Human Rights Committee, 1997), paragraphs 322 - 326 and UN Human Rights Committee, 'Switzerland', (Geneva: UN Human Rights Committee, 2002), paragraph 76. See also article 42, paragraph 3 of the International Convention on the Rights of all Migrant Workers and Members of their Families.
[32] This is one of the ways in which the protection offered by the 1951 Convention relating to the Status of Refugees was watered down when the text was adapted to create an instrument to deal with the rights of stateless persons. Whereas refugees enjoy protection from *refoulement*, which may create an avenue for refugees to enter or legalise their stay in a state, the stateless are not provided with an equivalent guarantee.
[33] See *supra* note 26 as well as article 31 of the 1954 Convention relating to the Status of Stateless Persons.
[34] UN Human Rights Committee, 'General Comment No. 27: Freedom of Movement', (Geneva: United Nations Human Rights Committee, 1999), paragraph 20.

[35] As mentioned earlier, there is no overall consensus on the categorisation of rights as 'economic rights'. The opinion of scholars varies from a broad definition that includes all rights that are related to the process of earning a living, such as the right to work, to form trade unions, to social security and to an adequate standard of living. Others offer a narrower reading, which would include only rights related to investment or the taking part in profitable activities. See, for instance, Elles, *International Provisions Protecting the Human Rights of Non-Citizens: Study* , pages 30-34; E. Dankwa, 'Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly,* 9 (1987), 239-40, pages 239-240; Tiburcio, *The Human Rights Of Aliens Under International And Comparative Law* , chapters VI and VII.
[36] It is worth noting that in the formulation of the right to engage in wage-earning employment, the 1954 Convention relating to the Status of Stateless Persons differs significantly from its sister-convention, the 1951 Convention relating to the Status of Refugees. The latter requires states to lift restrictions on access to the labour market for refugees once certain conditions have been met. This useful and important clause was sadly dropped when the text was adapted to form the instrument on statelessness.
[37] Although it should be noted that some of the rights, which offer protection on a par with nationals, can only be invoked by stateless persons *lawfully staying* in the contracting state.
[38] Again, these rights are granted at different levels of attachment, which may have a significant impact on the ability of a stateless person to qualify for protection in practice.
[39] UN Human Rights Committee, 'General Comment No. 18: Non-discrimination', (Geneva: United Nations Human Rights Committee, 1989), paragraph 10.
[40] A concrete example of this is the right to enter one's *own country.* Whereas it is generally considered reasonable to interpret the term *own country* as the person's country of nationality and therefore to distinguish between citizens and non-citizens in the enjoyment of this right, such an interpretation may be *unreasonable* when applied to the situation of the stateless who would then have no country with regards to which to exercise this right. The development of a broader interpretation of *own country* along the lines suggested earlier is therefore an expression of the principle of non-discrimination, which includes the obligation to offer different treatment where cases are clearly different.
[41] P. Leclerc and R. Colville, 'In the Shadows', *Refugees Magazine,* 147/3 (2007), 4-7.
[42] In a 2004 survey, half of respondent states reported having *neither* a specialised procedure for identifying cases of statelessness, nor even a mechanism for identifying stateless persons within the context of asylum procedures. It is highly unlikely that the percentage is any higher among states that failed to respond to the questionnaire. UNHCR, 'Final Report Concerning the Questionnaire on Statelessness Pursuant to the Agenda for Protection, March 2004', (Geneva: United Nations High Commissioner for Refugees, 2004a), pages 26-27.
[43] In addition, the absence for a mechanism for identification of statelessness is also jeopardising the implementation and enforcement of norms relating to the prevention of statelessness since the ability to determine whether an individual would *otherwise be stateless* is a necessary precursor to the application of special fall-back provisions to avoid statelessness.
[44] For example, European Court of Human Rights, 'Tatishvili v. Russia', (Application No. 1509/02, Strasbourg, 22 February 2007, European Court of Human Rights, 2007) and Inter-American Court of Human Rights, 'Yean and Bosico v. Dominican Republic', (Series C, Case 130, 8 September 2005, Inter-American Court of Human Rights, San José, Costa Rica, 2005b).
[45] Indeed, the finding that an individual as stateless is also relevant in the context of Refugee Status Determination since, in such cases, the country of former habitual residence (rather than the country of nationality) must be identified in order to assess the risk of persecution.
[46] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/Eng/Rev.1, Reedited January 1992* (Geneva: United Nations High Commissioner for Refugees, 1992), paragraph 196.
[47] P. Weis, *Nationality and Statelessness in International Law* (Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1979), page 221.
[48] The Committee is authorised to receive complaints from states and individuals as well as to carry out a periodic review of the situation in state parties.
[49] See, for instance, UNHCR, 'UNHCR Executive Committee, Conclusion No. 106: Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons ', (Geneva: United Nations High Commissioner for Refugees, 2006).
[50] See *supra* note 44.
[51] In the remarkable *Dickson Car Wheel Company* case, the international arbitration panel voiced the situation of the stateless with regard to diplomatic protection as follows: "A state […] does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury". UNRIAA, 'Dickson Car

Wheel Co. (USA) v. United Mexican States', (UNRIAA, Vol. IV (Sales No. 1951.V.1), July 1931, 1931), page 678.

[52] For example, following the partition and independence of Eritrea from Ethiopia and the accompanying hostilities, property confiscations and expulsions, a claims commission was established to "decide through binding arbitration all claims for loss, damage or injury by one government against the other, and by nationals […] of one party against the government of the other party". Article 5, paragraph 1 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea. According to the traditional doctrine of diplomatic protection, only nationals of the two countries would benefit from these arrangements, and those persons who were rendered stateless in the partition process would be without such protection.

[53] Article 8, paragraph 1 of the International Law Commission, 'Report of the Work of its 58th Session', (New York: UN General Assembly), page 47.

[54] Leclerc and Colville, *op.cit*.

[55] Most famously by Justice Earl Warren of the US Supreme Court in United States Supreme Court, 'Trop v. Dulles, Secretary of State et al.' (356 US 86, United States Supreme Court, Washington, DC, 1958).

[56] Recall that the right to a nationality has been included in the catalogue of human rights guarantees.

CHAPTER 3

PROMOTING CITIZENSHIP IN KENYA: THE NUBIAN CASE

Abraham Korir Sing'oei

Introduction

To assess the benefits of citizenship to former stateless persons and communities in Kenya, this chapter addresses two interrelated questions. First, does the conferment of juridical citizenship make any difference to the human rights situation of individuals and groups in Kenya? To respond to this question, an analysis of citizenship from a historical, legal and policy context is undertaken. Second, how has the granting of juridical citizenship impacted on a former stateless community? The case of the Nubian community in Kenya will be evaluated.

This chapter draws on analysis of legal and non-legal material in the field of migration, international law and human rights, specifically on the topic of citizenship and its related dimensions, statelessness, and the rights of non-nationals. Media reports (which constitute important sources of information), reports by treaty bodies and the observations or conclusions of these institutions are also reviewed. This chapter also makes use of information obtained from focus group discussions and selected semi-structured interviews carried out by the author in 2008 and early 2009. The aim of this approach was to ensure, in the light of resource constraints, that the largest possible number of representatives of all the interest groups among the Nubians—women, youth, men and elders—were able to share their individual experiences. As the Nubians remain a very structured community, the researcher additionally elected to solicit the views of the Nubian Council of Elders.

Citizenship in Kenya: The Legal, Historical and Policy Debate

Kenya attained political independence from Britain on December 12, 1963. Its constitution, whose provisions on the subject of this chapter have not changed since then, identified the specific requirements that would qualify persons to access Kenyan citizenship.[1] Celebrating the constitutive character of citizenship in the context of Kenya, Lonsdale and Odhiambo, two well-reputed academics, asserted that:

> No nation has been born without having to face up to the question about who is to be included, whom excluded; about how equal the rights of citizenship can in practice be; what degree of privileged differentiation is tolerable between regions, languages and personal status; what, in any conflict of rights, it means to be subject to more than one rule of law, local and customary, national and statutory.[2]

While the above authors acknowledge the potentially exclusionary nature of citizenship, the non-discrimination norm in the constitution[3] prohibits differential treatment in the conduct of public affairs in Kenya, including on the conferment of citizenship. The constitution therefore assures that Kenyan citizenship is based on universal and inclusive values as opposed to exclusivist notions of race, ethnicity, class or gender. Chapter six of the

constitution, which deals with citizenship, has no preamble that lays out the key principles under-riding citizenship in Kenya. As such, a reading of this part of the constitution reveals only a complex architecture for the acquisition or deprivation of citizenship and its different classes. The following observations emerge from an analysis of the constitutional provisions pertaining to the acquisition and loss of citizenship in Kenya.

First, citizenship in Kenya is defined with reference to the departed colonial order. While deemed a transitional arrangement, the requirement that Kenyan citizenship by operation of law was to be accessible to "citizens of the United Kingdom and colonies or British protected persons" as defined under the 1948 British Nationality Act[4], remains confusing for at least two reasons. First, it is not clear whether Africans could be deemed 'citizens of the United Kingdom and colonies' (CUKC).[5] Second, the designation 'British protected person' (BPP) was and remains ambiguous with regard to the potential beneficiaries of such a status. It has been said though that:

> The cumulative effect of the (British Nationality Act, 1948) and the Order in Council which followed it was to confine the term (BPP) to persons who had specific connections with specified protectorates and trust territories, and those who, by virtue of local law, were subjects of named protectorates and protected states.[6]

Like CUKC, acquiring BPP status in the Kenyan context could perhaps be applicable to the Asian community which, like the Nubians, were bonded labourers for the colonial government, having been forced out of their own country to construct the Kenya-Uganda railway.[7]

The laudable aims of the British Nationality Act, 1948[8] however, when incorporated into Kenya's state succession framework were problematic for non-indigenous African groups such as the Nubians. Although Africans, Nubians were neither considered as CUKC nor BPP nor did they satisfy the onerous *jus sanguinis* requirements in the constitution. They were thereby not qualified for automatic citizenship. Indeed, this is the position espoused by the Kenyan government, which has held out for the community an opportunity to register as citizens, though an inferior citizenship as will be evident below.[9]

Second, the *jus sanginis* and *jus soli* requirements combined in section 87 of the Kenyan constitution demand that in addition to being a CUKC or a BPP, a person must have been born in Kenya as of December 12, 1963, by a parent who was also born in Kenya. In other words, to qualify for automatic citizenship, one had to be a member of a family that had lived in Kenya for at least two generations prior to 1963 while also meeting the *jus soli* requirement of having been born in the territory.

While on paper the above requirement may appear sufficiently clear, particularly for Britons and, to a lesser degree, for Asians, in practice, the implementation of this provision has been quite challenging. This is especially true with regard to African populations in the country for whom birth registration at the time, as now, was extremely low, thereby rendering them unable to provide documentation needed to prove multi-generational births in Kenya. In practice therefore, it was assumed that indigenous African communities in Kenya satisfied this requirement while the rest of the population, including the Nubians, had to provide documentary evidence to satisfy the constitutional demand. As a result, a practice emerged by which membership in a group indigenous to Kenya is the *de facto* determinant for complying with the citizenship requirements in the constitution rather than a by a case-by-

case individual determination as envisaged. Without this automatic citizenship, a generational chain reaction resulted in which a parent who was unable to meet the requirements was rendered incompetent of transmitting citizenship to their child, who, even if born in Kenya, would only be entitled to citizenship by registration or naturalization.

To ameliorate the lack of documentary proof of registration, a vetting or screening process conducted through the agency of security organs of the state was put in place but, again, only for certain communities including the Nubians.[10] Without clear rules of procedure or an evidentiary statute to govern the parameters for determining the value of individual statements, these screening committees relied on subjective considerations of the Committee members. Such committees have been accused of brazen bribery and lack of accountability.[11] On the one hand, the burden of proof on a claim for citizenship in the case of a member of a minority group is heavily tilted against such a member since, *a priori*, they must rebut the presumption that they are not citizens. On the other hand, a member of a politically dominant community in Kenya enjoys the presumption that they are nationals and are therefore better placed, even in the absence of documentary proof to demonstrate their legitimacy vis-à-vis the Kenyan state.[12]

Third, the 1963 constitution created a differentiated and hierarchical citizenship with both citizenship by naturalization and registration being markedly inferior to citizenship by birth to the extent that the former could be revoked at the behest of administrative officials.[13] In addition, the legislation designed to enable the implementation of the citizenship provisions in the constitution lacks clear procedural rules to guide the administrative decision-making process, rendering it purely a discretionary measure, often one of the easiest means towards statelessness.[14] Further, the weak protection afforded to citizenship by registration or naturalization has produced a disincentive against pursuing this citizenship regime. Instead there is more pressure to acquire an ancestry-based citizenship, hence further hardening its requirements.

Fourth, the gendered nature of citizenship is most pronounced in the context of Kenya. For instance, a non-national spouse of a Kenyan male entitled to citizenship by operation of law can only acquire citizenship by registration[15] which is fraught with uncertainty as illustrated above. Moreover, in this case, a husband and his wife will have Kenyan citizenship of completely varying qualitative character, which may imperil the right to family unity.[16] Women who are Kenyan citizens and married to either foreign diplomats or non-citizen spouses are also incapable of transmitting their Kenyan citizenship to their children.[17] Similarly women with Kenyan citizenship are unable to transmit their citizenship to their foreign born children.[18] Clearly, paternity is the locus for the granting of citizenship in Kenya.

Lastly, the Kenyan constitution does not articulate how to retain or recover lost citizenship or the specific instruments that certify one's citizenship, the latter being left to legislation.[19] What is clear, however, is that various laws adopted since independence grant special rights to citizens of Kenya. These rights include the right to work without a permit,[20] leave or enter the country,[21] vote,[22] own property,[23] carry out certain business,[24] and serve in the country's security sector.[25] It is, therefore, clear that while citizenship in Kenya is an important ingredient necessary to realise basic rights and human security and to achieve sustainable development, some categories of persons—notably women and minorities—will access it with difficulty.

Citizenship Today: Policy and Perception

The legal and political landscape of citizenship in Kenya is undergoing a muted metamorphosis. The constitution review process provides a lens through which some of the changing conceptions of citizenship may be observed, even though these changes are yet to crystallize into law. For instance, in the draft constitution of 2004, the inferiority of citizenship by registration or naturalization is no longer apparent.[26] Similarly, the gender-based discrimination in the current constitution is eliminated, and women are not only allowed to transmit citizenship to their children[27] but non- national spouses of Kenyan men also retain citizenship even in the event of divorce.[28] The draft constitution also recognizes dual citizenship[29] but maintains the status quo in relation to providing blanket recognition to current citizenship holders[30] without creating a mechanism for mediating the challenges faced by communities whose citizenship is currently doubted by the State, such as the Nubians. Moreover, by delegating to parliament the responsibility for enacting a more detailed legislation to govern procedure for acquisition, loss or renunciation of citizenship,[31] the Draft creates real fear that the arbitrariness that bedevils the current citizenship regime may be reproduced.

The 2004 draft provided explicitly for the right of citizens to a passport and other registration documents,[32] removing the arbitrariness currently attendant in the registration processes which particularly disadvantage minority communities.[33] The draft law does not, however, address the status of a child of a stateless person as such, unless such a child is abandoned, in which event, the child acquires Kenyan citizenship.[34] Adoption of the draft would fall short of international law's normative intent to avoid statelessness.[35]

Citizenship and Its Benefits: The Nubian Case

When the Nubians, a Muslim community of about 100,000 people which has resided in Kenya for well over a century, challenged its denial of citizenship before Kenyan courts in 2002 on the assertion that most of its members were being denied identity cards and passports,[36] they were making a bold statement that they could no longer stand by and accept systematic state discrimination. Originally from the Nuba Mountains in the Sudan, the Nubians in Kenya had been conscripted into the British colonial military machine, serving as guards and soldiers in the colonial conquest of local communities in East Africa and, afterwards, fought alongside the British army in the two world wars.[37] They were granted settlement in *Kibera* as a token of appreciation for their service to the British,[38] but also the convenience of Kibera served the British design to maintain the Nubians in its indentured labour, particularly as personnel in its Kenyan African Rifles.

Prior to 1963, Nubians generally perceived themselves as equal to the rest of the African communities eking out a living in the less than ideal suburbs of Nairobi. The first change they experienced in the first decade after independence was the massive influx of other African communities into Kibera, which was apparently attractive because of the informality of property rights and the accommodative Nubian culture.[39] The demographic changes in Kibera over the years have reduced Nubians to less than 10% of the total population of the area. This change is dramatically demonstrated in the political context. From the late 1960s to early 1970s the Nubians were represented by their own member of parliament, Yunus Ali, but by 2003, the Nubians could not even elect one of their own to the local authority, the lowest unit of civic representation.

Nubians have lived in Kenya for over 100 years but are not a recognized national tribe. A Nubian woman holds a photograph of her grandfather with other Nubian officers who served for the British in the King's African Rifles.

Demographic changes alone are not the single variable that can explain the increasingly vulnerable political position of the Nubians. The other significant factor is that the registration of persons program of the independent Kenyan government gradually began to take its toll on the Nubians as exposed by the interviewees whose experiences are presented in the following section. Rather than grant recognition to the members of the community by issuing them with birth certificates, identity cards, or passports, the registration centres became avenues for exclusion, especially of the younger generation. Further migration of other communities into Kibera has taken place in the context of multi-party politics, which displaced large groups of Luo and Kikuyu communities from the Rift Valley and Coast provinces in 1992 and 1997.[40] Kibera then became a sanctuary for these displaced people, and in the eyes of the government, severely skewing its demographics to the advantage of 'foreigners'. More importantly, the rise in migration into Kibera increased the pressure on social amenities to a near breaking point. At the height of the coming into power of Mwai Kibaki in 2003, for instance, a classroom in a primary school in Kibera had a child to teacher ration of 100 to 1.[41]

The other pressure faced by the Nubians emerged from the government's policy to provide low-cost public housing in the Kibera district. Consequently, more than ten forced evictions took place in Kibera between 1963 and 1994. These displacements, aside from constituting serious human rights violations,[42] have altered the geographies of human settlement in Kibera. For instance, it has been asserted that "…as many as 1,200 people live on one square

hectare, sometimes in shacks as small as nine square metres."[43] Basic necessities such as clean water, adequate sanitation and drainage are extremely scant or non-existent. The Nubians suffered the worst from the displacements; they never benefited from the state's housing program.[44]

The stereotyping and 'othering' of Nubians in public processes, has greatly hampered the community's quest for recognition.[45] For instance, in the Kenya National Housing and Population Census, the primary governmental statistical and planning instrument which is constitutionally mandated,[46] the Nubians are categorized as 'others' while the rest of Kenyan communities are specifically identified. [47] The United Nation's Committee on Economic Social and Cultural Rights has identified the socio-economic challenges of the Nubians in their non-recognition, hence recommending that Kenya should ensure the Nubians are given distinct recognition as an ethnic community with rights to ensure the "preservation, protection and development of their cultural heritage and identity."[48]

It is important to note, however, that the marginalisation of the Nubian community seems to have registered slight improvement in the last five years. The reason for this shift may include, in part, the success of the legal advocacy on the Nubian case at the Kenya courts as well as at the African Commission.[49] More immediately though, the political recognition of the Nubians came in the context of the assurances of president Kibaki in the electoral campaigns of December 2007.[50] This move was designed to politically neutralize Raila Odinga, the Orange Democratic Movement's presidential candidate, who was seeking re-election as Member of Parliament for Lang'ata constituency of which Kibera is part,[51] The Nubians were, for the first time, caught up within a high-stakes game of presidential electoral politics that became the most violent in the history of post-independence Kenya.[52]

In the aftermath of the promises made during the presidential elections, it became apparent that "government initiatives to accelerate issuance of identity cards to members of the Nubian community were more effective."[53] At the international level, the government also took up the political recognition of the community as sufficient defence against the criticism directed against the Kenyan state. For instance, while affirming the government's recognition of the Nubians and rebutting the statement of the UN Independent expert on Minorities, Jeanette Mwangi, Kenya's representative at the United Nations, informed the UN Human Rights Council of the specific programmatic approach taken by the state to resolving the challenges of the Nubians thus:

> In order to address their needs, an inter-ministerial committee had been set up to address, among other things, their nationality. This committee had begun its work through a visit all over the country, including where the Nubian communities resided. Nubians held Kenyan passports and, in some cases held public offices. It was erroneous to state that Nubians did not posses lands in Kenya.[54]

The results of these government efforts are beginning to be felt. For instance, the Nubians are now represented in vetting committees that determine issuance of both identity cards and passports.[55]As observed by the UN Committee on Economic Social and Cultural Rights, however, the Kenyan government must go beyond the rhetoric of recognition and grant Nubians clear and unambiguous citizenship.

Case Studies of Individuals

The cases discussed in this part of the chapter typify the challenges faced by many Nubians in access to identity documents and the benefits of citizenship. In most cases, the problems that need to be surmounted by Nubians are one of four types: refusal by hospital authorities to register births of Nubian children, failure by the state to issue late registration of births, onerous documentary requirements to prove citizenship, and inordinate delay.

Halima Ibrahim was born in 1978, whilst her sister Habiba Ramadan Riziki, was born in June 1979 in Kibera, Nairobi. Their mother, Hawa Ibrahim, was born in Kibera in 1954. Hawa's parents were born in Kibera, too, although her grandparents moved from Kibigori in Kisumu to Nairobi.

In 1999, Halima and Habiba applied for national identity cards but were asked to produce documentary proof that their grandfather was born in Kenya. Having neither met their grandfather nor having obtained his birth certificate, they were unable to obtain any identity documents. Because of lack of this document, Halima lost several job opportunities, including an offer to work at a three-star hotel. Habiba, in spite of her training at the *Christian Concern Tailoring School* was unable to retrieve her certificate from the school anticipating a negative impact on her pursuit for employment. Both Habiba and Halima obtained their identity cards in late 2007 without further condition, but their acquired civic recognition has not impacted their economic status which has yet to improve, although they were both able to vote for the first time. Even without employment, both women are hopeful that they can imagine a future without fear of harassment by police.[56]

Sadik Mohammed is a 27-year-old man whose application for an identity card was rejected in 2001. He is the son of Mohammed Senusi and Amina Mohammed Medi. Both of Sadik's parents are third generation Nubians in Kenya. His two siblings, Gharib Mohammed and Zahra Mohammed, aged 24 and 21 years respectively, were never even allowed to apply for identity cards. All three were given identity cards in November 2007 but bemoan the lost opportunities. Their ability to vote during the elections of December 2007 represented to them their most important civic contribution. [57]

Hawa Hamis Barkit who was born in 1928 in Nairobi applied for a passport as a matter of urgency to travel to Mecca for Hajj on January 26th, 2001, in order to fulfil her obligation as a Muslim. According to her plans, she was to have travelled on March 17th, 2001. She was granted the passport in late 2007. Now, at age 80, she feels she may not survive the journey, dashing her hopes to satisfy a mandatory spiritual obligation.

