

**GUIDELINES ON STATELESSNESS NO. 1:  
The definition of “Stateless Person” in Article 1(1) of the 1954  
Convention relating to the Status of Stateless Persons**

UNHCR issues these Guidelines pursuant to its mandate responsibilities to address statelessness. These responsibilities were initially limited to stateless persons who were refugees as set out in paragraph 6 (A) (II) of the UNHCR Statute and Article 1 (A) (2) of the 1951 Convention relating to the Status of Refugees. To undertake the functions foreseen by Articles 11 and 20 of the 1961 Convention on the Reduction of Statelessness, UNHCR's mandate was expanded to cover persons falling under the terms of that Convention by General Assembly Resolutions 3274 (XXIX) of 1974 and 31/36 of 1976. The Office was entrusted with responsibilities for stateless persons generally under UNHCR Executive Committee Conclusion 78, which was endorsed by the General Assembly in Resolution 50/152 of 1995. Subsequently, in Resolution 61/137 of 2006, the General Assembly endorsed Executive Committee Conclusion 106 which sets out four broad areas of responsibility for UNHCR: the identification, prevention and reduction of statelessness and the protection of stateless persons.

These Guidelines result from a series of expert consultations conducted in the context of the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness and build in particular on the *Summary Conclusions of the Expert Meeting on the Concept of Stateless Persons under International Law*, held in Prato, Italy in May 2010. These Guidelines are to be read in conjunction with the forthcoming *Guidelines on Procedures for Determining whether an Individual is a Stateless Person* and *Guidelines on the Status of Stateless Persons at the National Level*. This set of Guidelines will be published in due course as a UNHCR Handbook on Statelessness.

These Guidelines are intended to provide interpretive legal guidance for governments, NGOs, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff and other UN agencies involved in addressing statelessness.

## I. INTRODUCTION

### a) Overview

1. The 1954 Convention relating to the Status of Stateless Persons (1954 Convention) is the only international treaty aimed specifically at regulating the standard of treatment for stateless persons.<sup>1</sup> As such, it is of critical importance in ensuring the protection of this vulnerable group.

2. Article 1(1) of the 1954 Convention sets out the definition of a stateless person as follows:

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

The Convention does not permit reservations to Article 1(1) and thus this definition is binding on all States Parties to the treaty. In addition, the International Law Commission has concluded that the definition in Article 1(1) is part of customary international law.<sup>2</sup> These Guidelines do not address Article 1(2) of the 1954 Convention which sets out the circumstances in which persons who fall within the “stateless person” definition are nevertheless excluded from the protection of this treaty.

3. Procedures implemented by States to determine whether an individual qualifies as a stateless person for the purposes of Article 1(1) are considered in separate guidance, as these Guidelines focus on the substantive criteria of the definition, except where cross-reference to the guidelines on procedures is necessary.<sup>3</sup> Questions relating to the rights and obligations of stateless persons are also addressed in separate guidelines.<sup>4</sup>

4. These Guidelines are intended to assist States, UNHCR and other actors with interpreting Article 1(1) to facilitate the identification and proper treatment of beneficiaries of the 1954 Convention. In addition, these Guidelines will be relevant in a range of other circumstances, such as the interpretation of other international instruments that refer to stateless persons or to related terms also undefined in treaties. In this respect, it is noted that as the 1954 Convention has not been able to attract the same level of ratifications/accessions as the 1951 Convention relating to the Status of Refugees (1951 Convention) and other human rights treaties, there is limited State practice, including jurisprudence of national courts, on the interpretation of Article 1(1).

### b) Background to the 1954 Convention

5. The 1954 Convention shares the same origins as the 1951 Convention. It was originally conceived as a draft protocol to the refugee treaty. However, when the 1951 Convention was adopted, the protocol was left in draft form and referred to a separate negotiating conference where it was transformed into a self-standing treaty concerning stateless persons. Most importantly for the purposes of these Guidelines, the 1954 Convention establishes the universal definition of a “stateless person” in its Article 1(1).

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<sup>1</sup> The 1961 Convention on the Reduction of Statelessness is concerned with avoiding statelessness primarily through safeguards in nationality laws, thereby reducing the phenomenon over time. The 1930 Special Protocol on Statelessness, which came into force in 2004, does not address standards of treatment but is concerned with specific obligations of the previous State of nationality. This Protocol has very few States parties.

<sup>2</sup> See page 49 of the International Law Commission, *Articles on Diplomatic Protection with commentaries*, 2006, which states that the Article 1 definition can “no doubt be considered as having acquired a customary nature”. The Commentary is accessible at [http://untreaty.un.org/ilc/guide/9\\_8.htm](http://untreaty.un.org/ilc/guide/9_8.htm). The text of Article 1(1) of the 1954 Convention is used in the Articles on Diplomatic Protection to provide a definition of stateless person.