A graduate of one of Kenya's leading public universities, Adam Hussein Adam secured an offer of employment in Saudi Arabia through a Kenyan Agency, Al-Najmayn Agencies, to begin work in November 2000. He was to be paid an annual salary of US$ 36,000. However, he could not secure a passport to proceed to Saudi Arabia. To facilitate the passport process, the Ministry of Labour and Human Resources had written to The Principle Immigration Officer urging him to issue Adam a passport. Adam received his passport in 2002 with the intervention of the Centre for Minority Rights Development (CEMIRIDE), but his Saudi Arabian employment offer had already lapsed. Due to Adam's academic qualifications, which many Nubians do not have, he was able to secure work at CEMIRIDE. Last year, Adam was appointed a program officer at a leading international NGO, a job that takes him to many parts of Africa and the world.[58] Adam also feels secure in his future in Kenya.

Consequently, he has invested in property outside of Kibera, has recently married and has a daughter whose birth was duly registered without much complication.

Medina Ibrahim Asman applied for a passport in May 2002 to travel to a summer conference in Hawaii as a presenter after obtaining a full scholarship and to, thereafter, take up graduate studies at George Washington University in the fall semester but he was advised by the Immigration department in Nairobi to wait. Five years later, Medina was granted the passport, but the dream for a better education was effectively lost and with it, more potential opportunities for personal development and service.[59] Medina is now married and is involved in a small-scale business.

When retired Central Bank of Kenya manager, Ibrahim Adhuman Said, lost his national identity card seven years ago, he thought it was not of much consequence since he could always get a replacement. He was wrong. When he presented himself at the Registrar of Persons office in Nairobi, Said was armed with a photocopy of his national identity card and passport. Overnight, Said was transformed from a respected retired civil servant and community elder into an outlaw who had to defend his name and honour. "I was shuffled and tossed from one office to the next." It took him three and half years to extricate himself from becoming a nobody, despite having worked for Central Bank for 25 years as an assistant manager.[60] Said's journey to Kibera chief's office marked the beginning of a long and painful journey that would end in court.

Shafir Ali Hussein has not surmounted the administrative obstacles to obtain a birth certificate for his daughter born in 2005. He observes:

> I have one child, she is 1 ½ years old. She was born at home in Kibera. Because she was born at home, I had to apply for a birth certificate independently. I have been trying to get her a birth certificate since late December 2006 [sic: 2005?]. I went to Sheria House where I was given a form to fill. I filled out the form and took it back. I was told to go to City Hall. At City Hall I was asked for my wife's clinic card and my daughter's clinic card. I brought these cards back, but I was told that they were not stamped. I had to return to the hospital and get them stamped. I took the stamped cards back to City Hall but could not find the person I was dealing with. After some visits, I found the officer and he told me to fill in a form B3. The form asked the names of the child, the father, and the mother and the date of birth of the child. I filled out the form. I then had to take the form to the Chief and Sub-Chief for signatures. I returned the form to the City Hall on Tuesday 4 February 2006. I am waiting for a response. I do not feel good about this process. The reason they are giving me all these hurdles are because of the Muslim name (Interview with author, July 12, 2008).

Impact of Citizenship on the Community

Nubian community leaders now report that nearly one-half of adult Nubians have national identity cards, and the registration process is no longer as onerous as before.[61] The impact of legal recognition for individuals as discussed above includes improvement in their personal security, as exemplified by the reduced number of arbitrary arrests of Nubian youth, enhanced enjoyment of political rights, especially the right to vote, and in few cases, acquisition of employment. Such employment has mainly been in the private sector and rarely in government departments or in the military, a sector that no Nubian has been able to

access. The historical marginality of the community which denied them opportunities for social development (notably education access), still, however, undermines the fuller participation of Nubian individuals in the affairs of the country. The marginalisation of the Nubians is summed up by Youssef Abdalla, a community elder, and is shared by many others[62]:

> The problem we have is that the young Nubian generation does not have jobs. They ask for it in the army and police but they do not get it . . . so there are many who are unemployed in Kibera for simply being Nubians . . . and we all know you need a job to survive. We have no land and cannot vote. We have no representation and no voice.[63]

Moreover, the racial structures that frustrated Nubians pursuit for development—corruption, ethnic favouritism and poverty—still hold back personal upward progression, their recently acquired paper citizenship notwithstanding. Nubian individuals are also caught up within the broader latent discrimination of Muslims in the country.[64] In this case, their extrication from one layer of domination only exposes the Nubians to the reality that a more insidious form of discrimination still stands between them and the realization of substantive equality.

The relationship between the Nubians and the land they occupy remains tenuous, a reflection of the inability of juridical citizenship to secure stronger recognition of property rights for a minority group.[65] As suggested earlier, part of the request of the Nubian community to the Kenyan president during the campaign period was for him to exercise his authority under the law to grant 900 acres in Kibera for the Nubians. This request was accepted and assurances of quick implementation were made to the Nubians.[66] This promise has not been implemented, even though the Nubians have incorporated a Trust in anticipation.[67]

As a result of being issued with national identity cards, more Nubians were empowered to vote during the last general election. Consequently, for the first time since the early 1970s, the Nubians have two councillors in the Nairobi city council, one elected and the other nominated.[68]

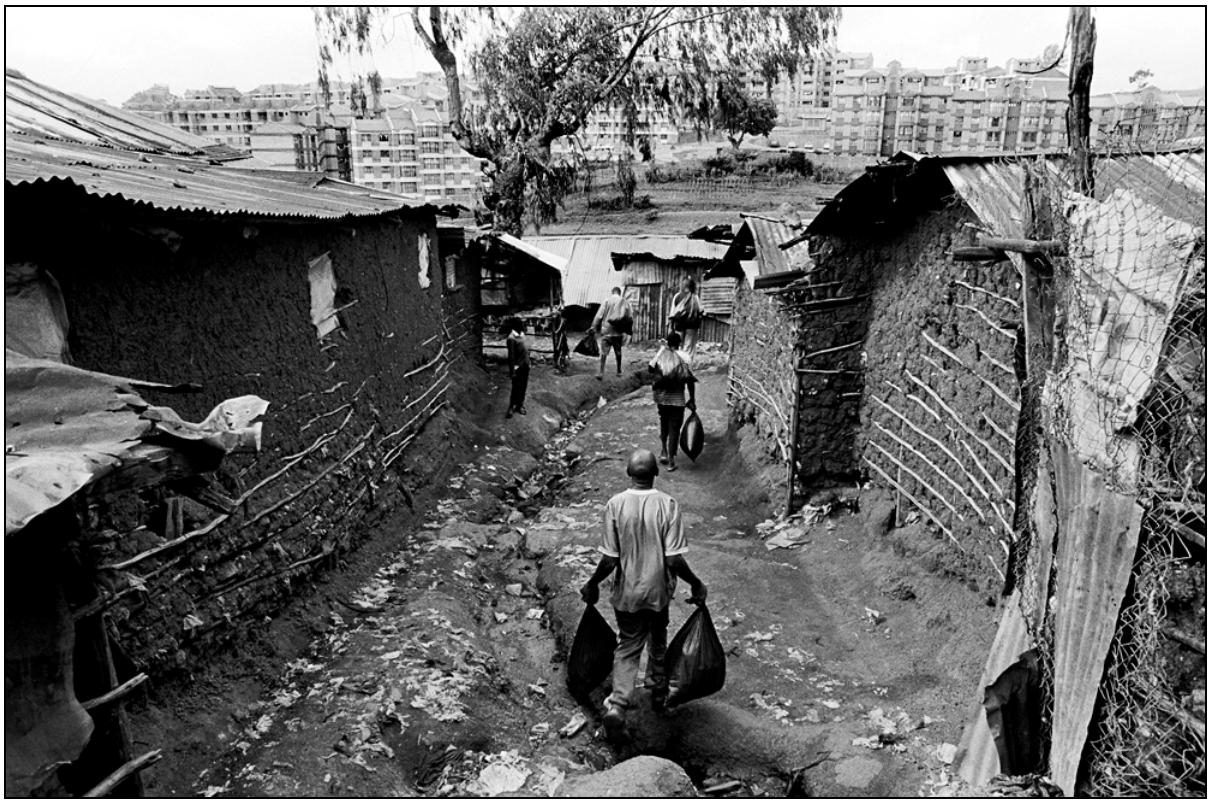
Conclusion

The bifurcated nature of citizenship in Africa[69] undermines its utility for groups like the Nubians. Although the Nubians are now recognized by the state, with at least one-half of them having procured national identity documents, they are still considered non-indigenous for purposes of social political entitlements, including public sector employment, education grants or scholarships, and land ownership.

The recognition of Nubian citizenship is moreover caught up within a ruptured state of civic mistrust and breakdown in the country with the Kenyan state imperilled by the challenges of corruption, deeper ethnic discord and mobilisation within a fragile political transition from authoritarianism to democracy. The legitimacy of this conferment may therefore be seen in this context as part of the political reformatting of the dominant forces of the state, seeking the appropriation of minorities for political gain.

The partial integration of the Nubians into the political market is not sufficient without a corresponding integration into the labour market. In addition, without clear property rights

within Kibera, Nubian destitution will continue long after the papers granting them citizenship have been signed. The state must take deliberate programmatic steps to redress years of Nubian exclusion, in addition to ensuring that their right to citizenship is fully recognized.



Unemployed Nubian youth collect garbage to earn extra money and to help clean up the Nubian sections of Kibera. Nubian youth continue to have difficulties obtaining Kenyan National ID cards.

The inability of the Nubians to contribute to the 'common good' which, in their view, entails, among other deprivations, serving in the security forces, an area of their specialisation since colonial times (and one that represents the true nature of their citizenship) confirms Anver Salojee's assertion that "The link between social exclusion and citizenship hinges on the manner in which individuals from racialised groups encounter structural and systemic barriers and are denied or restricted from participating in society."[70] In fact, while increasing recognition has generated beneficial outcomes to individual members of the community, structural barriers still consign the Nubians to the same state of poverty and destitution from which they were seeking escape through their struggle for citizenship. In this case, citizenship has not brought complete relief.

Notes

[1] Republic of Kenya, 'Constitution of Kenya', (2008), Chapter VI.
[2] A. E.S. Odhiambo and J. Lonsdale, *Mau Mau and Nationhood: Arms, Authority and Narration* (Athens, Ohio: Ohio University Press, 2003).
[3] Section 82, Kenya Constitution, *supra* note 1. The discrimination of non-nationals is a specific exception to the non-discrimination rule in the constitution. *Id.,* section 82 (4) (a).
[4] Section 87 (1) Kenya constitution, *supra* note 1; initially section 2(5) of Kenya Independence Act, 1963.
[5] Generally, it has been said that from 1948, Africans in British colonies including Kenya had shared nationality status with Britons, though obviously not the same rights. See, R. Hansen, *Citizenship and Immigration In Post-War Britain: The Institutional Origins of a Multicultural Nation* (Oxford: Oxford University Press, 2000).
[6] R. Plender (ed.), *Basic Documents on International Migration Law International Migration Law* (The Hague: Martinus Nijhoff, 1988) (Citing the British Protectorates, Protected States and Protected Persons Order, 1949 and British Nationality Act, 1948, section 30).
[7] See, e.g., R. Hansen, *supra* note 5. He asserts that Asians in Kenya had two years after 1963 to apply for Kenya citizenship, failure of which their disloyalty to Kenyan *Gemeinschaft* would be sufficiently proven. *Id.,* at 159. Asians in East Africa faced serious challenges to naturalization and the 'africanization' of the economy, culminating in their expulsion from East Africa in the 1970s.
[8] The assumption of the British Nationality Act 1948, was that all CUKC's would move smoothly from being dependent colonial subjects to citizens of an independent commonwealth country, R. Hansen, *supra* note 5*,* at 169. This did not work for either the Asians or the Nubians, *Infra* part 2.2 below.
[9] See Anonymous, 'Yunus Ali and Others (On behalf of the Nubian Community) v Attorney General of the Republic of Kenya and Others', (Civil Application No.256/2003, Nairobi High Court, Nairobi, 2003), Affidavit of the Principal Registrar of Persons, Joyce Wanjiru Mugo, in support of government's refusal to grant registration documents to members of the Nubian community, *Id.,* Paras 12, 13 and 17.
[10] See e.g., UN General Assembly, 'Report Of The Special Rapporteur on the Situation of Human Rights And Fundamental Freedoms Of Indigenous People, Rodolfo Stavenhagen-Mission to Kenya ', (New York: UN General Assembly, 2007).
[11] See generally, Kenya Anti-Corruption Commission, 'An Examination Report of the Systems, Policies, Procedures and Practises of the Ministry of Immigration and Registration of Persons (April 2006)', (Nairobi: Kenya Anti-Corruption Commission 2006, 2006).
[12] See P. Mayoyo and E. Otieno, 'Long-standing Struggle for Migingo to be Discussed', *Daily Nation,* 11 March 2009 2009.
[13] Section 94 (1), Kenya Constitution, *supra* note 1. The grounds for revocation of citizenship include disloyalty to Kenya, imprisonment for more that 12 months, support for an enemy country during a state of war, and long-term residency outside Kenya. Revocation of citizenship on penal or other grounds banishes an individual to the domain of being stateless contrary to international law.
[14] Kenya Law Reports, 'Kenya Citizenship Act (Chapter 170 Laws of Kenya)', (1967). Section 9 of the Act provides that, "The Minister shall not be required to assign any reason for the grant or refusal of any application under this Act and the decision of the Minister on such application shall not be subject to appeal or review in any court." The ousting of legal review of ministerial decision to revoke citizenship is perhaps one of the most serious blight in the Kenyan law on citizenship, and one of the most clear pathways to creating stateless persons and communities.
[15] Section 88 (2) Kenyan Constitution, *supra* note 1.
[16] Plender (ed.), *Basic Documents on International Migration Law International Migration Law*. The ICCPR (A/6316 (1966), 999 U.N.T.S. 171) *entered into force* Mar. 23, 1976. See: UN General Assembly 1966b.
[17] Section 89, Kenya Constitution, *supra* note 1.
[18] Section 90, Kenya Constitution, *supra* note 1.
[19] Kenya Law Reports, 'Registration of Persons Act (Chapter 107) Laws of Kenya, Art 1', . The registration process under the Act does not confer citizenship but merely confirms that a registration officer has been persuaded that an applicant has provided documentary and oral evidence required for the issuance of an identity card.
[20] Under the Immigration Act (Chapter 147 of 1967 as amended in 1972), non-citizens in Kenya require work permits e.g., Class A-F permits.
[21] Section 81(1) Kenya Constitution, *supra* note 1. See also, Kenya's Immigration Act, *Id.,* which provides that only Kenyan citizens and such persons as may have a valid permit have the right to enter the country, *Id.,* Art 4(1).
[22] National Assembly and Presidential Elections (see: Kenya Law Reports, 1969b)

[23] A non-citizen is unlikely to own land under the Trust Lands Act or the Group Representatives Act. Under the Draft National Land Policy (2005) the government seeks to regulate further the land rights of non-citizens. The problem of the proposed policy, however, is that the citizenship status of some groups in Kenya is questionable; hence the likelihood that the policy may have negative repercussions upon their land rights See National Land Policy Secretariat, 'Draft National Land Policy', (2007).
[24] Immigration Act, *supra* note 19, requires permits for non-nationals to carry on business in the country e.g., Classes G-K.
[25] See Second Schedule Police Act (Chapter 84 Laws of Kenya, 1961).
[26] {Kenya, 2004 #287}. While this Draft was eventually amended in Parliament before the final Draft was submitted to the failed referendum in December 2005, it is noteworthy that the provisions on citizenship remained largely unaltered- except for two provisions, whose impacts may be adverse to minorities. While section 21 of Bomas had explicitly narrowed the conditions for deprivation of citizenship to only those circumstances in which acquisition was by "means of fraud, false representation or concealment of any material fact" the Referendum Draft in section 22 seems to leave open the door for new grounds for deprivation. Similarly, section 17 (2) (b) creates uncertainty in relation to citizenship by birth in a manner similar to the current constitution. The final draft was defeated at the referendum meaning that the independence constitution is still the substantive law in terms of citizenship regulation in Kenya.
[27] Section 16, *Id.*
[28] Section 17 (2), *Id.*
[29] Section 20, *Id.*
[30] Section 14, *Id.* provides that : "Every person who was a citizen immediately before the effective date retains the same citizenship status as from that date." This is an important provision to ensure smooth transition, but it fails to recognize residual effects of the current ambivalent citizenship regime.
[31] Section 24, *Id.*.
[32] Section 13(b), *Id.*.
[33] The Somali, Turkana, Borana and Galjeel minority communities in Kenya are, like the Nubians, equally discriminated against with regard to access to citizenship. See e.g., Kenya Human Rights Commission, 'Forgotten People Revisited: Human Rights Abuses in Marsabit and Moyale', (Nairobi: Kenya Human Rights Commission, 2000).
[34] Section 19(2), *supra* note 26.
[35] See generally, Convention relating to the UN General Assembly, 'Convention Relating to the Status of Stateless Persons', . See also the CRC and African Children's Convention
[36] Anonymous, 'Yunus Ali and Others (On behalf of the Nubian Community) v Attorney General of the Republic of Kenya and Others',
[37] Makoloo Maurice, *Kenya: Minorities, Indigenous People and Ethnic Diversity*, (Minority Rights Group International: London, 2005).
[38] National Archives of Kenya, 'Kenya Land Commission Report, Evidence', (Nairobi, Kenya: Kenya National Archives, 1933). Of the Sudanese (Nubians), the report observes that "Their past service to Government entitles them to sympathetic consideration . . ..We shall se out the grounds for thinking that it would be of advantage both of themselves and Government that they should be allowed to do so (i.e., continue living in Kibera)."
[39] The Nubians believe that strangers should be accorded respect and welcomed into their territory. Interview with the Council of Elders, note 128 *infra*.
[40] See generally, National Assembly of Kenya, 'Report of the Parliamentary Commission on Ethnic Clashes (Chaired by Kenneth Kiliku, 1993-1997)', (Nairobi, Kenya: National Assembly of Kenya).
[41] See Victor Chinyama's *Kenya's abolition of school fees offers lessons for rest of Africa* available online at http://www.unicef.org/infobycountry/kenya_33391.html>.
[42] See e.g., Centre on Housing Rights and Evictions, 'Listening to the Poor', (Geneva: Centre on Housing Rights and Evictions, 2006).
[43] See Maji Na Ufanisi, 'Kibera Integrated Water, Sanitation & Waste Management Project (K-WATSAN)', (2007).
[44] For a comprehensive appraisal of Nubian land struggles in Kibera, see K. Sing'oei and A. Hussein, 'Covert Racism: Kibera Clashes: An Audit of Political Manipulation of Citizenship in Kenya and 100 years of Nubian Landlessness', (2002).
[45] Makoloo, *supra* note 37, at pg. 17.
[46] See section 42(3)(f) and 42(5) of the Constitution, note 1, *supra*.
[47] See e.g., Kenya Law Reports, 'Statistics Act, 2006, Schedule I', (2006). This law mandates the state to collect information on, among others, 'communities', but the four national census conducted since independence have always identified Nubians as 'others'.

[48] UN Committee on Economic Social and Cultural Rights, 'Concluding Observations on Kenya's Initial Report', (Geneva: Office of the High Commissioner for Human Rights, 2008).
[49] See Anonymous, 'Institute for Human Rights and Development in Africa, Open Society Justice Initiative and Center for Minority Rights Development (On Behalf of the Nubian Community in Kenya) v Kenya (decision pending).' *Communication 317/2006, African Commission on Human and Peoples' Rights, Banjul, the Gambia* (2006).
[50] Recalling this incident, Abdul Faraj, the Kenya Nubian Council Chairman says: "I was at state house (president's official mansion)… After recognizing the community, the president assured us that whatever our requests contained in the memorandum of issues submitted to him would be implemented in three days. We felt that this was a credible time-bound promise." See interview with author, August 12, 2008.
[51] The Kenyan constitution requires that a presidential candidate must also be an elected member of parliament. See Section 5(3)(f) Kenya Constitution, *supra* note 1.
[52] See Associated Press, 'Muslim Minority May Decide Kenyan polls', *Taipei Times,* December 26, 2007 2007.
[53] Interview with Isa Abdul Faraj, August 12, 2008.
[54] UN Human Rights Council, 'Press Statement of UN Human Rights Council, Conclusion of the Interactive Debate on Reports on Right to Adequate Housing and Minority Issues', (Geneva: United Nations Human Rights Council, 2008).
[55] Interview with Issa Abdul Faraj, Chair Nubian Council of Elders, June 2, 2009.
[56] Interview with author, 13 August, 2008.
[57] Interview with author, 13 August 2008.
[58] Interview with Adam Hussein Adam August 15, 2008.
[59] Based on authors' interview with Medina Ousman on August 9, 2008.
[60] Interviewed in A. Kareithi, 'Nubians Prepare for Battle to Acquire Citizenship', *The East African Standard,* 9 October 2006.
[61] Refugees International, 'Kenya Voices: A Nubian Elder's Reflections on Ending Statelessness', (Washington, DC: Refugees International, 2008b).
[62] Makoloo, note 37 *supra,*at pg 17.
[63] Aljazeera Television, 'Kenya's Nubians Fight for Rights: Interview of Youssef Abdalla', 12 August 2007.
[64] As Muslims, the poverty of Nubians in Kenya has often been interpreted within the broader context of discrimination targeted at Muslims generally. In the post 9/11 period, this distinction is becoming the more salient. See e.g., Daily Nation, 'Kenya; Uproar As MPs Allege Bias Against Muslims', *Daily Nation,* November 17, 2006 2006. In response, a tacit admission of state culpability, President Kibaki appointed a Special Action Committee on October 16, 2007 to review individual complaints of alleged harassment and/or discrimination in the treatment of persons who profess the Islamic faith with regard to security operations and take immediate action to solve problems encountered by Muslims. See Presidential Press Services, 'A Special Committee Appointed to Address Muslims' Issues', 17 October 2007.
[65] See P. Amis, 'Squatters or Tenants: The Commercialization of Unauthorized Housing in Nairobi', *World Development,* 12/1 (1984), 87-96. In Amis's sample of 95 large informal landlords in Kibera, 71 (66 percent) were Kikuyu and 24 (22 percent) were Nubian. Further, 10 of the 29 (35 percent) large landlords that they could identify were from the local administration.
[66] Kibera land technically falls under the Government Land Act, which vests all waste and unoccupied land on the president of the republic of Kenya. It is not therefore lightly to be assumed that the president's directive is a mere political statement, since it is not unusual for the president to use this power to transfer public land into private hands. See e.g., B. D. Ogola, 'Land Tenure System', in C. Juma and J. B. Ojwang (eds.), *Land We Trust: Environment, Private Property and Constitutional Change* (Nairobi, London: Initiatives Publishers, Zed Books, 1996), 85-116.
[67] Minutes of focused group meeting held between author and Nubian Council of Elders, August 12, 2008.
[68] *Id*.
[69] S. Adejumobi, 'Citizenship, Rights and the Problem of Conflicts and Civil Wars in Africa', *Human Rights Quarterly,* 3 (2001), 148.
[70] A. Salojee, 'Social Inclusion, Anti Racism and Democratic Citizenship', in T. Richmond and A. Salojee (eds.), *Social Inclusion: Canadian Perspectives* (Toronto, Ontario: Fernwood Publishing, 2005).

CHAPTER 4

FROM ERASED AND EXCLUDED TO ACTIVE PARTICIPANTS IN SLOVENIA

Jelka Zorn

Introduction

In 1991, Slovenia seceded from the Socialist Federal Republic of Yugoslavia (SFRY). From the outset, the Slovene independence process seemed democratic, transparent, and respectful of human rights and minorities. However, ethno-nationalist sentiments would eventually find their way into policies regarding citizenship and the treatment of foreigners [aliens]; the result was that thousands of long-term immigrants[1] from other republics of the former Yugoslavia as well as some Slovenes were not only left without citizenship in the new Slovene state but were also deprived of all statuses and rights—including even the most basic human rights that they had previously enjoyed.

The economically motivated migration to Slovenia had begun as early as the 1960s, but it was not until the 1970s, and especially the 1980s, that these immigrants, who represented territorially dispersed communities without political demands, settled with their families and became visible in Slovenia (Mežnarić 1986). When Slovenia declared its independence in 1991, these communities became the implicit target of the nationalist sentiment embedded in the citizenship and aliens' legislation of the new state. While secession legislation made it possible for the majority of these immigrants to become Slovene citizens,[2] many were less fortunate. Most troubling was that after secession a host of administrative procedures were used to strip those who did not apply for citizenship of their social, economic, and political rights, giving rise to a new social category of 'erased' persons.

The term 'erasure' was coined by the journalist Igor Mekina in 1994[3] to describe a measure whereby, following the country's independence, some 25,671 persons who did not opt to become Slovene citizens or had been refused citizenship were secretly erased from the Register of Permanent Residents of the Republic of Slovenia by the Ministry of the Interior and, subsequently, were deprived of their acquired rights.[4] The term erasure was then used extensively by the Helsinki Monitor in their human rights advocacy work over the second half of the 1990s (Mekina 2008). In 1999, it appeared formally in the Slovene Constitutional Court decision.[5] From 2002 onwards, some ten years after the state action took place, the term was popularised by the erased themselves when they began an energetic campaign of political action (Beznec 2008; Pistotnik 2008). Notably, following the erasure, the victims did not have to cross state borders to find themselves in a new and unpredictable legal situation. On the contrary, one could say that the borders 'crossed them.'

In a symbolic sense the erasure can be viewed as an administrative act of 'punishment' for an alleged failure to assimilate and demonstrate loyalty towards the new state (Beznec 2008; Zorn 2009a).[6] Before Slovenia's secession, immigrants from other republics of the SFRY were often identified as 'others' on the basis of their ethnicity; however, in the new sovereign state of Slovenia, both their ethnicity and new status as non-citizens were treated in a highly negative way.

The oppression that the erased faced was not limited to the political sphere but encompassed a wide range of concrete, existential rights including employment, access to health care (including reproductive rights), education, social assistance, mobility, legal security, personal safety (freedom from deportation and detention), family matters and housing. The production of *de facto*, and sometimes *de jure*, statelessness was not only a temporary side-effect of secession, this lack of legal status was in fact reproduced and excused for over a decade while Slovenia was, and still is, internationally praised as the only 'success story' in the territory of the former Yugoslavia (Dedić et al. 2003). Even today, certain political parties in Slovenia persistently use hate speech when referring to those whose legal status was revoked by the state, namely the erased.[7]

This chapter presents a detailed analysis of the erasure and its effects as well as a critical evaluation of attempts to resolve this problem. The harsh exclusion faced by those who remained without citizenship and residency status in the new Slovene state will serve as a backdrop for an examination of the meaning and benefits of restoring citizenship (and residency rights) to the affected population. The empirical section is based on the author's involvement in research of the phenomenon known as the erasure and the campaign of the erased over more than a decade (Dedić et al. 2003; Zorn 2005, 2006, 2007, 2008, 2009a, 2009b) and draws from interviews conducted between October 2007 and July 2008.

Slovene Secession and Initial Citizenship Policy

In the Slovene example, the problem of *de facto* statelessness is associated with long-term immigrants who did not become Slovene citizens during the Slovene secession from Yugoslavia and were consequently erased from the register of permanent residents of the Republic of Slovenia in 1992. To understand the erasure, composition of citizenship laws from before and after the secession must be examined. This concrete policy in the case of newly designated non-citizens was not based on the law and the Constitution but, in fact, on a *lack* of legislation—specifically, on the legal void created by the new Aliens Act. Historically formed notions of nationhood, based on ethnic belonging, that were widespread during the secession also played a role. Ethno-nationalist sentiment grew alongside the founding documents of the state, written in the spirit of political correctness, and, as such, emphasising egalitarianism and a civic form of nationalism (Bajt 2003, Zorn 2009a).

With the disintegration of the SFRY in 1991, Slovenia became the first republic to establish itself as an independent state.[8] According to the 1991 census, 88.3 percent of residents identified themselves as ethnic Slovenes, suggesting that approximately ten percent of the population had emigrated from other areas of the SFRY (Croats, Serbs, Bosnians, Albanians, Macedonians, and Montenegrins).[9]

In 1991, the initial designation of Slovene citizenry was defined by Articles 39 and 40 of the Citizenship of the Republic of Slovenia Act.[10] The provisions of this Act derived from the 1974 SFRY Constitution and subsequent citizenship laws which stipulated two layers of citizenship.[11] According to the 1974 Constitution, every Yugoslav citizen was also a citizen of a republic.[12] On the basis of this Constitution, new federal and republican citizenship acts were introduced in 1976.[13] Republican citizenship was an administrative, obligatorily ascribed status, a primer to and condition for obtaining federal citizenship. It was generally unknown to the citizens of Yugoslavia slightly awkward sentence. It seems that for Yugoslav citizens, however, republican citizenship had no legal consequences.[14] It was to become

relevant only after the SFRY had begun to come apart when, in the successor state of Slovenia, it was applied as an initial criterion for the overall determination of citizenship. Article 39 of the Citizenship of the Republic of Slovenia Act states:

> Any person who held citizenship of the Republic of Slovenia and of the Socialist Federal Republic of Yugoslavia in accordance with the existing regulations shall be considered a citizen of the Republic of Slovenia.

For long-term residents of Slovenia who were not considered citizens of the Republic of Slovenia (immigrants from other republics of the SFRY and their offspring), Article 40 defined the conditions for obtaining Slovene citizenship:

> A citizen of another republic that had registered permanent residence in the Republic of Slovenia on the day of the plebiscite of the independence and sovereignty of the Republic of Slovenia on 23 December 1990, and has actually been living here, shall acquire citizenship of the Republic of Slovenia if, within six months of the entry into force of this Act, he/she files an application with the administrative authority competent for internal affairs of the community where he/she has his/her permanent residence…

The above article was to prove central to the problems that resulted from the erasure. By the time the six-month window for submitting citizenship applications expired, on 25 December 1991, more than 174,000 people of whom approximately 30 percent were born in Slovenia applied for citizenship on the basis of Article 40 (Medved 2007:218). It should be noted that this number of applicants comprised a significant percentage (8.7) of the total population. Not all non-Slovene long-term residents were granted Slovene citizenship—some applications were rejected, and some people did not apply. Many had intended to apply for citizenship but were deterred by inaccurate information provided by employees at municipality centres (Kogovšek 2008). They were told, for example, that it was not possible to apply without a birth certificate—information which is contrary to the stipulations of the procedural law since everyone has the opportunity to apply for and, if necessary, supplement their application with the required documents in due time. Other reasons given by the erased for not applying for Slovene citizenship on the basis of Article 40 include concerns about real-estate inheritance issues and planned retirement in their countries of origin. It should also be emphasised that in the period of the six-month window for applying (from 25 June to 25 December 1991), Slovenia had not yet been internationally recognized as a sovereign state,[15] and it might be argued that its prospects were not clear at that time (Beznec 2008).

In either case, those who chose not to apply for Slovene citizenship under the lenient conditions stipulated in Article 40 believed that they would be entitled to social rights as legal aliens on the basis of their permanent residence addresses, family ties, and employment in Slovenia. The subsequent erasure from the register of permanent residents of all those who did not become Slovene citizens, a total of 25,671 persons, was impossible to predict despite growing anti-Yugoslav and anti-immigrant sentiments (Beznec 2008; Blitz 2006; Dedić et al. 2003, Lipovec Čebron 2008).

Legal Void of the Aliens Act

In addition to the Citizenship of the Republic of Slovenia Act, one of the fundamental laws of the new sovereign state was the Aliens Act.[16] Drafts of both laws were discussed at the National Assembly in May 1991 and adopted on 5 June 1991—that is, 20 days before the independence ceremony. During the discussions on the content of the new legislation, Metka Mencin, a centre-left-wing deputy of the Assembly, proposed an amendment to Article 81 of the Aliens Act. This amendment stated that immigrants from other republics who did not apply for Slovene citizenship would be issued permanent residence permits based on a registered permanent residence address or employment in Slovenia. Although the Executive Council approved of this proposal, a majority of deputies in the Assembly voted it down.[17] It was said that the matter 'does not need to be regulated by the Aliens Act, but by agreements between countries'. However, such agreements never materialized (Beznec 2008; Dedić et al. 2003; Mekina 2008; Zorn 2008)).

Ultimately, Article 81 of the Aliens Act did not outline provisions for persons who became aliens due to the secession.[18] This lack of regulation, which the Constitutional Court of the Republic of Slovenia *post festum* defined as a legal void,[19] was abused in order to invent and implement a measure which resulted in the total exclusion of those residents who did not become citizens of the new state. On the other hand, residence permits for foreigners with non-SFRY citizenship issued while Slovenia was a constituent republic of the SFRY, continued to be legal in the independent Republic of Slovenia.[20] The Constitutional Court defined this fact as an illegal discrimination since the principle of equality before the law was violated. [21] The Court also ruled that the principles of trust in the law and legal safety had been broken since the erased were not notified about the change of their permanent resident status; they found out that they had been erased solely by chance.

It was not clear how to express grievances or to whom and on what legal grounds complaints should be filed. Interviews with victims of the erasure are most revealing in this regard (see Blitz 2006; Dedić et al. 2003; Lipovec Čebron 2008; Zorn 2005, 2006, 2007, 2008, 2009a, 2009b). One participant provided the following illustration of the confusion he encountered on a regular basis when dealing with authorities following the erasure:

> In February 1992, I went to the administrative centre in order to renew my driving license. The employee said: 'Sir, you are a foreign citizen. You'll have to get an international driving license.' I replied: 'What do you mean? I passed my driving license exam here, in Slovenia. All the documentation about my exam is here and I have no intention of going and seeking a driving license anywhere else but here.' I found out that I had been erased from all sorts of registers – I don't know why and how – and without even being informed. So I didn't have a chance to complain (Josip, 27.11.2007).

The secret manner in which the erasure was conducted gave further weight to claims that the action was in itself arbitrary.

Reducing Statelessness: Ways Out of the Erasure

In the years following the erasure, approximately half of the erased acquired some form of status. Permanent resident status could be acquired under several different laws (Aliens Act[22], Temporary Asylum Act[23], Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia[24]). The road to justice was marked by three milestones. First, in 1999 the Constitutional Court ruled that the erasure was unconstitutional as was the subsequent Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia. This decision made it possible for a number of erased persons to re-acquire permanent residence permits.[25] Further, on the basis of the court's decision, the Citizenship Act was amended in 2002, with Article 19 now making it possible for erased persons to acquire Slovene citizenship under more lenient criteria than regular naturalisation rules. Second, in 2002, the erased organised themselves into a political action group and initiated a coordinated campaign to recover their rights and receive compensation and recognition. Third, in 2003, the Constitutional Court ruled on a complaint submitted by the Organisation of the Erased Residents' complaint and recognized that the Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia was also not in compliance with the Constitution. Specifically, the Court stated that the Act failed to recognize revoked statuses retroactively from the date of the erasure; that it excluded those erased persons who had been removed from Slovenia; and that the three-month window it provided for filing an application was insufficient.

In spite of the promise of the Constitutional Court's actions, the decision of 2003 has yet to be fully implemented, and the legal barriers preventing many of the erased from legalizing their status in Slovenia remain. Moreover, the erased have yet to receive an apology from the state (based on an unambiguous acknowledgement of the erasure as an unconstitutional act) and compensation for damages. Attempts at reform should, however, be noted. There was a marked turning point on 3 February 2004 when the Ministry of the Interior began issuing retroactive decisions to fill the void between the erasure and re-acquired residence permits (Pistotnik 2008). Protests, however, from opposition parties and a filed interpellation against the Minister put an end to these efforts, and, as a result, only 4,093 persons received such supplementary decisions.[26] When a new right-wing government took over in 2004, any progress towards the just regulation of the erasure was completely obstructed until the change of government in 2008. The current government, which was elected in 2008, decided to continue where the 2004 government had left off.

Current Situation

The change of government in 2008 brought new reformers into the open, and, in February 2009, the new Minister of the Interior declared that she was determined to fulfil the Constitutional Court decisions by issuing supplementary decisions retroactively to those who had already acquired permanent resident status or citizenship. Yet, only those erased persons who had already acquired permanent residence or citizenship are eligible. For the rest of the erased, the Ministry promised to propose a new law despite an unsuccessful introduction of an interpellation measure that aimed to remove the new Minister of the Interior. [27]

While the fate of the erased remains only partially resolved, the Ministry of Interior has provided the following data which helps to clarify the current scope of the problem. The

number of original erased people (i.e., those removed from the register of permanent residents on 26 February 1992) was 25,671 persons. Some of these people have since died and a further 5,360 were minors at the time of the erasure, so the governmental figures need to be adjusted accordingly.[28] It is clear that as of 24 January 2009, 7,313 persons[29] had received Slovene citizenship.[30] Hence, less than half of the entire erased population have become Slovene citizens or foreigners with reinstated permanent residence status. It is highly likely that the majority of those who have yet to receive any status in Slovenia now live abroad; regulations which would give such persons back their revoked statuses have yet to materialize. It should also be noted that for a small country like Slovenia, with an overall population of just under 2 million people, the number of people without status today is considerably higher than in other European states. As of 24 January 2009, there were 13,426 persons with no status in the Republic of Slovenia.

Methods and Findings

The following section draws upon the findings from interviews conducted before April 2009 and draws upon earlier related research. Most of the persons interviewed had already regained permanent resident status or Slovene citizenship. Interviewees were found through personal contacts and using the snowball method. Out of this group, four of the interviewees were contacted again in April 2009 to further clarify some of their comments regarding the benefits they now enjoy as citizens. Two local activists were also interviewed for this article: Sara Pistotnik[31], a researcher at the Peace Institute, and Katarina Vučko[32], who serves as a legal advocate at the Legal and Information Centre of Non-governmental Organisations. In addition, the author has also studied approximately 50 interviews conducted by the Peace Institute for research purposes.[33]

Case Studies

Vladimir is an ethnic Serb from Bosnia who arrived in Slovenia in 1976 and acquired citizenship in 1992 through Article 40. A year after receiving his citizenship, it was withdrawn and his documents were destroyed with a hole-punch. In spite of several high court rulings that the withdrawal of his citizenship was unlawful, his citizenship was not restored. During the time when he was undocumented, he experienced torture at the hands of the police who beat him up and, on two occasions, attempted to deport him. He described the second attempt which took place during the war:

> Once they failed to expel me over the Slovene-Hungarian border they took me to the Croatian border – for the second time. They should never have done that because, by nationality, I'm a Serb. They violated every convention. At the Slovene border they moved me to another car: they took me out of the police car and put me in a plain white van. The border police at the Croatian side wouldn't take me. They had to drive me back. At the Gruškovje border crossing, there's a strip of land a couple of kilometres wide that isn't in either country. There, in the middle of the two border crossings, we stopped. They pulled me out of the car. The police officer stuck an automatic rifle in my mouth and threatened that next time, he would pull the trigger – if I came back. Then he proceeded to kick me. They left me there, in that strip of land, as if to say that I should try to get into Croatia myself. I didn't know what to do (26 June 2002).[34]

Vladimir later explained that his appearance on the radio helped him to tell his story and in the end to recover his citizenship. He described the turn of events:

> My appearance on a show on Radio Slovenia, where I had a chance to present my story, helped me get back my citizenship. At the show, there was also a lawyer from the Ministry of the Interior. In 2001 they reinstated my citizenship. Now I'm a completely different person. The police don't harass me anymore. When they stop me, I give them my documents; they take a look at them, say thanks and let me go. Before, they would call me a *četnik*, and they could beat me, but now they don't say anything. Before, they knew that I was without papers and a Serb by nationality, and it was very easy for them to manipulate and abuse me (November 2007).

While several of the interviewees spoke of problems with the police, for many of the erased, the greatest challenge was receiving health care and accessing employment. The case of Esad below illustrates some of the obstacles to receiving social assistance and the benefits that the restoration of status brought this individual:

> When I got citizenship in 2003 I began to work, but I lost my employment due to my illness. I was later assessed by the disability commission. I got a disability categorisation of three, so I receive an allowance of 260 Euros per month. This is a big difference compared to the long period without documents and without any support whatsoever. I've applied for a higher category of disability, but the assessment procedure has yet to be completed.
>
> As a citizen, I am eligible to apply for a municipality apartment, and I did. I won't necessarily get one, because more people apply than there are apartments available. Citizenship means that you're not harassed, you're not vulnerable and exposed to detention or even deportation, and that you have rights. However, these rights might sometimes only be on paper, so it doesn't always mean that you can realize them. Nevertheless, citizenship has changed my life for the better, I feel safe when I go out, I travel a lot, and I receive a disability allowance. Before, I hadn't travelled for 12 years. Most importantly, I can go out in public and join various campaigns for human rights: for asylum seekers, migrant workers, the erased, against detention centres etc. As a citizen, I have the courage to appear in the front lines of these campaigns, and I have never felt discouraged from talking to the media. This activism has also changed my life for the better (24 April 2009.)

Several participants noted similarly how the restoration of citizenship or in some cases residency status affected their sense of personal safety to the point where they felt able to engage in political action for social justice.

Two interviewees (who became citizens following years of statelessness) along with the activists interviewed agreed that the quality of life of those who received a permanent residence permit and especially Slovene citizenship improved greatly. Even though some of the participants in the study still cannot access certain rights (the right to employment or public housing), they at least have a feeling of basic security, that they 'belong', and like Vladimir above, that they will no longer be threatened by the police and exposed to detention and deportation. Participants generally claimed that they felt their lives will take a turn for the better. The following excerpts illustrate this conclusion in detail:

> Getting citizenship is like getting back your identity. Even the dead have identities; on tombstones are the names of the people buried below. When we were erased, we didn't exist as persons, but only as bodies – we were neither dead nor alive. Now I feel that I'm acknowledged as a person again. I can identify myself by presenting a personal document. And the police leave me alone and I'm no longer oppressed by administrative employees since I no longer have to go to the aliens and naturalisation offices (Safet 24 April 2009).

Another commented:

> I believe that being a citizen means a hundred percent change – in every aspect of my life. I feel safe now, I can go wherever I wish knowing that I can always return home. If you have citizenship, you can walk the streets relaxed and calm – the police cannot harm you. Before I felt like a criminal, because I didn't have documents. It was illegal to live like that, I was aware of that, and I needed to be careful all the time. The change from before to now, when I have citizenship, is total, I think, hundred percent.. Now it feels different when I talk to people, their relationship towards me has changed. Before, they would blame me for not being capable of sorting out my situation with regard to citizenship status. Now I feel safe, and I can easily talk to anybody, I'm taken seriously. It is a huge change (Vanja 20 April 2009).

Analysis

In the case of Slovenia, there are two statuses, or 'layers', of inclusion and accessibility to social and other rights: citizenship and permanent residency (for non-citizens).[35] The erased were excluded from both. As the data from the Ministry of the Interior record, the ways in which people were able to rely on particular legislation to receive status affected the degree to which they could integrate and interact in Slovenian society. As the above official data reveals, many erased persons who have re-acquired permanent residence status have also managed to naturalise. Those, however, who cannot naturalise report two key obstacles: insufficient income (they or their spouses lack proof of the permanent means to support themselves) and failure to pass the Slovene language exam (Lipovec Čebron 2008b).

Others however face even greater obstacles and are effectively barred from resolving their situation. While campaigning and conducting research on the issue of the erasure, the author and her colleagues interviewed persons who had been erased and were living in Slovenia, Bosnia and Herzegovina, Serbia, Germany and Italy; these individuals cannot re-acquire their status as permanent residents in Slovenia and, as a result of the erasure, many have not been able to return to Slovenia (since they crossed the border in 1991 or in 1992) because the border police will not let them re-enter the country.

Another group without any kind of status is found in the tiny minority of individuals who have remained in Slovenia since the day of the erasure and are undocumented. In principle, these individuals have the right to acquire a legal status under the Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia.[36] However, due to practical reasons which the legislature failed to take into consideration (such as lack of foreign citizenship and a passport), they cannot register their alien's status in Slovenia.