<sup>3</sup> Please see the *Guidelines on Procedures for Determining whether an Individual is a Stateless Person* (“Procedures Guidelines”).

<sup>4</sup> Please see the *Guidelines on the Status of Stateless Persons at the National Level* (“Status Guidelines”).

## II. Interpreting Article 1(1)

### a) General Considerations

6. Article 1(1) of the 1954 Convention is to be interpreted in line with the ordinary meaning of the text, read in context and bearing in mind the treaty's object and purpose.<sup>5</sup> As indicated in its preamble and in the *Travaux Préparatoires*, the object and purpose of the 1954 Convention is to ensure that stateless persons enjoy the widest possible exercise of their human rights.<sup>6</sup> The drafters intended to improve the position of stateless persons by regulating their status. As a general rule, possession of a nationality is preferable to recognition and protection as a stateless person. Therefore, in seeking to ensure that all those who fall within the 1954 Convention's reach benefit from its provisions, it is important to recognise and respect an individual's nationality status.

7. Article 1(1) applies in both migration and non-migration contexts. A stateless person may never have crossed an international border, having lived in the same country for his or her entire life. Some stateless persons, however, may also be refugees or persons eligible for complementary protection.<sup>7</sup> Those stateless persons who fall within the scope of the 1951 Convention will be entitled to protection under that instrument, a matter discussed further in the *Status Guidelines*.

8. Persons who fall within the scope of Article 1(1) of the 1954 Convention are sometimes referred to as "*de jure*" stateless persons even though the term is not used in the Convention itself. By contrast, reference is made in the Final Act of the 1961 Convention to "*de facto*" stateless persons. Unlike Article 1(1) stateless persons, the term *de facto* statelessness is not defined in any international instrument and there is no treaty regime specific to this category of persons (the reference in the Final Act of the 1961 Convention being limited and non-binding in nature).<sup>8</sup> Care must be taken that those who qualify as "stateless persons" under Article 1(1) of the 1954 Convention are recognised as such and not mistakenly referred to as *de facto* stateless persons as otherwise they may fail to receive the protection guaranteed under the 1954 Convention. These Guidelines address interpretive issues regarding the Article 1(1) definition of stateless persons, yet avoid qualifying them as *de jure* stateless persons as that term appears nowhere in the treaty itself.

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<sup>5</sup> Please see Article 31(1) of the 1969 Vienna Convention on the Law of Treaties which sets out this primary rule of interpretation. Article 31 goes on to set out other factors which are relevant in interpreting treaty provisions whilst supplementary methods of interpretation are listed in Article 32.

<sup>6</sup> Please see the second and fourth paragraphs of the Preamble:

"Considering that the United Nations has, on various occasions, manifested its profound concern for stateless persons and endeavoured to assure stateless persons the widest possible exercise of these fundamental rights and freedoms,...

Considering that it is desirable to regulate and improve the status of stateless persons by an international agreement,..."

(The reference to "fundamental rights and freedoms" is a reference to the Universal Declaration of Human Rights which is mentioned in the first paragraph of the Preamble).

<sup>7</sup> For example, they may fall within the European Union's subsidiary protection regime set out in Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. See, more generally, UNHCR Executive Committee Conclusion No.103 (LVI) of 2005 on complementary forms of protection.

<sup>8</sup> On *de facto* statelessness see for example, Section II.A. of United Nations High Commissioner for Refugees, *Expert Meeting on the Concept of Stateless Persons under International Law (Summary Conclusions)*, 2010 (hereinafter referred to as the "*Prato Conclusions*"):

"1. *De facto* statelessness has traditionally been linked to the notion of effective nationality and some participants were of the view that a person's nationality could be ineffective inside as well as outside of his or her country of nationality. Accordingly, a person could be *de facto* stateless even if inside his or her country of nationality. However, there was broad support from other participants for the approach set out in the discussion paper prepared for the meeting which defines a *de facto* stateless person on the basis of one the principal functions of nationality in international law, the provision of protection by a State to its nationals abroad.

2. The definition is as follows: *de facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality".

The full text of the Conclusions is available at: <http://www.unhcr.org/refworld/pdfid/4ca1ae002.pdf>.

9. An individual is a stateless person from the moment that the conditions in Article 1(1) of the 1954 Convention are met. Thus, any finding by a State or UNHCR that an individual satisfies the test in Article 1(1) is declaratory, rather than constitutive, in nature.<sup>9</sup>

10. Article 1(1) can be analysed by breaking the definition down into two constituent elements: “not considered as a national...under the operation of its law” and “by any State”. When determining whether an individual is stateless under Article 1(1), it is often most practical to look first at the matter of “by any State,” as this will not only narrow the scope of inquiry to States with which an individual has ties, but might also exclude from consideration at the outset entities that do not fulfil the concept of “State” under international law. Indeed, in some instances consideration of this element alone will be decisive, such as where the only entity to which an individual has a relevant link is not a State.