The situation of statelessness has persisted in situations where an erased person lacks travel documents and therefore cannot legally travel abroad (to his/her country of origin) in order to obtain foreign citizenship and documents. In a number of cases, these persons have lost all ties to their countries of origin (i.e., former Yugoslav republics), and do not even have an address which could serve as a basis for requesting citizenship in these countries. Nor can they obtain the required foreign documents at the embassies of their countries of origin in Slovenia, because embassies provide services of this kind only for citizens legally residing in a country.[37]

Benefits Based On The Status of Permanent Residency

Those who have regained the status of permanent residents can claim the following social rights stipulated in various sector-specific laws:

- the right to permanent residence in the country: once a permanent residence permit has been acquired, the person in question no longer needs to spend money and time gathering documents; they no longer need to pay fees and provide costly notarised translations of personal documents in order to prolong temporary residence permits;
- access to health care on the basis of health insurance;[38]
- access to the educational system;[39]
- access to employment, irrespective of the situation and conditions in the labour market;[40]
- the right to a state pension—persons who have no other source of income, are 65 years of age or older, and have had a permanent address in Slovenia for at least 30 years (between their 15th and 65th year of age) are entitled to state pensions;[41]
- the right to family integrity—however, aliens who possess a residence permit and would like to bring their family (spouse and/or children, parents only if the alien in question is a minor) must submit evidence of sufficient funds to support those immediate family members who intend to reside in the country;[42]
- the right to receive social assistance on equal terms with citizens;[43]
- the right to free legal aid;[44]
- safety from detention in the Detention Centre and expulsion from the state;
- the right to return to their homes in Slovenia if they cross state borders (for example, they can travel to their country of origin and return to their home in Slovenia).

Benefits Based On Citizenship Status

A wider spectrum of rights is available to those who have acquired Slovene citizenship. Besides the social rights listed above, citizenship confers the following additional rights:

- the right to the reimbursement of basic health insurance, if a citizen is unemployed and cannot afford to pay for it himself/herself (health insurance is reimbursed by their municipality);[45]

- the right to non-profit rent apartments and municipality housing facilities;[46]
- political rights (the right to vote and to be elected in general elections);[47]
- the right to carry a Slovene passport.[48]

During the period of transition from state socialism to the current socio-political system and sovereign nation-state, all citizens, including children, had two additional rights pertaining to the distribution of collective property—collective property was nationalised (i.e., transferred to the ownership of the state) and then transformed into private property. First, every citizen received a certificate in order to become a shareholder. Second, in the case of apartments under non-private ownership, users had the right to buy the apartment at a non-commercial price, thereby converting it into private property. It should be noted that, for the distribution of collective property, nationality was key (beneficiaries were citizens), regardless of participation in the production of this property. This means that children with citizenship were also beneficiaries—they received certificates—although they did not necessarily play a part in the production of this property. On the other hand, the erased were completely excluded from sharing the collective property although they participated in its production.

Evaluating the Benefits of Acquiring Status

In the years following the erasure from the Register of Permanent Residents, many of the affected persons filed complaints and sought justice at various state institutions such as the Ministry of the Interior, the Slovene Ombudsman, the President of the State, and the courts. These were individual actions, since the manner in which the erasure was implemented kept its victims isolated from one another. Legal labyrinths were dealt with on the individual level and the term 'erasure' did not exist to inform the victims of what had actually happened. Since they were not allied, they were not able to recognise the systematic nature of the cancellation of their individual statuses (Blitz 2006; Dedić et al. 2003; Zorn 2005).

One interviewee, for example, recalled that learning about the erasure on television and contacting other erased persons was a turning point in her 'post-erasure' life:

> I felt as if I had wings. I felt like the pain was going to literally fall from my body, I felt alive again and that the future exists, that there is a light at the end of the tunnel. Finally this injustice had come out, it had been revealed! I was not alone, I wasn't the one who screwed up; I thanked God many times for this (Andreja, 2 February 2008).[49]

Externalising responsibility and learning about the magnitude of the problem did not only bring about the psychological potential for change in individuals (feelings of relief and empowerment); a number of cases reveal how this change found its expression in political activism:

> There are many problems in our country. One cannot remain passive. From nothing comes nothing. So it happened that now, when I'm older, I take to the streets [attend protests]. It might sound strange or even ridiculous that now, as seniors, we attend street protests and rallies, but I feel it makes me stronger, it give us new heart. It's a small contribution that I have to offer – my participation; but I hope this has at least a small effect in changing things for the better (Vera 5 December 2007).

In December 2008, at the first national conference on the erasure,[50] there was a panel made up of four speakers (two men and two women)[51] who experienced the erasure from the register of permanent residents in 1992 and were actively involved in the campaign. Instead of reiterating the ways in which they had been excluded, they were asked to discuss the benefits of being politically active: why they became active and how they were introduced to the campaign; what being active means to them and how they feel now; and the results of their campaign. Their replies and interviews with other erased persons and two local activists make it possible to divide the results of the campaign into two categories: collective or societal gains and personal benefits. The former include the visibility of the erased; the inclusion of the issue of the erasure in the public agenda; illuminating systemic failures such as the impotence of the authority of the Constitutional Court and the misuse of a referendum[52] campaign for the promotion of political parties; the weakness of the rule of law; the strictly bureaucratic functioning of public institutions (i.e., their total ethical blindness); and other similar gains. Public discussions on remedying the erasure can be thus considered a 'test' of the principle of justice and the rule of law and a struggle for the revision of the purported 'success story' of Slovene independence.

The personal benefits of being politically active can be summarised as follows: empowerment of individuals (as individuals and as erased); the ability to participate in new domestic and international networks; the enjoyment of positive social roles; a restored sense of belonging; and the opportunity to gain new experiences, for example, through the possibility of travelling abroad. It comes as no surprise that those who felt empowered by their involvement in political work also lent their support to the political campaigns of asylum seekers and migrant workers.[53] However, it should be recorded that the campaign of the erased has also met with negative responses including: the polarisation of society around the issue and the breakdown of the discussion into facile 'for and against' arguments; the misuse of the issue of the erasure during the general election campaign (especially in 2004, significantly less in 2008); the stigmatisation of the erased; and the harassment of individual activists and their family members.

Conclusion

Those who regained permanent resident status or citizenship have benefited in the following ways:

1. Possession of personal documents allows for self-identification, residence in the country, work, border crossing and accession to rights stipulated in sector specific laws on education, health care, social assistance, employment, housing and family integrity etc.
2. A decreased feeling of vulnerability as a result of the fact that they have regained documents and thus basic security. They regained a feeling of belonging since they no longer live in fear of harassment (by police or neighbours), deportation or detention. People feel that their lives have taken a turn for the better.
3. Re-acquired legal status has enabled some to become politically active and brought the issue of the erasure, and with it the questionable functioning of state institutions, into the public agenda. They reported that becoming political and active led to feelings of connectedness and empowerment.

Although the majority of persons who remained in Slovenia for the duration of their erasure managed to naturalise or re-obtain the status of permanent residents, this does not mean that their everyday situation automatically reverted to what it would have been had they never experienced the erasure. Moreover, the current legislation fails to provide compensation for the 'stolen years', as some erased individuals refer to the period when they were without documents and thus without rights. While the actions of the new Minister of the Interior are welcome, and, indeed, supplementary decisions are an important step towards eliminating this unconstitutional situation, nearly all other problems generated by the erasure currently still remain open questions.

Notes

[1] Of the 25,671 persons who were left without Slovene citizenship and the right to reside in Slovenia not all were immigrants. Owing to the non-transparent legacy on which the initial designation of citizenry was built, Slovenes were also among those excluded (Dedić et al. 2003) The number of persons was reported at the Ministry of the Interior's Press Conference 27 January 2009, available online at: http://www.mnz.gov.si/nc/si/splosno/cns/novica/article/12027/6214/, accessed 1 February 2009.
[2] 171,125 long-term or second-generation immigrants became Slovene residents in the initial designation of citizenry (Medved 2007: 218).
[3] The term erased appeared in Igor's Mekina article 'Izgnani, deložirani, izbrisani' [Expelled, evicted, erased] in a leftist weekly *Mladina*, 22 November 1994 B. Mekina, 'A Monument to the Erased', in J. Zorn and U. Lipovec Čebron (eds.), *Once upon an Erasure: From Citizens to Illegal Residents in the Republic of Slovenia* (Ljubljana: Študentska založba, 2008), 44–51.
[4] The administrative transformation of permanent resident status was implemented in the case of non-Yugoslav citizens. For example, an Italian citizen who had held a permanent residence address in Slovenia within the framework of the SFRY kept his/her status of permanent resident in the new sovereign state of Slovenia (Article 82 of the Aliens Act, Official gazette 1/1991-I, no longer valid as of 14 August 1999). See: Republic of Slovenia 1999.
[5] Anonymous, 'Decision No U-I-284/94', (Constitutional Court of Slovenia, http://ius.info/Baze/Usta/B/USTA66656335.htm (accessed 15 February 2008), 1999).
[6] The assertion of European Member of Parliament Lojze Peterle (who was Slovene Prime Minister in 1992, when the erasure from the register of permanent residents took place) is a telling example. In a TV show broadcast on 26 February 2009, when he was asked to explain why only former Yugoslav citizens legally residing in Slovenia were erased from the register of permanent residents, whereas other foreigners kept their resident status intact, he replied: 'We were not at war with those foreigners from the UK, USA or China. It is well known who we were waging war against.' By this he meant immigrants from other Yugoslav republics, whose 'natural' position in his opinion was among the 'aggressors' threatening Slovenia. He viewed their ethnic identity as their political opinion or even action, even though 5,360 children were also among these alleged 'aggressors'.
[7] For a good analysis of hate-speech see former Human Rights Ombudsman Matjaz Hanzek's, 'When will words become actions? Reflections on hate speech in Slovenia' Eurozine, 20 July 2007, 2008 at http://www.eurozine.com/pdf/2007-07-20-hanzek-en.pdf
[8] The sovereignty of the Republic of Slovenia was declared on 25 June 1991 on the basis of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia, Official Gazette of the Republic of Slovenia No 1/1991-1. The first legal foundation for Slovene statehood, however, was the Constitution of the People's Republic of Slovenia, which dates back to 1947 (Kristan 1976: 50). Also, the right to secede was defined in the 1974 Constitution of the SFRY. The right to self-determination was stipulated in Part I of the Basic Principles of the Constitution. The Constitution of the SFRY is available online: http://sl.wikisource.org/wiki/Ustava_Socialisti%C4%8Dne_federativne_republike_Jugoslavije_%281974%29/Temeljna_na%C4%8Dela (accessed 15 February 2008).
[9] 7.3 percent of residents identified themselves as Croats, Serbs, Muslims, Bosnians, Albanians, Montenegrins or Macedonians; 0.6 per cent identified themselves as Yugoslavs (which was perceived as a transnational category); 0.5 percent of the population did not wish to declare their ethnic belonging, and for 2.2 per cent there is no data. Statistical Office of the Republic of Slovenia (2003). Hungarian and Italian national minorities and the Roma ethnic community also reside in Slovenia.
[10] Official Gazette of the Republic of Slovenia, 'Citizenship of the Republic of Slovenia Act. Official Gazette No 1/1991', (Ljubljana: Republic of Slovenia, 1991).
[11] Article 249 (Chapter Relations in the Federation) of the Constitution of the SFRY (1974); Citizenship of the SFRY Act, Official Gazette of the SFRY no 58/76 and Citizenship of the Socialist Republic of Slovenia Act, Official Gazette No 23/76.
[12] Article 249, Chapter Relations in the Federation of the Constitution of the SFRY (1974).
[13] Citizenship of the SFRY Act, Official Gazette of the SFRY No 58/76 and Citizenship of the Socialist Republic of Slovenia Act, Official Gazette No 23/76.
[14] Some of the deputies of the Assembly of the Republic of Slovenia, when discussing new citizenship laws for the independent Republic of Slovenia, emphasized that the institution of republican citizenship was generally unknown to residents of Slovenia and that records were not really kept in order. National Assembly of Slovenia, 'Transcripts of the National Assembly Sitting No 19', (Ljubljana: National Assembly of Slovenia, 1991). See also B. Beznec, 'The Impossible is Possible. An Interview with Aleksandar Todorović', in Jelka Zorn and Uršula Lipovec Čebron (eds.), *Once upon an Erasure. From Citizens to Illegal Residents in the Republic of Slovenia*

(Ljubljana: Študentska založba, 2008), 19–31and J. Zorn, 'We, the Ethno-citizens of Ethno-democracy: The Formation of Slovene Citizenship', in J. Zorn and U. Lipovec Čebron (eds.), *Once upon an Erasure. From Citizens to Illegal Residents in the Republic of Slovenia* (Ljubljana: Študentska založba, 2008), 52–69.

[15] The Republic of Slovenia regards the day of its international recognition as 15 January 1992. The legal and political basis for recognition by the European Community was opinions of the special commission headed by Robert Badinter; the opinions were issued on 11 January 1992. http://www.mzz.gov.si/index.php?id=13&tx_ttnews[tt_news]=22815&tx_ttnews[backPid] (accessed 15 February 2008).

[16] Aliens Act, Official Gazette No 1/1991-I (not valid from 14 August 1999).

[17] Transcripts of the National Assembly Sitting No 19, held on 9, 15, 21, 22, 30 May and 3 and 5 June 1991.

[18] In 2009, the Ministry of the Interior reported that, in 1992, 5,360 children had been erased from the register of permanent residence. Available online: http://www.mnz.gov.si/fileadmin/mnz.gov.si/pageuploads/2009/izbrisani-koncni_podatki.pdf (accessed 10 April 2009).

[19] Anonymous, 'Decision No U-I-284/94',

[20] Third paragraph of Article 82, Aliens Act, Official Gazette No 1/1991-I (no longer valid as of 14 August 1999).

[21] Decision No U-I-284/94 on 4 February 1999 was followed by several decisions in which the Constitutional Court reasserted its opinion: decision No Up-60/97 on 15 July 15 1999, decision No U-I-89/99 on 6 October 1999, decision No U-I-295/99 on 18 May 2000, decision No U-I-246/02 on 3 April 2003 and decision No Up-211/04-21 on 2 March 2006.

[22] Aliens Act, Official Gazette No 1/1991-I (no longer valid as of 14 August 1999) and Aliens Act, Official Gazette of the Republic of Slovenia No 61/1999 and subsequent amendments. See. Republic of Slovenia, 1999.

[23] Temporary Asylum Act, Official Gazette of the Republic of Slovenia No 20/1997 (no longer valid as of 23 July 2005).

[24] Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia, Official Gazette of the Republic of Slovenia No 61/1999.

[25] Official Gazette No 61/99. Approximately 7,000 persons received status of permanent resident under the above-mentioned law.

[26] Minister of the Interior Katarina Kresal's speech defending her work against the interpellation by the opposition parties, 1 April 2009. Available online: http://www.google.si/search?hl=sl&q=dopolnilne+odlo%C4%8Dbe+rado+bohinc&meta=&aq=f&oq= (accessed 12 May 2009).

[27] Minister of the Interior Katarina Kresal's speech defending her work against the interpellation by the opposition parties, 1 April 2009. Available online: http://www.google.si/search?hl=sl&q=dopolnilne+odlo%C4%8Dbe+rado+bohinc&meta=&aq=f&oq= (accessed 12 May 2009).

[28] As of 24 January 2009, 1,302 persons had passed away.

[29] 3,816 of them first acquired a permit for permanent residence and then citizenship; the rest of them applied for Slovene citizenship directly

[30] It should be noted however that while the vast majority of those who received residency were able to rely on the Citizenship Law or Aliens Act[30] (87%), others had to rely on the Temporary Asylum Act (0.5%) or could only acquire temporary residency (7%).

[31] Interview with Sara Pistotnik was conducted in Ljubljana on 18 March 2009.

[32] Interview with Katarina Vučko was conducted in Ljubljana on 26 February 2009.

[33] Peace Institute: The Erased Residents of Slovenia: A Challenge for a Young Democratic State. Head of the project is Neža Kogovšek. Slovene summary available online: http://www.mirovni-institut.si/Projekt/Detail/si/projekt/Izbrisani-prebivalci-Slovenije-Izziv-za-mlado-drzavo/ (accessed 17 May 2009).

[34] Excerpts of this interview were originally published in Dedić et al. 2003. This individual was interviewed again in November 2007. Despite this, the author decided to draw on the first interview, which was conducted in 2002.

[35] As the third status of inclusion and accessibility of social rights a refugee status based on the International Protection Act (Official Gazette of the Republic of Slovenia No 111/2007) should be mentioned.

[36] See Official Gazette of the Republic of Slovenia (1999), 'Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia,' Official Gazette of the Republic of Slovenia No 61/1999 and Constitutional Court Decision from 16 April 2003, Official Gazette 36/2003.

[37] Reported by Katarina Vučko, 26 February 2009, and Sara Pistotnik, 18 March 2009.

[38] Article 15, Health Care and Health Insurance Act of the Republic of Slovenia (Official Gazette 72/2006).

[39] Constitution of the Republic of Slovenia (Article 57), Elementary School Act (Official Gazette 81/2006), Gimnazije Act (Official Gazette 115/2006), Higher Education Act (Official Gazette 119/2006).
[40] Official Gazette of the Republic of Slovenia, 'Article 10 of the Employment and Work of Aliens Act, Official Gazette No 4/2006', (Ljubljana: Republic of Slovenia, 2006).
[41] Pension and Disability Insurance Institute of the Republic of Slovenia, 'Kako do Državne Pokojne? (How to Obtain a State Pension)', (Ljubljana: ZPIZ - Zavod za pokojninsko in invalidsko zavarovanje Slovenije (The Institute of Pension and Invalidity Insurance of Slovenia)). Currently the state pension amounts 178 Euros per month.
[42] Article 36 of the Aliens Act (2006).
[43] Article 5 (Beneficiaries), Social Assistance Act, Official Gazette 36/2004.
[44] Article 10, Free Legal Aid Act, Official Gazette 96/2004.
[45] Point 21 of Article 15, Health Care and Health Insurance Act of the Republic of Slovenia (Official Gazette 72/2006).
[46] Paragraph 5, Article 87, Housing Act, Official Gazette 69/2003.
[47] Article 7, National Assembly Elections Act, Official Gazette No 109/2006.
[48] Article 1, Passports of the Citizens of the Republic of Slovenia Act, Official Gazette No 65/2000.
[49] This quotation is taken from an interview conducted by colleagues from the Peace Institute for the research project entitled The Erased Residents of Slovenia: A Challenge for a Young Democratic State. The head of the project was Neža Kogovšek. Slovene summary available online: http://www.mirovni-institut.si/Projekt/Detail/si/projekt/Izbrisani-prebivalci-Slovenije-Izziv-za-mlado-drzavo/ (accessed 17 May 2009).
[50] The conference *16 years later: Political and legal aspects of the erasure in Slovenia* was held on 3 and 4 December 2008 in Ljubljana. It was organised by the Peace Institute http://www.mirovni-institut.si/Dogodek/Detail/si/dogodek/16-let-pozneje-Politicni-in-pravni-vidiki-izbrisa-v-Sloveniji/ (accessed 14 May 2009).
[51] Irfan Beširović, Nisveta Lovec, Aleksandar Todorović and Mirjana Učakar were speakers at the panel entitled European tour of the erased: from Copenhagen to Belgrade.
[52] A referendum to decide on a law that would fill the void in the legal status of the erased, called the Technical Act, was initiated by opposition parties as their unofficial pre-election campaign. The campaign pitted loyal citizens, who would have to pay compensation to the 'traitors' of the Slovene nation, against the erased and thus against the law. The referendum was held on 4 April 2004. 31.1 per cent of the electorate cast their vote. 94.7 per cent voted against the law. At the national elections, held on 3 October 2004, the former opposition won (Pistotnik 2008).
[53] Unfortunately, the struggles of asylum seekers and migrant workers against exclusion and exploitation provoked extremely negative responses from the Ministry of Interior (in the case of asylum seekers) and individual employers (in the case of migrant workers). For the activists involved, these negative responses included negative decisions on their asylum applications or dismissals in the case of migrant workers.

CHAPTER 5

FROM STATELESSNESS TO CITIZENSHIP: UP-COUNTRY TAMILS IN SRI LANKA

P.P. Sivapragasam

Introduction

The history of plantation people in Sri Lanka goes back at least two hundred years. Because there is limited information available from that time period, there is much room for interpretation, and it is important to note that contemporary accounts may be coloured by an individual's academic tradition, ethnic, religious, and ideological perspective; or their relationship with the contemporary trade union movement.

The origin of plantations themselves can be traced back to the Portuguese Canary Islands in the 15th century. In the 16th and 17th centuries, they were established in the New World where they mainly produced sugar and cotton for the European market—subsidised by African slave labour (Kemp and Little 1987). Subsequently, and despite the abolition of slavery in the 19th century, plantations spread under the aegis of an expanding western imperialism into parts of Africa and Asia. A wider range of food, beverages, and raw materials for industrial use were cultivated for the consumer markets and factories of the West. To this day, plantations remain an important form of agricultural production in many countries of the world.

An important and recurring issue in plantation studies is the problem of definition. The issue is not trivial. Acceptable definitions and conventions are a prerequisite for meaningful comparison and generalization, and in the field of policy, it is important to set universal, or at least widely applicable, standards. A plantation is usually a large farm or estate, especially in a tropical or semitropical country, on which cotton, tobacco, coffee, tea, sugar cane, or trees are cultivated, usually by resident labourers. A plantation is an intentional planting of a crop, on a larger scale, usually for uses other than cereal production or pasture. The term is currently most often used for plantings of trees and shrubs. The term also tends to be used for plantings maintained for economic purposes other than that of subsistence farming.

Most of these involve a large landowner, raising crops with economic value rather than for subsistence, with a number of employees carrying out the work. Often it refers to crops newly introduced to a region. In the past, it had been associated with slavery, indentured labour, and other economic models of high inequity. Arable and dairy farming are usually (but not always) excluded from such definitions.

The term plantation is defined in the International Labour Organization's (ILO) Plantations Convention 110 of 1958 as:

> any agricultural undertaking regularly employing hired workers which is situated in the tropical or subtropical regions and which is mainly concerned with the cultivation or production for commercial purposes of coffee, tea, sugarcane, rubber, bananas, cocoa, coconuts, groundnuts, cotton, tobacco, fibres (sisal, jute and hemp), citrus,

> palm oil, cinchona or pineapple; it does not include family or small-scale holdings producing for local consumption and not regularly employing hired workers (article 1(1) of the ILO Convention 110, as amended by the Protocol).[1]

Another widely accepted definition is:

> A plantation is an economic unit producing agricultural commodities for sale and employing a relatively large number of unskilled labourers whose activities are closely supervised. Plantations usually employ a year round labour crew of some size, and they usually specialize in the production of one or two are marketable products. They differ from other kinds of farms in the way in which the factors of production, primarily management and labour are combined.[2]

Plantation Workers in Sri Lanka

Historically, plantation workers in Sri Lanka shared a fate similar to that of millions of workers in many neo-colonial Third World Countries. They were products of the 19th century phase of western capitalist expansion under colonialism which was characterized by the establishment of plantation economies. From 1830 onwards, coffee plantations were developed in Sri Lanka. By 1880, tea had replaced coffee.[3] Immigrant Indian workers became the cheap and easiest source of labour for the plantations of Ceylon (Sri Lanka).

The systematic recruitment of Indian labour began in 1839, and, in that year alone, 2,432 male labourers arrived in Ceylon (Nadesan 1993). There are, however, no details of the number of women who arrived with them. Planters soon recognized the advantages of employing women workers. Women provided a reserve army which the planters could draw upon when needed, thus enabling the establishment of an elastic and cheap supply of labour. Through the development of household structures, women gave birth to children, enabling the plantation owners to reproduce their own supply of labour and, thus, to subsidise the plantation. The fact that several members of the same family were employed lent justification in the eyes of the planters to the lowering of the individual wage. Both men and women were subjected to exploitation on the plantations. However, it should be noted that suffering was inflicted on the women workers jointly by both the capitalist class and by male workers. If domestic work is defined as labour, then women laboured free of charge and alone. Cooking, sweeping, washing the dirty linen of the infants, cleaning, removing garbage and washing pots and pans were some of the burdens imposed by capitalists on women under the cover of 'family responsibility'—and this with the connivance of male workers (themselves cruelly exploited by the capitalists) who accepted this exploitation as 'our culture'.

One of the most striking developments of the 1920s was the militant action of the urban workers to improve their living and working conditions. A.E. Goonasinghe played an important role in developing a workers movement in the urban sector (Nadesan 1993). The estate workers, however, were faced with great barriers at every stage of their struggle to organize themselves. K. Natesa Aiyer, an Indian Brahmin, joined with A.E. Goonasinghe in trade union action, but the association between the two men did not last long. Natesa Aiyar finally founded the first trade union for the plantation workers—the All Ceylon Estate Labour Federation—in 1931 with its headquarters in Hatton. In May 1931, a meeting of 5,000 workers was held in Hatton, and resolutions were adopted protesting against wage cuts

(Nadesan 1993:93). The later years saw a multiplicity of trade unions, and the major trade unions in the plantation sector became politically motivated.

A group of women take a break from picking tea. Most Hill Tamils who have received Sri Lankan citizenship say their lives have changed very little.

Today's Up-Country or Plantation Tamils derive their origins from a British colonial era project. According to Professor Bastianpillai, workers around India—the Tamil Nadu cities of Thirunelveli, Tiruchi, Madurai and Tanjore—were recruited from 1827 by Governor Sir Edward Barnes on the request of George Bird, a pioneering planter. The nature of their labour also defined Tamils of Indian Origin who lived on the plantations under a regimented system of labour management where they were denied any right to mobility and were restricted to a narrow area in the plantation. It is important to note that the Plantation Tamil communities are not directly related to the Tamils in other parts of Sri Lanka who have been involved in a civil conflict with the government: unlike other Tamil communities, the Plantation Tamil labour force speaks Tamil, is Hindu by religion, and the majority of them are Dalits[4] who traditionally have resided in the central part of Sri Lanka among the local Sinhala Buddhist population of the surrounding areas. Restricted to tea and rubber estates, and a smaller number to coconut estates, the Tamil population did not have much opportunity to interact or integrate with other communities. For over 150 years, the management of the plantations has been responsible for the welfare of workers, including their health and education.

The contribution of the Plantation Tamils cannot be understated. Sri Lanka has one of the finest social welfare records among developing countries, and it is important to note that the

island's welfare policies are funded through revenue derived from the agricultural sector, which is still dominated by tea plantations; hence the important contribution of the Plantation Tamils who make up just 5.4% (2001) of the total population of Sri Lanka. According to the Ministry of Estate Infrastructure, the total number of families living on plantation is around 230,000, and the best estimate of the population of Plantation Tamils is 900,034 (2006). The population of women living on the tea plantations, unlike those of the other ethnic groups of Sri Lanka and areas other than plantations in the world, is especially significant: of the total labour force, about 46.7 per cent is made up of women.

Hill Tamils working on tea plantations in Sri Lanka have historically been discriminated against. While many have obtained Sri Lankan citizenship in recent years, thousands are still stateless.

In spite of their role in the Sri Lankan economy, the people living on the plantations, particularly women, have been continuously subjected to various forms of oppression and have been denied civil, political, economic, social and cultural rights, and the right to development. Nadesan, a trade unionist describes the historical restrictions on the Plantation Tamils:

> The estate workers, however, were faced with great barriers in every stage of their struggle to organize themselves; no other section of the working class of Ceylon was confronted with comparable obstacles. The estates were sacred territories not to be blemished by any intruder agitator. There was the 'Protection of Produce Ordinance No. 38 of 1917' hanging like the sword of Damocles over any outsider entering the estates. According to Section 3 of this Ordinance, any person found loitering or lurking about in a plantation was liable to imprisonment for a period of six weeks and a fine of Rs. 25.[5]

Today, the Plantation Tamils remain isolated from the rest of the population and are subject to discrimination in many areas, including the denial of political rights such as voting as well as the right to freedom of movement; they are also prevented from opening banks accounts. They encounter a host of practical problems in their daily lives. One retired worker on the Greatwelly Estate, Deltota, described the situation he experienced before he received citizenship.

> I retired after working for 40 years on this estate as a labourer. For the last many years, many including me, have been without citizenship – as second-class citizens. Many of us did not get the opportunity of voting. Therefore neither a politician nor a government officer cares for us. We have been living sidelined for the last many years (N., 10 May 2009).

The description of plantation workers as 'second-class' citizens, however, does not take into consideration the magnitude of the problem as the estate system comprised an entire world for the Plantation Tamil workers who were bound by both formal and informal contracts to the estate. The room that housed workers and their families symbolized their captivity, as they had no right to leave the estate or own a land or a house elsewhere.[6]

Trade unions played a crucial role among the Indian Plantation Workers in the 1990s; however, the system has undergone significant changes in ownership with the nationalisation of plantations and subsequent privatisation. One result of these changes is the growing poverty among the plantation people. In 2002, the level of poverty in the plantation sector was well above the national average, and international aid agencies have noted that their welfare has been neglected for a long period of time (World Bank 2007).

Civil and Political Rights of the Plantation People

After Sri Lanka became independent in 1948, the new parliament soon enacted the Citizenship Act of 1948. This law conferred citizenship by descent on all persons who were born in Sri Lanka and whose father was born in Sri Lanka (Citizenship Act No 18 1948). The Indian and Pakistan (residents) Citizenship Act No: 3 -1949 provided for citizenship by registration. Application for citizenship by registration was in the first instance only open to persons who were, and could be proven to be, of Indian origin. The citizenship law of 1948 discriminates against people who have come to Sri Lanka 'recently' and has placed the community of the plantation Tamils in a vulnerable position that has been further aggravated by the discriminatory implementation of the law. This situation gave birth to statelessness.

The problem of the stateless Tamils was taken up in negotiation with India for the second time in 1964 when the two parties reached an agreement called the Sirimavo-Shastri Pact. The pact extended until 1974 when the number of stateless plantation Tamils was estimated at around 975,000. An agreement was reached whereby 600,000 plantation Tamils would be repatriated to India and 375,000 registered for Sri Lankan citizenship.[7] A subsequent agreement in 1974 agreed to split the remaining population between India and Sri Lanka.

In the aftermath of the July 1983 violence, when a large number of Sri Lankans ended up in India as refugees, India linked the problem of refugees arriving on its shore to the repatriation process for the Plantation Tamils. It should be noted that as a result of the violence in Sri Lanka, some of those who had previously opted for Sri Lankan citizenship now preferred the

possibility of relocating to India. In 1986, it was estimated that there were still 94,000 Estate Tamils without status but, given the inter-state tensions and complex ethnic political situation, Sri Lanka decided to grant Sri Lankan citizenship to this population and passed legislation for this purpose in January 1986.

Citizenship Reform and Evidence of Good Practice

Over the past 50 years, all of Sri Lanka's post-independence governments have attempted to resolve the problem of the stateless Plantation Tamils. To this end, the Indian government has also played an important role. Both governments, however, have considered the issue more as a political, rather than humanitarian or human rights issue. Nonetheless, the Sri Lankan government's efforts to resolve the problem in 2003 were commendable both in terms of outcome and the way in which the issue galvanised political constituencies in both Sri Lanka and India. Remarkably, all parties in the Sri Lankan parliament unanimously supported the government's motion to address the situation. Although the people of Indian origin had previously been critical of the earlier approaches of the Sri Lankan and Indian governments over the last 50 years to resolve the issue, both states proved willing and able to cooperate on this issue.

The introduction of the *Grant of Citizenship to Persons of Indian Origin Act No. 35*[8] by the Sri Lankan Parliament in October 2003 gave immediate citizenship to people of Indian origin who had lived in Sri Lanka since October 1964 and to their descendants. The innovation of this legislation lies in its simplified procedure whereby, rather than applying to state authorities for citizenship, individuals could obtain a 'general declaration' which was to be countersigned by a justice of peace and serve as proof of citizenship. UNHCR, which led an active media campaign to inform people about the new citizenship procedures, has subsequently described Sri Lanka as a 'success story'. Amin Awad, UNHCR's Representative in Colombo, went on record declaring "almost overnight, the stateless population in Sri Lanka was more than halved…It was a huge success story in the global effort to reduce statelessness" (Perera 2007:21).

Yet, the issue has not been resolved for thousands of individuals and continued discrimination against the Plantation Tamils is suggested by the regular involvement of civil society and international organisations, trade unions and UNHCR which have engaged in awareness-raising programs, lobbying efforts, and advocacy. Out of 300,000 identified stateless persons in 2003, only 190,000 individuals were eventually registered as citizens (Perera 2007). Numbers registered also varied widely from one region to another; in the northeast of the country, 679 persons registered for citizenship through mobile services in Vavuniya, and 320 persons registered in Trincomalee.

While the citizenship issue has been largely resolved in law, several problems have not been addressed. These include the following challenges:

- The state administration bodies have not been made fully aware of the legal arrangements that followed the 2003 law;
- In practice, the government insists on citizenship certificates from people of Indian origin who approach them; yet, many are still unable to obtain these documents;
- There is widespread ignorance about the value of citizenship certificates.[9]

- Individuals who cannot provide citizenship certificates are often denied the right to be included on the voters list;
- There is need to conduct a campaign to re-register or clarify the situation of individuals in Tamil Nadu, India, where many stateless people have sought refuge.

To make the resolution of statelessness meaningful for the Plantation Tamils, the aforementioned issues must not only be identified but also implemented, principally through the education of administrative officers at all levels in order to ensure affected individuals equal rights and opportunities.

Research and Findings

For the present project, the researcher interviewed individuals on plantations in Kandy and Nuwaraeliya, Sri Lanka, in February and March 2009.

Interviewees identified a number of positive effects of obtaining citizenship. One individual stated in summary, "As far as I am concerned, I feel that those who have been granted citizenship are treated as human beings." A change repeatedly noted by interviewees is the newly granted freedom to participate in the country's political system. Specifically, the right to vote and to stand as a candidate for local elections was recorded. Individuals highlighted the fact that their nationality and national identification was ensured. It was also mentioned that children of the new citizens have the right to basic documents. Others claimed that since their political rights had been realized, they could engage in political processes in a meaningful way. Moreover, the degree to which they could demonstrate their community's political importance and enter into bargains and alliances gave them greater access to development activities.

The interviews also highlighted the fact that younger workers were more likely to benefit from the citizenship campaigns. There is evidence of migration off the estates to the large cities of Colombo and Kandy. This trend supports some of the recent findings obtained by UNHCR. For example, Perera records the testimony of an individual named Kalyani who was able to move out of the plantations and establish a career outside the tea industry in the nursing sector in Colombo:

> I was really thankful when my national identity card arrived because it allowed me to travel to Colombo and find work here,' said the 23-year-old.' I am earning much more than I would have if I stayed on at the estate.' Her husband is also applying for his national identity card and will then join her in Colombo. He is with my two-year-old son in Hatton. My mother takes care of the child while he goes to work, but very soon all of them can join me here for a much better life (Perera 2007:23).

It should be noted here that, in addition to age, obtaining a National Identity Card (NIC) was considered essential to being able to leave the plantation as recorded by one young shop worker from Hatton.

> Many Plantation Youth migrate to Colombo or Kandy for job, as they do not wish to work on the estate like slaves. Getting NIC [is] easier for me as I had the citizenship

> certificate but, quite a good number of my fellow workers are being arrested by police in the absence of NIC.

In spite of the granting of citizenship, formal documentation appears to be a major factor in personal and social development. Other participants, especially older individuals, offered a more nuanced view and felt that the impact of citizenship has been mixed or that there has been no real change. One person said:

> Many of those who obtained citizenship have been registered as voters; they have been politically strengthened and their political rights have been guaranteed. Though this is a progressive step, their economic conditions can not be said to have improved.

Another stated, "[I]t is not possible to state that any significant changed has occurred for better in the lives of beneficiaries." Several participants reported that it was only by applying through dedicated NGOs that they were able to receive citizenship certificates. Others who applied through trade unions were less successful. Given the influence that the tea and rubber estates have in the region, it is possible that the authorities are more sensitive to trade unions and less inclined to support applications for citizenship sent to them by NGOs, although given the small number of interviews, it is not possible to reach this conclusion on the basis of this research alone.

Interviewees also mentioned problems that remain for the community. There are individuals who still face difficulties getting their names on the voter registration list. One interviewee stated:

> They say that we are all citizens of Sri Lanka. I cannot say that our lives have become better because we are citizens. Our wages have not been increased. And indebtedness grows. Our day to day life becomes hard as we depend on the estate work alone without other options, and we do not have our own land to cultivate.

Some participants noted that administrators are not informed of legal developments and this has negatively affected their rights to participate in political and other activities. For example, it was noted that *grama niladari* [local government official] officers are not clear about the citizenship act of 2003 and its procedures, a fact previously recorded by other commentators (Perera 2007). This lack of awareness has resulted in people approaching certain officers, in the hope of registering on the voter's list, only to encounter problems. Several interviewees mentioned that the right to citizenship has not yet addressed the high degree of poverty.

Generally poor living conditions have not changed for the Plantation Tamils. One retired worker from Golinda Estate, Hettimulla, offered this account of the economic and personal challenges he faced without documentary proof of his citizenship:

> I was born and bred on this estate and, was working here. To date I have not cast vote. According to the estate management my birth has not been registered. Therefore I have not been able to obtain a National Identity Card. As a result, I do not know whether I can receive even my Employee Provident Fund benefits.
>
> All have sent application for citizenship through a trade union. But up to date nobody has received [a] citizenship certificate…

There also appears to be little improvement with regard to educational development of the population as a result of their recently regularized status, though citizenship does allow formerly affected persons to now hold employment, such as a teacher, in the government sector.

Conclusion

Sri Lanka is one of the few countries in the world that uphold two different types of citizenship: citizenship by descent and citizenship by registration. While most residents of Sri Lanka obtained citizenship by descent, the plantation Tamils are required to use the registration process. However, expedient—and it must be acknowledged that the simplified registration procedure introduced following the 2003 *Grant of Citizenship to Persons of Indian Origin Act. No. 35* more than halved the number of stateless people in Sri Lanka—the dual procedures still leave Plantation Tamils at a disadvantage relative to other Sri Lankans. The law has not been implemented sufficiently, and there is widespread ignorance among public officials about which procedures to apply; also, many stateless people remain ignorant about the benefits of applying for a certificate of citizenship. Several have been denied documentation and thus have no proof of their citizenship. One consequence of this has been continued harassment by police. In the absence of documentation, some have been denied their pensions (employee provident fund benefits) and, while some younger people have been able to relocate to the big cities and move into new lines of work, many others have seen no real change.

Plantation workers of Indian origin were brought to Sri Lanka to help maintain a sector of the country's economy, which later became Sri Lanka's backbone. Such plantation labour constituted the first modern working class of the country. However, the opportunity to overcome poverty and powerlessness has yet to be seized (World Bank 2007). Further reforms are essential, including the introduction of sustainable programmes that meet the strategic challenge to end elite dominance so long associated with control over the plantations and the workers on these estates.

Notes

[1] International Labor Organisation, *ILO Convention No 110 Adopted in 1958* (Geneva: International Labor Organisation, 1958).
[2] C. Kirk, 'People in Plantations: A Literature Review and Annotated Bibliography', (London: IDS, 1987)
[3] S. Nadesan, *A History of Up-Country People in Sri Lanka* (Hatton, Sri Lanka: Nandalala Publication, 1993).
[4] Dalits are identified as so called oppressed caste people particularly in India.
[5] Nadesan, *A History of Up-Country People in Sri Lanka* , p. 83.
[6] N. Shanmugaratnam, 'Privatisation of Tea Plantations: The Challenge of Reforming Production Relations', *Sri Lanka: An Institutional Historical Perspective* (Colombo, Sri Lanka: Social Scientists Association, 1997).
[7] UNHCR Citizenship for All, Focus On Protection', (Colombo, Sri Lanka: United Nations High Commissioner for Refugees, 2004b).
[8] Government of Sri Lanka, *Grant of Citizenship to Persons of Indian Origin Act. No. 35 of 2003* (Colombo, Sri Lanka: State Printing Department, 2003).
[9] Sulakshani Perera recounts one teacher explaining that in spite of educational reforms there is a particular problem among parents who refuse to regularise the status of their children. She quotes a Mrs. Arumugam, principal of a small school on Chrystler's Farm estate in Hatton, Nuwaraeliya district, saying "We try and educate the students about the need for national identity cards and proper documentation…But when they tell their parents, the children's comments are simply brushed aside. Some parents also question why national identity cards and birth certificates are important, because they themselves have managed perfectly fine without them. So these children grow up with absolutely no evidence of their parentage, except a piece of paper issued by the estate management" (Perera 2007: 23).

CHAPTER 6

CITIZENSHIP REFORM AND CHALLENGES FOR THE CRIMEAN TATARS IN UKRAINE

Rustem Ablyatifov

Introduction

The Crimea is a unique region of Ukraine with respect to geography, climate, geology, and history. It is inhabited by people of various ethnic origins with distinctive languages, cultures, traditions and history. However, the region's history has left many knotty questions and problems unresolved. One such matter, inherited from the recent past, was the issue of forced deportations, which affected, among others, the Crimean Tatar population. This situation was not created by the Ukrainian people or the Ukrainian government but rather was a legacy from Stalinist times and the repressive policies of the Union of Soviet Socialist Republics (USSR). Today more than 250,000 Crimean Tatars and other formerly deported persons (FDP) have returned to the Crimea. However, the measures adopted by the Ukrainian government to accommodate the repatriates are insufficient, and many citizenship issues have not been resolved. This chapter evaluates efforts by the Ukrainian government to reintegrate repatriated Crimean Tatars and will, in particular, address the citizenship campaigns instituted for their benefit.

Historical Context

The Crimean Tatars are indigenous to Crimea. Their place in the ethnic matrix of former Soviet peoples is, however, extremely complicated. Their language belongs to the group of Turkic languages, and most Crimean Tatars are Muslim. In the 15th and 18th centuries the Crimean Tatars had their own state—the Crimean Khanate part of present day Ukraine. The Crimea was later annexed by the Russian empire in 1793. The native population was decimated by the colonial policies of Russia and the Soviet Union which brought war to the Crimea, deprived people of their land, and prompted forced emigrations. The repressive policies associated with the period of Soviet collectivisation of agriculture dealt a further blow to the Crimean Tatar population, which decreased from 98 per cent to 20 per cent by 1939.

Soviet rule was established in the Crimea in 1921 with the creation of the Crimean Autonomous Soviet Socialist Republic, then part of Soviet Russia. Although autonomy was limited, there was a particular ethnic and territorial character to the reorganisation of Crimea in the USSR. In 1921, the conception of 'Korenizatsiya' (roots) was introduced in the USSR as an attempt to address the multinational challenges of managing the vast Soviet state, which was organised into ethnic and public entities and territorial units of different levels (including autonomous republics, autonomous sub-regions, and the like). The Korenizatsiya provided some minority rights including opportunities for the development of native languages and cultures and also ensured that ethnic groups were formally represented in these ethnically defined sub-national entities. Such policies were also carried out in the Crimea.

During this period, both the Crimean Tatar and Russian languages were recognized as official. Crimean Tatar national symbols were also visible and featured on flags and other political markers. The Soviet principle of ethnic representation was reflected in the administrative division of autonomy in the Crimea. In 1921, the Crimea was divided into 15 *rayons* (territorial units), and in 1930 a further 145 rural districts were designated for Crimean Tatars, as well as 5 rayons. The rest of Crimea was divided up for the other nationalities present and included 102 districts for Russians, 29 for Germans, 7 for Bulgarians, 5 for Greeks, 1 for Armenians and Estonians respectively; the remaining 54 rural districts were for mixed populations and functioned in parallel to the ethnically designated territories.

In 1944, the Crimean Tatars were falsely accused of having collaborated with Nazi Germany and were then forcibly deported to Central Asia and Siberia by an extra-judicial procedure. Two years of illnesses, starvation, and slave labour took a toll on more than 46 per cent of deported Crimean Tatars. The whole population was targeted and victimised to the point of destruction on account of its ethnic origin. With the Crimean Tatars either dead or deported, new settlers moved into the Crimean peninsula, most of whom were ethnically Russian. Soon after the Crimean Tatars were deported, the necessity for autonomy had fallen away, and in 1946 the Crimea became an ordinary oblast (region) of the USSR.

In 1954, the Crimean oblast was officially transferred from Russia to the Ukrainian Soviet Republic. This event was particularly significant and later paved the way for the mass return of the Crimean Tatar people to their homeland during the period of 'perestroika' in the late 1980s. However, until that time, the Crimea was off limits to Crimean Tatars. In 1956, military regulations and laws regulated the living conditions of Crimean Tatars who were housed in special settlements which bore many similarities to the ghettos Nazis had established for Jews just a decade earlier. Every Crimean Tatar was obliged to undergo a monthly personal check, which took place in the commandant's office. Those who wanted to visit other settlements for personal or family reasons, such as attending a funeral, required special permission, which could only be granted by the military authorities. Individuals who broke these rules were punished severely and were sentenced to serve 25 years in a prison camp.

The collapse of the USSR in 1991 and the establishment of the Ukrainian independent state had a huge impact on the process of return and resettlement of the Crimean Tatars. It was of principal importance that independent Ukraine, both the state and Ukrainian democratic political forces, unambiguously supported the return of the deported Crimean Tatars and other ethic groups to their historic homeland. The openness shown by the government of Ukraine to the return of the Crimean Tatars not only ruled out the possibility of any conflict between the indigenous minority and the state but also fostered a sense of loyalty among the Crimean Tatars who supported the idea of the independent Ukrainian state.

The Autonomous Republic of the Crimea (ARC) was created in its present form as an integral part of Ukraine in 1991. It was founded in response to the demands of the Crimean Tatar people who were returning from places of deportation, but, in practice, the granting of autonomous status benefited the Russian speakers. The interests of the Crimean Tatars were ignored.

The problems facing the 250,000 member Crimean Tatar community are complex and multi-faceted and include social, economic, cultural, political, and legal issues. The economic

challenges are particularly worrisome, and there is a high degree of destitution among the Crimean Tatars whose situation is by all accounts appalling. In addition, there are a number of political and legal problems associated with the return of the Crimean Tatars to Ukraine. Problems with the protection and enforcement of minority rights are among the issues most often stressed by Crimean Tatars leaders. These include: the need for effective legal mechanisms that guarantee Crimean Tatars representation in Crimean and Ukrainian bodies of power; official recognition of the Crimean Tatar People Majlis (a legislative body elected by the Crimean Tatar people) and the Qurultay (National Congress) as representative bodies of the Crimean Tatar people; official recognition of the Crimean Tatars as an indigenous people in Crimea and Ukraine rather than a national minority; and the recognition of the Crimean Tatar language as one of the official languages of the Autonomous Republic of Crimea.

Citizenship Status of the Formerly Deported Ethnic Groups in Ukraine

For over 45 years, the Crimean Tatar people struggled with the Soviet totalitarian regime, which prevented them from returning to their native land. Thousands suffered in labour camps and prisons. It was only in late 1989 that their commitment and dedication bore fruit; assisted by Soviet and foreign human rights activists, the Crimean Tatars were finally able to overcome the resistance of the state authorities and were allowed to repatriate en masse. Their return took place against the backdrop of the dissolution of the former Soviet Union and the establishment of 15 newly independent states on its territory.

The peak of the repatriation of Crimean Tatars coincided with the formation of the Commonwealth of Independent States (CIS) and created many additional problems. In particular, individuals returning to the peninsula after August 1991 faced problems in renouncing the citizenship of their countries of previous abode or affiliation (Uzbekistan, Tajikistan, Kazakhstan, Kyrgyzstan, Turkmenistan, Russian Federation and Georgia) and acquiring citizenship in their new home country, Ukraine.

Between 35,000 and 40,000 people repatriated every year from 1990 to 1995. This trend decreased slightly in the following years. By December 2001, the All-Ukrainian Population Census counted 248,000 Crimean Tatars.

Though Ukraine was one of the first CIS countries to adopt its own citizenship law (8 October 1991) and recognized the citizenship of all "citizens of the former USSR who at the moment of declaration of independence (24 August 1991) were permanently residing in the territory of Ukraine", the same law completely disregarded the growing mass return of Crimean Tatars.

The lack of Ukrainian citizenship was one of the most serious problems of formerly deported Crimean Tatar people as well as for Armenians, Greeks, Bulgarians and Germans. Of the approximately 250,000 Crimean Tatars, 108,000 returned after 13 November 1991 when the Law of Ukraine 'Of Citizenship of Ukraine' entered into force. This law did not provide for automatic Ukrainian citizenship but required applicants to go through a process of naturalization. Of this group, approximately 25,000 were stateless persons who were able to benefit from a simplified naturalization procedure that was introduced in the 1997 Law on Citizenship.

From 1991 to 1996, non-citizens of Ukraine lived in an indeterminate situation because neither the authorities nor civil society were aware of their legal situation. The remaining 83,000 repatriates were not able to obtain Ukrainian citizenship because of financial and legal barriers. Several administrative obstacles were put in their way as a means of refusing citizenship to those who held citizenship in another CIS state. For example, the majority of repatriates (62,000) were considered nationals of Uzbekistan, and one important hurdle facing Crimean Tatars who wanted to renounce their Uzbek citizenship was the high consular fee (US $10) established by Uzbekistan. It should be noted that the average monthly wage of a Ukrainian citizen amounted to less than the US $10 consular fee. For the average repatriate-Crimean Tatar who was usually unemployed and without adequate housing, this sum was inconceivable. In addition, individuals were required to apply in person at the Embassy of Uzbekistan in Kyiv and then wait one year.

In 1997, the government introduced the first of three citizenship campaigns which was propagandistic in nature. During 1997-98, the militia passport service and one NGO Foundation Assistance dealt with citizenship issues on behalf of Crimean Tatars from Uzbekistan, Tajikistan, Kyrgyzstan and encouraged them to naturalize in Ukraine. However, the challenge of granting Ukrainian citizenship to large numbers of returnees was soon frustrated by the legal arrangements and incompatible systems in their former places of residence and only a fraction of people were able to benefit from this particular campaign.

Real assistance could only be given to stateless persons who had returned to Ukraine during the window in 1991, after Ukraine had declared its independence and before they could obtain foreign citizenship in the successor states to the USSR in the CIS where they had been resident. Those who benefited were a large number of Crimean Tatars—refugees from Tajikistan who had escaped the civil war. The number of stateless people who fell in the above category, and were able to take advantage of Ukrainian citizenship at this time, was approximately 20,000.

The second 12-month citizenship campaign was launched in 1998 and while it was similar in nature to the previous campaign, a larger group of people were able to benefit, thanks to an inter-state agreement between Ukraine and Uzbekistan which addressed the problems that had so frustrated the campaign of 1997-98. A major problem for Crimean Tatar repatriates from Uzbekistan was removed in August 1998 when under international pressure, particularly from the Organisation for Security and Cooperation in Europe (OSCE), Ukraine and Uzbekistan signed an agreement that provided formerly deported persons with a simplified procedure for renouncing Uzbek citizenship and obtaining Ukrainian citizenship. This procedure, though originally time limited, was later extended to December 31, 2001. In all, about 10,000 Crimean Tatars in Uzbekistan were granted citizenship through this procedure.

A third campaign from 1999-2001 built on the Ukraine-Uzbek accord of 1998. During this campaign the Crimean Tatars formerly based in Uzbekistan were provided with ample opportunity to renounce former citizenship and to acquire Ukrainian citizenship. It should be noted that UNHCR took an active part in these campaigns and exerted its influence on the Ukrainian government to settle the problem of citizenship of the Crimean Tatars.

In practical terms, UNHCR supported the Crimean NGOs that offered legal aid to repatriates as well as training to lawyers working in NGOs, employees of the passport service, local government bodies and the militia (police). Thanks to the financial and technical assistance

provided by UNHCR, it was possible to establish a network of NGO field offices across the Crimea and, thus, reach returnees who needed assistance.

International Cooperation and the Granting Of Citizenship

The problem of lack of citizenship was resolved through a complex set of measures which received wide support from international institutions, above all UNHCR. Local parliamentary bodies, in addition to the Crimean Tatars self-governing institutions, also helped to advance a solution to the problem, and on 1 January 2002, an estimated 235,043 formerly deported Crimean Tatars became citizens of Ukraine—approximately 90% of the total number of the Crimean Tatars based in the ARC.

There were, however, some remaining issues and some people have still not managed to obtain citizenship, including, 4,100 Crimean Tatars who returned to Crimea from Uzbekistan. Also, the simplified procedure for obtaining citizenship in Ukraine (which was established by the Law of Citizenship and the 1998 Ukrainian-Uzbek Agreement) concerned only formerly deported persons and their descendents; it did not cover spouses in case of mixed marriage—an estimated 26,100 people (10 per cent of repatriates) who lived permanently in the ARC, remained as foreigners or stateless persons. Of this category, there are approximately 11,200 citizens of Russia, 3,100—Kazakhstan, 2,900—Tajikistan, 1,600—Kyrgyzstan, 1,000—Georgia, 657—Azerbaijan and Armenia, and 51—Moldova. In this regard, the Ukrainian government appealed unsuccessfully to the governments of Kazakhstan, Tajikistan, Turkmenistan, Kyrgyzstan and Russia to sign similar agreements for a simplified procedure for the obtaining of Ukrainian citizenship for Crimean Tatars.

An estimated 150,000 to 200,000 Crimean Tatars remain in Uzbekistan, and while the overwhelming majority of them might want to return to Crimea, because of complications with the process for return, many cannot meet the time requirements. The Representation Office of Majlis of the Crimean Tatar people in Central Asia (Tashkent) repeatedly applied to the Uzbek President (and Ukraine's Embassy in Uzbekistan) to extend a campaign to provide a simplified procedure for the renunciation of Uzbek citizenship in order to obtain Ukrainian citizenship.

Over the past decade, the domestic situation has changed considerably. As recorded above, Crimean Tatars who registered their Ukrainian citizenship in Uzbekistan before 31 December 2001, experienced significantly fewer problems than those current waves of Crimean Tatars who are returning to Crimea as citizens of Uzbekistan. Conditions for the returning of Crimean Tatars who hold Uzbek citizenship have become increasingly complicated.

Unfortunately, there is no legislation on repatriation or legal status of formerly deported persons of ethnic origin. One explanation for the lack of legislation may be due to continued prejudice against the Crimean Tatars as an ethnic group.

Citizenship and Collective Rights: An Evaluation

Initially, the right to Ukrainian citizenship for all returnees resettling in their homeland was one of the main political demands of the Crimean Tatars. Citizenship was considered by the Crimean Tatar political forces as one of the instruments to protect their rights as a people.

The Crimean Tatars consider themselves as indigenous people of Crimea and thus strive to participate in decision-making processes that take place at the regional Crimean and local levels. They want to influence decisions that directly affect them. In order to accomplish this, they believe Crimean Tatar representatives should be elected to representative bodies and appointed to governmental bodies.

Until the reforms discussed above took hold, the right to vote and to be elected to Ukrainian institutions could only be granted to citizens of Ukraine. Crimean Tatar political forces viewed their struggle for acquisition of nationality in terms of fighting for their collective rights. As a representative body, the Majlis of the Crimean Tatar people constantly raised this problem to the Ukrainian authorities. On the eve of elections in February-March 1998, Crimean Tatars conducted mass protests about their ambiguous position regarding citizenship. During the parliamentary elections in 1998, approximately 85,000 Crimean Tatars (that is, more than half of the population of voting age) had no opportunity to vote because of their lack of citizenship. The denial of the right to vote by such a large section of the population had a great influence in the outcome of the 1998 election results: none of the Crimean Tatar candidates were elected to the ARC's representative body, the Verkhovna Rada and only a few Crimean Tatars were elected to local councils. For example, two Crimean Tatar deputies out of 80 were elected to the Simferopol City Council where the share of the Crimean Tatar dwellers accounted for about 12 per cent of the total population.

However, after the 1998-2001 citizenship campaign, the situation regarding the political representation of the Crimean Tatars improved dramatically, and seven Crimean Tatar representatives successfully won seats in the Crimea's Verkhovna Rada in the elections of 31 March 2002. In all, 6,614 persons were elected as deputies of local councils in the ARC, including 922 Crimean Tatars (or 13.9%); in towns where there was a tendency to vote for Republican candidates, 63 (or 4.9%); in rural areas, 839 (or 16%) of the number of elected deputies. Thirteen Crimean Tatars were elected as village mayors, including in Bilohirsk *rayon*, 6; in Kirovske, 2; in Dzhankoi, Lenino, Pervomaiske, Krasnohvardiiske, and Chornomorske, 1.

As noted above, the Crimean Tatar's success in the 2002 local government elections was possible because they were seen as a large and important constituency. In contrast to 1998, there were approximately an additional 85,000 people who were eligible to vote, thanks to the adoption of the new citizenship law and the successful implementation of the bilateral Ukrainian-Uzbek agreement on citizenship for formerly deported persons and their descendants. As a consequence of their electoral success, the number of Crimean Tatars elected and appointed to public and local bodies increased considerably and in each *rayon* in Crimea, the deputy head official was a Crimean Tatar. In addition, the Crimean Tatars also entered the Council of Ministries of the ARC.

Yet, the situation was different for the Crimean Tatars in rural areas. Among other things, they were denied the right to participate in the process of the privatisation of rural Crimean agricultural lands because, at the time, most rural Crimean Tatars were stateless. This policy of deprivation resulted in a now serious imbalance between Russian-speaking land owners (the vast majority) and the few Crimean Tatar land owners. Further, despite numerous appeals of the Crimean Tatar politicians and general public, the introduction of the Land Code of Ukraine in 2001 consolidated this inequality. Both political experts and the Crimean Tatars consider this land allocation process a telling illustration of on-going discrimination against the Crimean Tatars and a violation of their rights.

Current Situation

The citizenship law of 2001, most recently amended in 2007, liberalized the procedure of naturalization and introduced sweeping reforms. Most importantly, this law now provides a range of options for acquiring citizenship. Article 6 stipulates the following means for acquiring citizenship:

1. by acquisition of nationality by birth;
2. by territorial origin;
3. by common procedure of acquiring citizenship;
4. by procedure of restoration of citizenship;
5. by adoption;
6. as a consequence of establishing care or trusteeship of a child by an individual or the state;
7. as a consequence of establishing care for a person who is recognized as an incapable person by the court;
8. for the reason that one or both parents of a child are citizens of Ukraine;
9. as a consequence of acknowledging paternity or maternity;
10. by other reasons that are provided for by the international treaty of Ukraine.

Most Crimean Tatar-repatriates have received Ukrainian citizenship on the basis of territorial origin. Article 8 of the law reads:

> A person who him/herself or at least one of whose parents, grandfather or grandmother, brother or sister were born or permanently resided within the territory, which became the territory of Ukraine in accordance with the Article 5 of the Law of Ukraine 'On Legal Succession of Ukraine' and within other territories, which consisted a part of the Ukrainian People's Republic, the Western Ukrainian People's Republic, the Ukrainian State, the Ukrainian Socialistic Soviet Republic, Trans-Carpathian Ukraine, Ukrainian Soviet Socialistic Republic (URSR) and who is a person without citizenship or a foreigner, and who has obliged him/herself to terminate foreign citizenship and who submitted an application to acquire the citizenship of Ukraine and his/her children are registered as citizens of Ukraine.

Under the rules of the Interior Ministry of Ukraine, based on the above-mentioned law, an individual who can prove his Ukrainian origin and has filed all necessary papers can become a Ukrainian citizen after one month of submitting their application. In 2008, some 45,873 persons received Ukrainian citizenship by means of a presidential decision. It should be noted, however, that others have been less fortunate, and Crimean Tatar repatriates who have come back mainly from Central Asia, still encounter difficulty largely because of legal inconsistencies between the systems in other post-Soviet states and Ukraine.

It is important to highlight some key reforms. In December 2003, Ukraine cancelled a 1996 bilateral agreement with the Republic of Uzbekistan on the prevention of cases of dual citizenship and allowed tens of thousands of deported persons and their children and

grandchildren who had already returned to Ukraine (particularly Crimea) to finally receive citizenship. Since 7 October 2004, when the cancellation law came into force, citizens of the Republic of Uzbekistan residing in Ukraine have been able to acquire Ukrainian citizenship without having to pay a large fee of more than US $10 to renounce their Uzbek citizenship.

Methods and Findings

Interviews were conducted in April and May 2009. Participants were selected because they were among the former Uzbekistan-based applicants who had applied to the researcher's NGO for legal assistance in their bid for Ukrainian nationality.

Overall, the participants noted that the citizenship campaigns sponsored by the Ukrainian government, with the assistance of UNHCR, were generally positive but two participants also noted that there had been a period of inactivity on the part of the government and that it was later forced to react on this issue. They claimed that the government was pressed to introduce the citizenship campaigns because of many protests by Crimean Tatars who demanded a resolution to the problem.

Two female participants, one middle-aged woman and a young woman in her 20s who returned in 1993 and went on record to say that they returned because they identified with Crimea, described the problems that they had encountered when they did not have citizenship and how these had been rectified. Zarema, who arrived in Ukraine as a minor, noted that when she applied for a job and a place at a public university without a Ukrainian passport, her applications were unsuccessful. However, once she received citizenship and Ukrainian documents, new opportunities presented themselves and the above barriers were removed. To her, the key benefits of citizenship included the opportunity to work with public services and to receive a public university education. For the middle-aged Adile, citizenship also meant that it was now possible to secure a plot of land or social housing.

For Anatolii, a young man who arrived from Uzbekistan in 1992, the granting of citizenship made his life much simpler. Whereas previously he could not work legally and was 'holed up', in fear of being found without papers by the militia, he no longer felt threatened. He described the immediate benefits of citizenship. First, the district militia officer stopped 'watching him' when he saw that he now held a Ukrainian passport. Second, he was able to find a regular job. Third, he noted that as a result of his change of status he was no longer so vulnerable to exploitation by employers and that he had a choice over the types of jobs he could do. Fourth, he states that he was now invited to participate in elections. Just as with Zarema and Adile, Anatolii claimed that receiving citizenship opened up new possibilities. In addition to feelings of assertiveness and the possibility of holding down a good job with decent pay, he felt that the possibility of acquiring a plot of land on which he could build was especially significant. The ability to acquire land enabled him to start a family and have a base of security.

Some of the most notable benefits of this campaign included a greater degree of confidence and assertiveness among the Tartar community. This was partially due to the adoption of a new law regarding proportional representation, which guaranteed the representation of Crimean Tatars in local self-government and the Verkhovna Rada of the ARC.

For individuals, there were some personal benefits; for example the possibility of finding employment in public service, a sector that is traditionally secure. Individuals were also now in a position to participate in the privatisation schemes of public property and, in theory, have a greater possibility of becoming land owners.

For younger people, the granting of nationality status enabled them to receive valid travel documents, which permitted them to travel not just in the former Soviet Union but also to other parts of Europe and Turkey. More important was the possibility of entering public institutions and receiving free tuition. The only perceived negative effect for young people was the fact that military service was compulsory and took them out of the labour market.

On balance, however, while the right to citizenship was one of the central political and legal demands of the formerly deported Crimean Tatars, the citizenship campaign could not solve the issue of legislative rehabilitation nor address some of the systemic problems of unemployment, the lack of decent housing and public infrastructure, high levels of morbidity, the lack of access to sufficient medical care, limited social integration, the restoration of property rights and the multiple challenges involved in the allocation of land. Formerly stateless people could not escape from the slow and complex legal and bureaucratic machinery that was necessary to guarantee access to rights. Moreover, for many, their exclusion from the state educational system had long term effects on their potential earning capacity and some of the less educated Crimean Tatar returnees were resigned to low-pay work.

Further, it should be noted that the reforms of the last decade have not been able to address the situation of approximately 20,000 stateless Crimean Tartars, mostly settled in urban areas in Central Crimea, who are still without valid documents and have yet to receive Ukrainian nationality.

Conclusion

The Ukrainian Citizenship Law defines the Ukraine's citizenship as a "permanent legal bond between individuals and the Ukrainian State that reveals itself in mutual rights and obligations". Belonging to the Ukrainian citizenry provides for a wide range of rights and freedoms in various spheres of life. Thus, citizens of Ukraine have a right to participate in public administration through their participation in elections and national and local referenda under the current legislation of Ukraine. Ukrainian citizens have the right to demand protection of their rights from the state. Ukraine's diplomatic missions and consular offices must take measures to provide for the citizens of Ukraine to enjoy the rights granted by the legislation of their country of residence and also to abide by the international agreements in which Ukraine and the country of residence are parties in full; they must protect their interests, which are guaranteed by law in accordance with the established procedure; and if necessary, the state must take steps to restore infringed rights of Ukrainian citizens.
Belonging to the Ukrainian citizenry is the most important pre-condition of the state's obligation to protect, in full, the rights and freedoms of its citizens that are guaranteed by the Constitution and laws of Ukraine not only on the territory of the state but also abroad. Equally important are provisions of the Constitution and laws of citizenship that prevent Ukrainian citizens from being deported or extradited to a foreign state.

The mass statelessness of the Crimean Tatars was, first of all, a violation of their legitimate right to have and realize their human rights on the same basis as other citizens of Ukraine. For the vast majority of repatriates, the deprivation of Ukrainian citizenship significantly complicated their resettlement and reintegration in Crimea. The deprivation of citizenship was also accompanied by violations of other fundamental rights, above all their economical, social, cultural and other rights, which contributed to the societal and political tension on the Crimean peninsula. The lack of citizenship and persistence of statelessness among so many Crimean Tatars and their exclusion from the electoral franchise were the causes of the numerous public meetings, protests and other demonstrations that brought them into conflict with the militia on the eve of the parliamentary elections in March of 1998. The mass statelessness of the Crimean Tatars also impeded a realization of their rights in the areas of investment, business development and other entrepreneurial activities. Their lack of citizenship status violated their rights to labour, social security, housing, education, equal participation in public life, and freedom of movement.

While both repatriates and their leaders, the Majlis of the Crimean Tatar people, regularly urged the Government of Ukraine to improve this unjust legal situation, it was only after the international community became engaged, as represented by OSCE and UNHCR, that the situation improved. Between 1999 and 2001, the joint efforts of the Government of Ukraine, UNHCR and the Crimean Tatar public then brought about fundamental changes that had been long awaited by tens of thousands of repatriates after long years of forced exile.

CHAPTER 7

ARABIA'S BIDOON

Abbas Shiblak

Introduction

Despite the presence of sizable groups of stateless persons in Arabia[1], only Yemen is a signatory to the 1954 Convention relating to the Status of Stateless Persons. The largest communities of concern in the region include numbers of Palestinians, denationalised Kurds, and the Bidoon, a term that is commonly used to describe the 'Bidoon Jinsiya', or people without nationality (FCO 2007). This chapter will focus on the one case where there has been a limited degree of progress toward resolution, that is, the Bidoon. The author explores reasons for the persistence of statelessness in the region, considers how socio-economic, environment, security, governance, and gender discrimination have exacerbated the phenomenon and takes a cursory look at the benefits of citizenship for individuals who have been able to regularize their status.

Research Context

Three main factors are reported to account for Bidoon's precarious position. These include: i) the politics of state formation; ii) large scale movements of nomadic populations across Arabia; and iii) insecurity and citizenship as demonstrations of loyalty. According to the UK Foreign Office, the fate of the Bidoon was not dissimilar to other nomadic peoples:

> The term *Bidoon* originated in the late 1950s when Kuwait drew up its laws on citizenship in preparation for full independence in 1961. The 1959 Nationality Law defined Kuwaiti nationals as persons who were settled in Kuwait prior to 1920 and who maintained their normal residence there. A number of long-term residents in Kuwait either did not apply for citizenship or did not qualify for first or second class citizenship. Many were believed to be the descendants of regional tribes who wandered through Kuwait, Saudi Arabia, Iraq and Syria.

Indeed, the fate of the Bidoon has been linked to the exclusionary processes of state formation in the Arab region that took place when the Ottoman rule ended. European colonial powers that inherited most of the Ottoman provinces decided to divide the areas of control among themselves. Under the influence of the British and the French, sub-national states emerged, cutting across the former Ottoman *Tanzimat* or administrative order; the ex-welayat or provinces system disappeared, and new borders were created for what were seen as artificially designed states that reflected the division of influence between the two colonial powers. As a result, main towns were cut off from their surrounding villages, which had previously provided social support and a source of trade. Equally, nomadic and semi-nomadic societies in the northern Arabian desert of *Badyiat Al-Sham* and the Syrian desert were also cut off.

Bedouin tribes, which for centuries moved with their animals without checkpoints or border crossings, found themselves constrained. Passports and identity documents were not only

unknown but also undesirable devices brought by 'men with blue eyes, who wore trousers and funny hats'. Many Bedouin were suspicious of the new ways and some chose not to have their names registered or simply did not bother to do so since their way of life maintained the same rhythm it had always had. Even for years after the new states where established, nomadic pastoralists were still able to function as free and full citizens. At the time, paper documents did not have the meaning they have now and, consequently, thousands of people remained undocumented.

The Bidoon today are largely the victims of state creation and have experienced similar problems to the undocumented indigenous people of the Gulf region. Official explanations for the ongoing exclusion of the Bidoon include: a) these people are not, in fact, stateless persons but citizens of neighbouring countries who move to work and live in countries where they are present; b) these countries offer them the chance to regulate their status, but they have failed to do so. Both sets of explanations attempt to excuse official policies of discrimination, and, while it may be true that some of the present day Bidoon's ancestors originated in neighbouring areas, most of these states were part of a larger entity that was not recognised as separate political units until recently. Kuwait, for instance, was always part of historical Mesopotamia and even part of modern Iraq where the present Kuwait ruling family have homes. Furthermore, the majority of the Bidoon of Kuwait were born there and lived all their lives in Kuwait. Indeed, for decades after the independence of Kuwait, the Bidoon were treated on a par with Kuwaiti citizens for most purposes, enjoying full social and economic rights but without nationality. At one stage they even constituted 80% - 90% of the Kuwaiti army.[2]

Changes to the 1959 Nationality Law, which was amended some 14 times, brought about a marked turn in the reception of the Bidoon in Kuwait. Whereas they had formerly enjoyed most of the same privileges as nationals, their situation worsened in the mid 1980s when their social and economic rights were withdrawn and access to government services was gradually banned. It was a process of exclusion and marginalisation that continued right up to the invasion of Kuwait by Iraq in 1990. An assassination attempt on the Emir of Kuwait in 1985 plus the Iraqi invasion introduced new security concerns for the ruling family who began to perceive the Bidoon as a fifth column.

Finally, the issues of security and loyalty must be considered. The topic of loyalty and fear of foreigners, however, is not limited to the more recent experiences of the Bidoon in Iraq. Loyalty remains an important matter in traditional tribal societies and throughout Arabia where loyalty is a criterion for naturalisation. It should be noted that the Al-Saud rulers of Saudi Arabia expelled their tribal opponents, mainly al-Rashid and their allies from Arabia, and tribes such as Shammar or Eneza, among others, were mostly denied citizenship. Until very recently none of these tribes were allowed to join the army or hold public office. More recently the present ruler of Qatar denationalised a whole tribe of Murrah (5,000-6,000 members) following an accusation that they had participated in a plot to oust the Emir.

In this context, security, which largely means the security of the ruling families, is connected to the desire to monopolise the wealth for the few in these oil-producing countries. It has been suggested that the desire to keep the demographic balance in favour of the Sunni majority against the Shiite population as in the case of Bahrain, remains the unspoken factor behind the exclusion of the Bidoon in most of these countries.

The Invisible Bidoon

It is difficult to know how many Bidoon are in Arabia. Their countries of residence are still fairly closed, though they are gradually opening up. Matters of citizenship and demography are still considered politically sensitive issues. There is enough evidence to suggest that there are at least 500,000 stateless persons presently in Arabia. Local groups tend to give higher figures than those reported by the authorities or by the United Nations High Commissioner for Refugees, but it is difficult to verify them. Some unofficial estimates put the figures of stateless communities in Saudi Arabia alone to be more than 300,000, the majority of whom are in the western provinces in Jeddah and the holy cities of Mecca and Medina.[3]

The largest population of Bidoon is still in Kuwait and estimated to be between 90,000-130,000 (FCO 2007). An additional 100,000 were forced to flee to Iraq during and after the Iraqi invasion of 1990. In the United Arab Emirates, official sources suggested late in 2008 that there were around 10,000 of what the authorities called 'undocumented residents'[4], while independent sources give higher figures of more than 50,000, maintaining that the number of 10,000 is, in fact, the official estimate of those expected to apply for nationality before the deadline on 6 November 2008.[5]

Legal Issues and Controversies

Citizenship is largely conceived of as a privilege granted by the head of state and is not a fundamental right. There is, in most cases, no judicial mechanism available to challenge the executive order to deprive someone or a group of people of their citizenship. Most of the nationality laws of these countries were introduced during the British administration but have since been amended and made considerably more restrictive. A series of out-of-date laws that still regulate various aspects of citizenship such as immigration, the status of refugees, the status of women, and child rights are to a large extent responsible for generating and maintaining the phenomenon of statelessness in the Gulf region. Most of the countries in this region adopted rigid criteria to grant nationality based only on the principle of *jus sanguinis* and the passing on of nationality through the male line, the husband or father. Children may, therefore, inherit statelessness from their stateless fathers; it should be recorded that in most of the Gulf States, women have no rights to pass on their nationality, if they have one, to their stateless children.

Efforts To Reduce Statelessness

Most of the Gulf States have begun to realise that they need to open up their restrictive nationality laws; that the current situation is not only unrealistic in a rapidly changing world, but it is also essentially undemocratic and largely in breach of basic human rights. In Kuwait and some it its neighbours, special amendments were recently introduced to allow foreigners who contribute to the country they live in, to naturalise. Like many Western immigration policies, the above-mentioned changes in the nationality legislation were clearly designed to attract entrepreneurs, professionals, and the well-connected rather than to reduce or eradicate the phenomenon of stateless Bidoon. It goes without saying that, irrespective of the criteria, the ruling families of the Arabian states have total discretion over who should or should not be naturalised.

As for the Bidoon, special laws or regulations were issued recently in most of these countries that allow the 'undocumented residents' to apply for nationality if they meet certain conditions. The criteria in most states are quite restrictive and the burden of proof falls on applicants to demonstrate that they can meet the requirements, with not much help offered from the authorities. The process lacks transparency, and, in most cases, there is no mechanism or judicial review available to challenge the executive determination. There is also a provision that allows the executive branch of government to deny nationality to any applicant who failed to obtain a security pass—a document that verifies the individual is not a security threat—which leaves the door open for arbitrary decisions with no right of appeal.

In the case of Kuwait, the authorities recently started issuing the Bidoon with a document commonly known as an 'Article 17 Passport'. It is not a passport or proof of citizenship but rather a travel document that the Minster of Interior can issue based on Article 17 of the Passport Regulation for Temporary Use. It was previously issued to foreigners working for the government as well as the Bidoon who needed to travel at short notice or for urgent reasons (including a pilgrimage to Mecca) or for medical treatment or to study abroad. The Kuwaiti government recently introduced a new version of the 'Article 17 passport' with a different colour cover (unlike the previous one which was blue and similar to the proper Kuwait passport) thus further signalling that this document is not of the same standing as a Kuwaiti passport. The change in design of the 'Article 17 passport' came as a result of complaints by Western countries because it was not easy to distinguish between the official document, which applied to Kuwaiti citizens, and the travel document.

The Kuwaiti authorities had promised to naturalise 2,000 Bidoon annually following a law introduced in 2000; however, the government shelved the law in 2003, and, as a result, fewer than 1,600 Bidoon were able to naturalise during this short period. Those who successfully obtained Kuwaiti nationality include about 600 Bidoon families who lost household members, otherwise known as 'martyrs', who were killed in the war while serving in the army. Many had been waiting for more than 15 years for the authorities to decide on their applications for naturalisation.[6]

The Bidoon of Kuwait are now relegated to a bureaucratic no man's land. Nationality is deemed a matter relating to sovereignty and, by law, courts cannot review sovereign actions of the state. Accordingly, the Bidoon cannot petition the courts to have their citizenship claims adjudicated. Their social and economic rights were withdrawn years ago, and now they are harassed on a daily basis by the police, rounded up at checkpoints and subjected to ill-treatment. Despite government claims that have been taken on good faith by some official European and American monitors, the Bidoon still have no access to state-subsidised medical care or education. In general, they have to pay privately for their medical and schooling from their own pockets; in a few cases, under-resourced charities partially cover medical care for few families.

In November 2008, Bahrain announced that it had comprehensively resolved the issue of the Bidoon.[7] In June 2002, the King issued a decree allowing citizens of the Gulf Cooperation Council (GCC) to take up Bahraini nationality while keeping their original nationality. The prospect of holding dual nationality opened the door to the possible correction of the problem of statelessness. In May 2009, the Minister of the Interior claimed that Bahrain had also given passports, unlike many other Arab states, to stateless families and children of Bahraini mothers married to foreigners. However, the number of beneficiaries is unknown. According to press reports, the Minister of the Interior Minister of Interior, Shaikh Rashid bin Abdullah

Al Khalifa, clarified that Bahraini passports were only given to those who could fulfil certain criteria, including good knowledge of the Arabic language and completion of 15 years of residence in the country for Arabs and 25 years for non-Arabs. He also announced that those applying for citizenship may require a personal interview. In spite of these requirements, the Minister affirmed that 7,012 persons were naturalised in the last five years. Of those granted citizenship in Bahrain, the largest group were non-Arabs from Asian states (3,599), followed by Arabs (2,240), GCC citizens (1,095) and immigrants from 78 other countries.

Independent and opposition groups acknowledged that there had been some progress in Bahrain but estimated that around 5,000 Bidoon were left behind despite the government claims to the contrary.[8] These human rights groups in Bahrain also pointed out that the government is using the recent naturalisation measures as a political tool by granting nationality to thousands of Sunni Arabs who hold other nationalities in an attempt to change the demography to the detriment of the Shiite majority of the Island.[9] The issue of demographic engineering has brought considerable attention to the management and rationale of the naturalisation process and has even encouraged citizens to reapply for citizenship.[10]

Regarding the United Arab Emirates (UAE), it is not clear yet how many Bidoon have been naturalized in the UAE since a naturalisation campaign was introduced at the end of 2008. Some reports suggest that 51 people were naturalised in the first half of 2009. The issue of citizenship is still considered a sensitive issue in the UAE and among its neighbours, just as are the topics of democracy, identity and gender issues which, the interviews revealed, are largely still considered taboo in these states.

Findings

The research focused on the situation of the Bidoon in countries that the research team visited--namely Kuwait, Bahrain, and Oman. In addition, the research team gathered desk information and conducted interviews with human rights experts and exiles in Europe to learn more about other Gulf States that the team was not able to visit. A planned visit to the UAE was cut short following the cancellation of a flight, and, as a result, an interview was organised in Bahrain. The central aim of the research was to estimate the scale of the problem in each of the states and to evaluate governmental claims of reform.

In Kuwait interviews were conducted with experts, including a journalist and a young Bidoon man who had recently returned to Kuwait and held a Canadian passport. It was difficult for them to speak freely on the status of the Bidoon, especially with foreigners. However, an exile in the UK helped make contact with research participants in the field, and further interviews were compiled later through the diasporic Bidoon connections.

The findings showed a wider gap between what the government sources suggested (above) and the actual conditions of the Bidoon community. At least three of those interviewed were registered in the 1965 census, but their applications for naturalisation were thrown out without any explanation.[11] A Kuwait woman married to a Bidoon man said that her nationality was of no use to her nine children. “They were driven to destitution, barred from schools, unemployed and unable to obtain any documentation of their civil status.”[12] All of the interviews in Kuwait showed a repeated pattern where a) arbitrary decisions were often made and a lack of clarity was evident in regard to the Bidoon’s rights to naturalisation b) the government retained total discretion when applying (or refusing to apply) its own regulations

regarding the Bidoon; for example, by denying security clearance or *Qayed Amni* without which the Bidoon are barred from entitlement to nationality, documentation, travel, or assistance from charitable organisations, c) that a generation of Bidoon have been deprived of education in the state schools (since the mid 1980s) and are now illiterate or semi-illiterate.

Two interviews regarding Bahrain (one in the United Kingdom and one in Bahrain) were conducted with two human rights/political activists, one of whom was later detained. The fact that this participant was detained may also explain why a planned follow-up interview in London did not go ahead either.

As had not been the case in other countries, the researcher noted a 'state of fear' regarding open discussion about the situation in Bahrain and, therefore, relied on exiled groups abroad. At the time of the interviews in Bahrain, there was a tense political situation (stand off) between the government and the opposition groups. All the participants were subject to monitoring, but further information is still expected to be sent to London through the human rights activist who made the initial contact.

The initial findings from Bahrain present an unclear picture. While independent and opposition groups acknowledged that there had been some recent progress with naturalisation campaigns, they estimated that about 5,000 Bidoon are still left behind despite the government's claim to the contrary.

In Oman, the researcher relied on interviews conducted with officials from the Foreign Ministry in charge of the Omani communities abroad. No women were interviewed in country. In Oman, the researcher was assured that there was no longer a problem of stateless or non–documented indigenous communities amidst official reports that Oman had offered nationality to all expatriate Omanis who choose to return to the country from east Africa or Asia. However, not all Omani returnees have been accounted for—primarily those who settled in the wealthy oil-producing countries in the region such as UAE (which was part of Oman before its independence in early 1970s). This failing in the naturalisation policy has caused some Bidoon to move to the UAE in the hope of being naturalised there instead.

Further, the interviewer met participants from the UAE in Oman who reported that there is currently a review process underway, but in the absence of official documentation, the researcher was advised that the only way forward in his quest for information on the effects of changes in the naturalisation procedures was through informal and unofficial channels.

Evaluation

According to the research participants, the main barrier to the realisation of full citizenship in Kuwait is not the introduction of specific laws but rather that restrictive criteria have been used to exclude individuals from receiving citizenship. The government retains complete discretion and has been charged with using 'security' arguments, namely that individuals pose a security threat to the state, to deny people the right to citizenship. It should be noted that applicants for naturalisation must obtain a security pass, and this procedure may act as a means of preventing individuals from receiving Kuwaiti nationality.

For the approximate 2,000 Bidoon who have received Kuwaiti citizenship, there have been some important changes. Not only are they now entitled to birth certificates for their children, but they also may obtain driving licences as well as other licences and business permits. Many are self-employed as traders. A small number of high-profile individuals have received documents and are able to work in sports or arts. Few highly-educated professional Bidoon, mainly medical doctors, have returned to work and live in Kuwait after acquiring foreign citizenship. Less than 5 per cent of naturalised Bidoon were accepted back to serve in the army or the police.

It should be noted, however, that of the 2,000 or so who received citizenship, most of them were older residents who formerly enjoyed extensive social and economic rights in Kuwait before 1990 and have now had these rights restored. Younger Bidoon have been denied the right to citizenship outright. In general, the Bidoon who have been recently granted papers belong to an elite group that in no way represent the oppression suffered by most Bidoon.

There is also an important gender dimension that has not been addressed by the reform of naturalisation procedures. The research team noted that women in Kuwait who were married to Bidoon (as well as their children) were still subject to discrimination on the basis of national origin. Unlike women in other countries such as Tunisia, Egypt, Algeria and Morocco, children of non-national fathers (e.g., stateless Bidoon) cannot acquire Kuwaiti nationality. As one Kuwaiti mother interviewed noted: “How could it be fair that an illegal child has better chance to be granted nationality than mine, simply because his father is Bidoon?”

According to the UK Foreign Office (FCO), the following problems still confront the vast majority of Bidoon in Kuwait. They are

- unable to obtain either a Kuwaiti passport or identity card
- unable to vote
- unable to register births, marriages or deaths
- able to obtain a driving licence (since 2007) good for 3 or 12 months (Kuwaitis have 10 years) and endorsed ‘Illegal Resident’
- unable to access state secondary education; only 100 places available at Kuwait University for children of a Kuwaiti mother and Bidoon father
- able to access state hospitals the same as foreign nationals (monthly fee of KD 5, or GB £9)
- barred from employment in public sector, although those previously employed can continue
- liable to be arrested or detained as stateless or illegal residents
- able to sue in the Kuwaiti courts, as can foreigners. If accused of a crime, they can access legal aid, but they may find it difficult to have a lawyer allocated to them (FCO 2007)
- their children have no status, even if their mother is a Kuwaiti citizen.

The situation in other Arab states is less clear. In Saudi Arabia, for instance, there are no data on numbers of Bidoon per se who have benefited from citizenship. The vast majority of stateless people are dissident immigrants who settled following the Haj, and there is no special law for the indigenous Bidoon, only a general law for foreigners. This procedure applies above all to highly skilled migrants, mostly wealthy individuals from other Arab countries, as opposed to the Bidoon.

Conclusion

Promises of reform have not improved the lives of the vast majority of Bidoon. A handful of Bidoon in Kuwait have now had their rights restored, but they remain outsiders in a system that views them with suspicion and hostility. They do not enjoy political rights, and their social and economic rights are sharply curtailed in relation to Kuwaiti nationals. Equally, the stated change in policy in Bahrain has not been applied in a comprehensive or consistent manner, and many Bidoon remain excluded and under suspicion. Finally, there is a need to correct gender-bias in all the naturalisation policies of the Gulf States to ensure that women can pass on their nationality to their stateless children, irrespective of the status of their husband or the children's father. Until the Gulf States treat the Bidoon issue as a matter of human rights rather than security, the Bidoon will continue to be perceived as less-than-equal members of a foreign community and will continue to be of the victims of both official and societal discrimination.

Notes

[1] Countries of the Arabian Peninsula that include the six members of the Gulf Cooperation Council (Saudi Arabia, Kuwait, Bahrain, Qatar, the United Arab Emirates, and Oman) and Yemen.
[2] The FCO estimated recently that 80% of the Kuwaiti army in 1980s were Bidoon, British Embassy in Kuwait, November 2007. The Bidoon community sources put even higher figures of 90% but not within the senior officers ranks. Interview with Chair of Bidoon Community in the UK. 17/11/2008
[3] Interview with Saudi academic exiled, London , 27/11/2008
[4] Swiss News 21/10/2008; http://www.swissinfo.ch/ara/feedback.html?siteSect=105&sid=72134
[5] Al-Khaleej Times , 6/11/2008
[6] Interview no 1 Kuwait, 21 December 2008
[7] M. Al-Sayegh, 'بدون الخليج... مواطنون ب الو طن [Without the Gulf ... Citizens without Homeland]', *Arab Information Centre,* 9 November 2008 2008.
[8] IRC, 10,000-15,000. Interview with Bahraini academic and political activist put the figures not more than 5,000, interview no 1, Bahrain, 23 December 2008
[9] See: US Department of State, 'Background Note – Bahrain 2009', (Washington, DC: United States Department of State, 2009).
[10] See: A. Saldanha, 'Bahrain's Demographic Tensions', *Arabist.com* (2009).
[11] Kuwait interview 7 and 8, 4/4/2009
[12] Kuwait interview 5, 16/5/2009

CHAPTER 8

SUMMARY AND CONCLUSIONS

Brad K. Blitz and Maureen Lynch

The Perils of Qualitative Research

Sixty years after the international community embedded the right to nationality in the human rights architecture that we rely on today, approximately 12 million people around the world remain stateless. These are people who struggle to exist, much less enjoy protection of their human dignity.

One of the central challenges for the protection of human rights for the stateless is the deliberate discrimination of specific groups of people by state authorities. As Hannah Arendt noted in the Origins of Totalitarianism, statelessness reflects the continued failure by nation-states to incorporate basic principles of both international and domestic law and, in the absence of equality, makes a mockery of state institutions (2004). Yet, statelessness also cuts across a host of other issues that operate not just at the level of the state but at the subnational and global levels. As discussed in the opening chapter of this volume, statelessness is a global phenomenon with causes that lie both outside the state and within it, hence the need for an analytical approach that recognises transnational complexities in the development and reproduction of national identities. While statelessness may sometimes be associated with migration, displacement, population growth, trafficking, and climate change, it is sustained by the absence of the rule of law by weak and undemocratic systems of governance. Statelessness is further institutionalised in systemic discrimination in the form of gender inequality and racist and ethnocentric policies.

The premise for this study is that, in spite of the challenges noted above and the complex issues that give rise to statelessness, a small number of states have made measurable progress in helping individuals acquire or regain citizenship. The current project was designed to take stock of positive developments in five of those countries, and more importantly, to explore the benefits of citizenship as well as the broad array of human rights now enjoyed by formerly stateless populations. The goal was to then illustrate if and how citizenship has made a qualitative difference in the lives of formerly excluded groups and to examine the barriers that still prevent individuals from the full enjoyment of citizenship.

The literature review highlighted the convergence between the rights of citizens and non-citizens under international law. It also noted that statelessness itself exposes the hollowness of international human rights law; hence, the absolute importance of national actions for effective protection and the rationale for this research project. The focus of the research was to investigate the degree to which the granting of citizenship really does remove some of the 'unfreedoms' that Sen speaks of and to which he attributes the horrors of 'want and fear'. Yet the literature also highlighted that there are a multitude of domestic factors that undermine the possibility of protection and that one of the by-products of weak governance and societal discrimination is the fragmentation of citizenship into different classes and entitlements that vary greatly, depending on one's place in the hierarchy of privilege.

As with qualitative studies in general, the empirical data may illustrate particular trends and tensions but can rarely be considered representative or indeed establish claims of causality. In the context of this study, the reliance on some 60 interviews conducted with formerly stateless individuals and representatives of social service organisations across Kenya, Kuwait, Slovenia, Sri Lanka, and the Ukraine can only offer some selected insights into an issue of global proportions. For that reason, the research was designed with a strong exploratory focus. The interviews were intended to gather information on the degree to which the granting of citizenship has enabled individuals to access rights and resources and enhance the quality of their lives. The research also sought to identify some of the barriers that prevent people who have been granted citizenship from the full enjoyment of their rights.

The project was set back by some particular limitations. Both anticipated and unexpected mitigating factors affected the research process, which the team attempted to correct when almost halfway through. The team recognised the challenges of vulnerable populations and, therefore, sought out community bodies, social service organisations, and personal contacts in the human rights field that were able to identify potential interviewees. However, in some cases, these contacts did not always understand the nature of the project and early transcripts demonstrated a lack of clarity in expectations. As a result, the editors additionally requested that research team members complete a questionnaire summarizing their findings to help harmonise the responses to the above questions and identify common themes.

Summary of Findings

While the number of individuals granted citizenship in each case is not clear— though figures for Slovenia, Ukraine, and Sri Lanka seem to be more concrete—some people have benefited from reform. In light of this fact, country data were studied to identify common themes, patterns, and trends. A brief survey of both state-specific and common findings follows.

Research from Kenya indicated that the situation for the Nubians has changed for the better. It was noted that in the aftermath of the presidential promise of 2007, government initiatives to accelerate the distribution of identity cards to members of the Nubian community appeared to be more effective. And while the Kenyan government recently established a process to address the challenge of documenting the citizenship status of the Nubian community in Kenya, it was estimated that, in this case, at least half of the approximately 100,000 members do not yet have citizenship.

Positive effects of citizenship include the fact that more people are obtaining registration documents and passports, which has facilitated their entry into the labour market. Greater numbers of Nubians are employed, mostly in the private sector. There has also been an increase in political participation. Participants reported that their ability to vote during the elections of December 2007 represented to them their most important civic contribution.

Negative effects, however, include state capture and further manipulation of the Nubians' precarious status by state authorities. At the administrative level, there are barriers that undermine the provision of official documents, including birth certificates, ID cards and passports. Some participants described how the loss of identity documents was met with onerous demands to prove Kenyan birth. There has been no improved access to housing rights, sanitation, water, or education. Generally speaking, while there has been some

improvement, the granting of nationality has still not addressed the wider recognition of the group as birthright citizens nor has there been progress in the social economic rights issues, particularly for children.

In the case of Slovenia, theoretically at least, individuals who re-gained permanent residency can claim a series of rights, including education, health care on the basis of health insurance, employment inclusive of the right to start a business, family unity, social assistance, and free legal aid, as well as freedom of movement and protection from expulsion or detention. In addition, those who subsequently became citizens have political rights (to vote and to be voted for in national and European elections). In some cases they can even purchase apartments they have lived in since 1991.

In practice, however, the above rights have not been easily accessed by many formerly stateless persons. The citizenship campaigns for the 'erased' in Slovenia have been successful in empowering those affected and in bringing the issues of exclusion, exploitation, and injustice to the public agenda. However, a number of erased persons who re-gained their permanent residence status are not in a position to acquire Slovene citizenship—mostly because they still lack the "proof of the permanent means to support themselves". The reforms also did not address underlying societal problems of exclusion and exploitation, and the above-mentioned political campaigns saw greater polarisation. The net result might be categorized as further stigmatisation of the erased and harassment of individual activists. Moreover, the current legislation fails to compensate for the period of 'stolen years', and there is no sense that the erased will receive an official apology or in any way be exonerated by the Slovenian state, even though the actions of the former government to deny them their acquired rights are beyond dispute.

The situation of the Bidoon in Arabia was also examined, though less successfully than originally planned. It is notoriously difficult to conduct interview research of a sensitive nature in the Gulf States and regretfully, insufficient evidence was gathered to permit conclusions to be drawn about the current situation of Bidoon who received citizenship status. The data provided did, however, suggest that the problems of exclusion and denial of nationality have seen little change, with the exception of perhaps in Bahrain where independent and opposition groups acknowledged that there had been some progress with naturalisation campaigns. Sources estimated that around 5,000 Bidoon in Bahrain are still stateless despite the government's claim to the contrary.

In Oman, interviewees indicated that there was no longer a problem of naturalisation but that poor economic conditions had caused many Bidoon to move to UAE in the hope of being naturalised there instead. Yet, the researcher was provided with no information about the nature of any positive or negative developments post-naturalisation and the matter requires further investigation.

In Kuwait, official sources estimate that approximately 6,000 Bidoon were naturalised, but this figure has been contested by human rights groups that claim the number is no higher than 2,000. Secondary sources recorded that for those who received Kuwaiti citizenship, there have been some notable changes. Not only are they now entitled to birth certificates for their children, but they may obtain driving licences as well as other licences and business permits. Many are now self-employed as traders and thus have less contact with the interface of the Kuwaiti state.

According to field research in Sri Lanka, participants generally felt that the citizenship campaign initiated by the government and UNHCR was a good attempt to solve the problem of stateless 'Upcountry' or 'Plantation Tamils' who at the time of the 2003 campaign were estimated to be 300,000 in number. A total of 190,000 individuals were registered as citizens during the naturalisation campaign, and of those, 72,000 de facto stateless persons have received 'special declarations' that record a formal acknowledgement of their status from the immigration authorities.

The benefits for these individuals so far include granting the right of nationality and the provision of national identification documents, greater political participation, including the right to vote and the right to stand as a candidate in local elections; improved basic rights for their children who now have the right to receive a birth certificate. One recorded development is the expansion of political bargaining over their rights to protection and assistance in the economic development of their communities. Nonetheless, the interviews record that a number of individuals cannot be registered on voters' lists, that there are still administrative barriers that need to be overcome, and that the extension of citizenship to former stateless Plantation Tamils has not been able to address broader problems, including poverty reduction to improve the quality of living conditions.

The most notable benefits of the campaigns in Ukraine included a greater degree of confidence and assertiveness among the Crimean Tatar community, which has been formally recognised after years of marginalisation. This was due in part to the large numbers of returnees and the active leadership of the Crimean Tatar community, which prompted the Ukrainian authorities to adopt a new law for the use of proportional representation that guaranteed their representation in local self-government and the Verkhovna Rada of the ARC. For individuals, there were some personal benefits, for example the possibility of finding employment in public service, a sector that is traditionally secure. Individuals were also now in a position to participate in the privatisation schemes of public property and, in theory, have a greater possibility of becoming land owners.

For younger people, the granting of nationality status enabled them to receive valid travel documents that permitted them to travel not just in the former Soviet Union but also to other parts of Europe and Turkey. More important was the possibility of entering public universities and receiving free tuition. The only perceived negative effect for young people was the fact that military service was compulsory and took them out of the labour market.

The citizenship campaigns of the 1990s could not, however, solve the issue of legislative rehabilitation nor address some of the systemic problems of unemployment, the lack of decent housing and public infrastructure, high levels of morbidity and the lack of access to sufficient medical care, limited social integration, or the restoration of property rights and the multiple challenges involved in the allocation of land. Formerly stateless people could not escape from the slow and complex legal and bureaucratic machinery that was to guarantee access to rights.

Common Themes

A comparative review of the case findings outlined above reveals a number of common themes as well as some disturbing patterns. In no case was there a blanket remedy for the entire stateless group nor did reversal of their situation occur in rapid order. Rather, numbers

of individuals appeared to benefit from state action over time or at some point became able to access more rights than was previously available to them.

In each of the case studies, there have been varying degrees of improvement in access to the labour market. This was most evident in Kenya where individuals went from not having worked because they were stateless to finding employment in the government sector. In Sri Lanka and Slovenia, former stateless people enjoyed considerably more benefits in regard to internal and international travel.

The matter of property and living conditions was highlighted in the cases of Kenya, Sri Lanka, Slovenia, and the Ukraine. In only two situations, Slovenia and the Ukraine, was any positive reference made to the acquisition of property.

Far less attention was paid to matters of education and healthcare—common elements of complaint among stateless persons. Research from Slovenia and the Ukraine indicated that access to education improved when individuals were able to regularize their status. This was not the case in Kenya. In regard to healthcare, data suggests only that Slovenia's formerly stateless persons had greater access.

Systemic problems of underdevelopment and corruption have undermined the potential benefit of citizenship and many excluded people remain without basic services. This is particularly acute in poor states such as Kenya and Sri Lanka and also in the Republic of Crimea in Ukraine.

In two situations, Sri Lanka and the Ukraine, the United Nations played a vital role in instituting fruitful campaigns. In the final instance, regarding the ongoing statelessness of Bidoon, government initiatives played a primary role—though with limited results and in only one state (Bahrain) out of a group of countries that hosts the population.

With the exception of Ukraine, where the problems of statelessness took place inside a wider context of political transition and the reorganisation of nationality across the former Soviet Union, the protracted nature of statelessness was, in each situation, solved in part but not in whole, over the course of decades. In all of the cases presented in this study, pockets of affected people remain in limbo.

Further, the passage of time as a push factor is unclear. There was no lurch towards democracy, no natural or even normative evolution in state thinking: rather, in each case, specific domestic and external pressures held greater explanatory weight for the changes in nationality and related laws that opened the doors to the fortunate few. While national governments were sensitive to external pressure, and each government is to be commended for the positive steps taken to date, the persistence of statelessness and discrimination, especially in Slovenia and Kuwait, and the failure to address it comprehensively over many decades, suggests that states do not perceive themselves to be truly vulnerable to external criticism.

A related and particularly disturbing discovery is that, where mentioned, the underlying problem or cause of statelessness was at best swept under the carpet and at worst further frustrated by the process of acquiring nationality in practically every case. For example, Nubians have still not been assured of their right to Kenyan nationality at birth and must continue to go through a challenging process (though certainly less harsh than it was

previously). Slovenia's 'erased', while able to get the underlying issues of exclusion and discrimination on the public agenda, are still at risk. The perceived issues of security and economic threat are two of the sticking points that continue to prevent the Bidoon from resolving their situation.

This research therefore provides further evidence of the reassertion of state sovereignty at the expense of human rights and the protection of human dignity—a finding which supports Goldston's (2006) claim that the discrimination between citizens and non-citizens, including stateless people, is primarily 'a problem of lapsed enforcement of existing norms'.

The Benefits of Citizenship

While it might still be premature in some cases to draw conclusions and comparisons regarding benefits of citizenship in this context, each case example can already provide lessons learned or best practices for the efforts of other states. Despite gaps and inherent limitations, this study does illustrate that the granting of citizenship offers some very real and important material and non-material benefits at both the community and individual levels. In general terms, one may state that the benefits of citizenship include the fundamental right to enjoy a nationality; to obtain identification documents; the right to be represented politically, to access the labour market beyond the informal sector or underground economy; and to move about freely. The potential for property ownership was also noted. Regaining citizenship ends isolation and empowers people, collectively and personally. Such political and personal changes are of considerable importance to the advancement of a human rights regime based on dignity and respect.

This research also makes a contribution to the theoretical debates over the value of citizenship and the need to investigate further the relationship between the 'unfreedoms' that Sen describes and that featured in the 1994 Human Development Report on Human Security. In this regard, it affirms the importance of studies produced by Refugees International and organisations on the ground that can inform our understanding of the ways in which repression and the denial of human rights affects individuals not only in law but also in practice.

Irrespective of trends in international law, the granting of citizenship itself is not sufficient to ensure the protection of human rights and to act as a unifying force for social integration. Indeed, the findings of this research study call into question some of the claims made by cosmopolitan scholars—most of whose work is based on European investigations and studies from advanced economies—over the potency of citizenship. The ending of direct discrimination on the basis of nationality does not undo structural effects or other modes of discrimination. Fragmentation and division occur both before and after the granting of citizenship. Hence, there is a need for more historically informed studies and micro-level investigations of the way in which repression and the denial of human rights affects individuals on the ground.

Equally important, the interplay between domestic actors and agendas, as suggested by Bauböck (2006) in his study on acquisition and loss of nationality, is borne out by the above findings and suggests that the process of nationality reform is a highly contested process in which stateless people may play a pivotal role. Just as pro and anti-immigrant forces have defined the situation for non-citizens in Bauböck's European model, the above findings from

Kenya and Ukraine suggest that large stateless populations have considerable agency and may set agendas for reform, even if they are challenged by xenophobic forces.

In spite of the relatively small sample, the research provides further insight into the modalities of domestic political reform and some mechanisms, which under favourable circumstances may influence change in the protection and promotion of human rights. The following six themes are offered with a view to advance future policy-relevant research on the prevention and reduction of statelessness.

1. **The benefits of citizenship are not evenly distributed:** In each of the above case studies, there have been varying degrees of improvement in access to the labour market, but those who benefited the most were the young. This was most noted in Kenya and Sri Lanka where individuals went from being stateless to having the opportunity of working in the state sector. In several cases, the granting of documentation enabled young people to acquire a university education and then enter jobs in secure sectors, including the government and health service. In Sri Lanka and Slovenia, former stateless people enjoyed considerably more benefits in regard to internal and international travel; this change in the right to travel again favoured the young who were better placed to relocate to cities and large towns, especially in Sri Lanka. The granting of citizenship does not absolve states of the responsibilities to prevent discrimination and ensure all benefit from their human rights.

2. **Setting the nationality agenda may move the process of reform forward:** As related to the point above, once stateless groups organised themselves, asserted their social identities as well as their claims to nationality, and, in some cases, attained the restoration of their social and economic privileges, they saw a marked change in their respective situations. In two examples, Kenya and Slovenia, stateless persons themselves were key actors and initiated the resolution of their plight. The case of Slovenia also raises the important point regarding the individualisation of rights and the way in which former de facto stateless people have been able to engage in the wider polity (both in Slovenia and in the European Union) and access European institutions such as the European Court of Human Rights. Arguably, by defining their rights and the parameters of the exclusion they experienced, they were better placed to press for change.

3. **Populations with a recognised ethno-national identity are more easily integrated:** A shared understanding of the historical relationship of the state concerned to the respective populations affected appears to determine the degree and manner in which they have been integrated following periods of statelessness. For example, while the origins of the Bidoon and the erased are neither uniform nor free from ambiguity, the terms themselves relate to people's status not their national or ethnic identities. There is little denying the historical attachment of the Plantation Tamils or the Crimean Tatars in Sri Lanka or Ukraine, respectively. Indeed, the history of the Plantation Tamils has been confirmed by India's long-standing political interest in their possible repatriation and in inter-state agreements between Sri Lanka and India on the resolution of their nationality problems. Also, in spite of inter-ethnic tension and long-standing discrimination against the Crimean Tatars, especially during the height of Stalinism, the fact of

their deportation from Crimea and their historical connection to Ukraine is undeniable. By contrast, the 'erased' in Slovenia and the Bidoon in the Gulf region are still viewed as foreigners who have not been well integrated and are the victims of suspicion.

4. **Documentation is essential to the realisation of human rights:** All of the field researchers referenced the importance of acquiring documents in the form of passports, civil identification documents, birth certificates, or even licenses. As noted in the findings from Slovenia, Sri Lanka and Kenya, documentation offered formerly stateless persons a means to civil and political participation as well as better access to services; conversely, those who lacked documentation were liable to abuse, including deportation. The realisation of the rights to citizenship may be advanced by the establishment of flexible policies regarding the provision of and recognition of official documentation.

5. **Recognition and exoneration have important psychosocial implications for nationality reform:** The fact that participants sought to be exonerated by the state and public and achieve some recognition for the abuse they suffered at the hands of the state is central to the pursuit of dignity and, as evidenced in both Slovenia and Ukraine, was a major motivating factor in their struggle for citizenship.

6. **Demographics matter for the resolution of statelessness:** In countries where there were a large number of stateless people relative to the overall population, there was a clear political interest in regularising the status of individuals who lacked citizenship. In Kenya, the large Nubian community was perceived as a potentially captive political constituency. In Ukraine, the numbers of Crimean Tatars returning from Central Asia forced the government to acknowledge this minority and, in an attempt to prevent inter-ethnic tension and division, grant it formal recognition. Thus, the presence of the community had a bearing on the eventual granting of minority rights as a matter of expediency. There were other negative aspects that came with communities' new founded political influence. The research team recorded how states had manipulated the situation of specific minorities and groups for political though not necessarily societal benefit, for example in Slovenia. Given the potential currency of stateless people as potential constituents, other regions with large stateless populations may also become sites of new citizenship campaigns and will require further assistance from UNHCR and closer monitoring of the treatment of minorities during periods of political reform and development.

The Wider Benefits of Citizenship

In conclusion, while it can be said that the five cases outlined in the present study demonstrate that there are a number of important benefits associated with acquisition of citizenship. As anticipated, some of the most notable changes acted to reverse the deprivation of rights suffered by stateless persons, sometimes for decades. Yet, stateless people are not the only beneficiaries when statelessness ends. Arguably, states may also gain greater legitimacy and improved standing in the international community: the resolution of the Crimean Tatar situation and the fate of the erased in Slovenia have both been central to

discussions between the European Union, Council of Europe and the governments of Ukraine and Slovenia, respectively.

Because ensuring the right to nationality is a foundation of human rights and a deterrent to displacement and disaffection, state action to reduce the number of individuals who are de jure or de facto stateless also benefits that state, its region, and the global community by increasing global stability and security. The number of persons at risk of being trafficked is potentially reduced. The rule of law gains sway. New citizens contribute their voices to politics, strengthen a nation's labour pool, and pay taxes. The list goes on.

The fact that the granting of citizenship ameliorates many, but not all, of the complex problems that have roots in economic inequality, systemic discrimination and other forms of injustice, points to the need to incorporate greater care to ensure the underlying causes are addressed by citizenship campaigns. Moreover, it is important to recognize the need to sustain integration initiatives and, in some cases, development aid for as long as deemed necessary. State responsibility does not end with the granting of citizenship status, as important as such action is. Further efforts to ensure and enhance protection are required.

It could prove particularly beneficial to augment the current project with additional comparisons from other states that have seen positive developments in recent months: Bangladesh and Mauritania, for example. Subsequently, the states studied in the current project along with Bangladesh, Nepal, Mauritania, Estonia, and Latvia, all of which have worked to end statelessness, should be brought together to identify, systematically and comprehensively, lessons learned and best practices that can be utilized by others seeking to do so. Meanwhile, states desiring to uphold nationality rights can draw points from the present study to guide their initiatives.

This project highlights the fact that the absence of citizenship has a human cost, which can be prevented. Timely and serious steps must be taken to avoid statelessness before it strikes—through birth registration, gender equality in nationality laws, and other types of reform.

The research also calls attention to a number of additional avenues for future investigation. There is vast opportunity to evaluate the often-overlooked impacts of statelessness. Little is known about the psychosocial implications of statelessness and much could be gained by measuring the life expectancy, socio-economic status, and educational trajectories of stateless persons. Furthermore, compilations of individual case studies identifying cause, effect, and remedy might prove helpful. Longitudinal studies could prove indicative as well

In the end, individual human rights are no less important today than they were 60 years ago. The good news is that solutions for some of the world's most persistent human rights problems are finally within reach. Globalisation, along with the development of vast social networks, increasingly visible civil society organisations, and innovative technology now make it possible for the global community to advance meaningful change where it was not possible before. The time is ripe for a more active human rights agenda.

In southern Nepal, a Dalit man and his grandson rest in the morning. The man's family has lived in the Terai for over five generations yet he is still without Nepalese citizenship.

Effective strategies to end the injustice of statelessness must not only involve fundamental changes in laws and norms that allow these human rights violations to continue but must be partnered with focused, ceaseless, and well-timed advocacy. A few countries have made measured strides in reducing statelessness. The UN response has improved. Non-governmental agencies, legal experts, and affected individuals are joining forces. Media attention has increased, but progress is limited and slow. Bolder and more creative efforts to uphold nationality rights for all—a foundation of identity, dignity, justice, peace, and security — must be identified and relentlessly pursued.

Overcrowding plagues every Bihari camp. Living conditions are cramped and pose safety and health problems as entire families, some as large as 15, live in 8x10 foot living spaces. Decorated with old newspapers glued to the walls, a family of seven sits and works in their room in Kurmi Tola Camp in Dhaka.

CONTRIBUTORS

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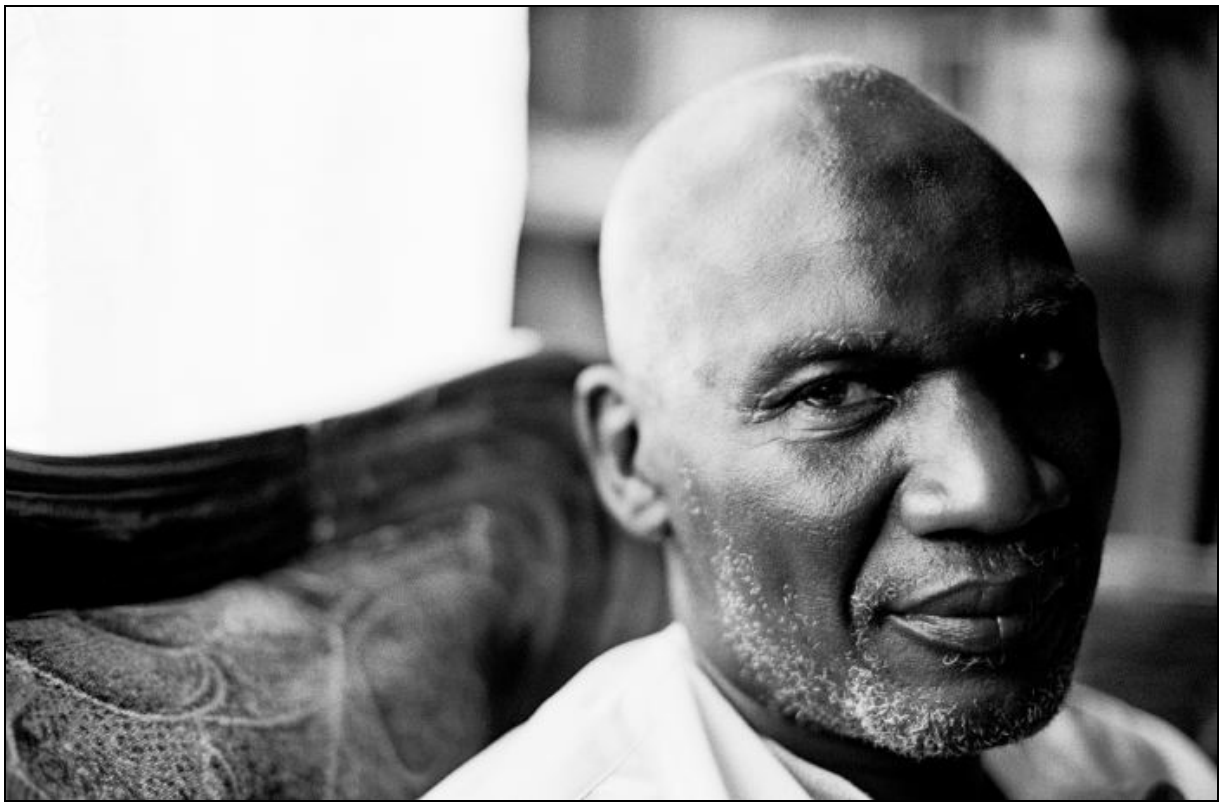

Portrait of a Nubian: Yusef at home in Kibera, on the outskirts of Nairobi. December 2008.

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