## **b) Interpreting “by any State”**

### **Which States need to be examined?**

11. Although the definition in Article 1(1) is formulated in the negative (“not considered to be a national by any State”), an enquiry into whether someone is stateless is limited to the States with which a person enjoys a relevant link, in particular by birth on the territory, descent, marriage, or habitual residence. In some cases this may limit the scope of investigation to only one State (or indeed to an entity which is not a State).<sup>10</sup>

### **What is a “State”?**

12. The definition of “State” in Article 1(1) is informed by how the term has generally evolved in international law. The criteria in the 1933 Montevideo Convention on the Rights and Duties of States remain pertinent in this regard. According to that Convention, a State is constituted when an entity has a permanent population, defined territory, effective government and capacity to enter into relations with other States. Other factors of statehood that have subsequently emerged in international legal discourse include the effectiveness of the entity in question, the right of self-determination, the prohibition on the use of force and the consent of the State which previously exercised control over the territory in question.<sup>11</sup>

13. For an entity to be a “State” for the purposes of Article 1(1) it is not necessary for it to have received universal or large-scale recognition of its statehood by other States or to have become a Member State of the United Nations. Nevertheless, recognition or admission will be strong evidence of statehood.<sup>12</sup> Differences of opinion may arise within the international community on whether a particular entity has achieved statehood. In part, this reflects the complexity of some of the criteria involved and their application. Even where an entity objectively appears to satisfy the criteria mentioned in the paragraph above, there may be States that for political reasons choose to withhold recognition of, or actively not recognise, it as a State. In making an Article 1(1) determination, a decision-maker may be inclined to look toward his or her State’s official stance on a particular entity’s legal personality. Such an approach could, however, lead to decisions influenced more by the political position of the government of the State making the determination rather than the position of the entity in international law.

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<sup>9</sup> The implications of this, in terms of the suspensive effect of determination procedures and the treatment of individuals awaiting an outcome of a determination of their statelessness, are addressed in the *Procedures Guidelines* and the *Status Guidelines*.

<sup>10</sup> The issue of what constitutes a relevant link is dealt with further in the *Procedures Guidelines* in the context of the standard of proof required to establish statelessness.

<sup>11</sup> Where an entity claims to be a new State but the manner in which it emerged involved a breach of a *jus cogens* norm, this would raise questions about its eligibility for statehood. A *jus cogens* norm is a principle of customary international law considered to be peremptory in nature, that is it takes precedence over any other obligations (whether customary or treaty in nature), is binding on all States and can only be overridden by another peremptory norm. Examples of *jus cogens* norms include the prohibition on the use of force and the right to self-determination.

<sup>12</sup> Please note though, the longstanding debate on the constitutive versus declaratory nature of recognition of States. The former doctrine considers the act of recognition to be a prerequisite to statehood whilst the latter treats recognition as merely evidence of that status under international law. These different approaches also contribute to the complexity in some cases of determining the statehood of an entity.

14. Once a State is established, there is a strong presumption in international law as to its continuity irrespective of the effectiveness of its government. Therefore, a State which loses an effective central government because of internal conflict can nevertheless remain a “State” for the purposes of Article 1(1).

### **c) Interpreting “not considered as a national ... under the operation of its law”**

#### **Meaning of “law”**

15. The reference to “law” in Article 1(1) should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice.<sup>13</sup>

#### **When is a person “not considered as a national” under a State’s law and practice?**

16. Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual’s case in practice and any review/appeal decisions that may have had an impact on the individual’s status.<sup>14</sup> This is a mixed question of fact and law.

17. Applying this approach of examining an individual’s position in practice may lead to a different conclusion than one derived from a purely objective analysis of the application of nationality laws of a country to an individual’s case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to “law” in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when it comes to its implementation in practice.

#### *Automatic and non-automatic modes of acquisition or withdrawal of nationality*

18. The majority of States have a mixture of automatic and non-automatic modes for effecting changes to nationality, including through acquisition, renunciation, loss or deprivation of nationality.<sup>15</sup> When determining whether someone is considered as a national of a State or is stateless, it is helpful to establish whether an individual’s nationality status has been influenced by automatic or non-automatic mechanisms or modes.

19. Automatic modes are those where a change in nationality status takes place by operation of law (*ex lege*).<sup>16</sup> According to automatic modes, nationality is acquired as soon as criteria set forth by law are met, such as birth on a territory or birth to nationals of a State. By contrast in non-automatic modes, an act of the individual or a State authority is required before the change in nationality status takes place.

#### *Identifying competent authorities*

20. To establish whether a State considers an individual to be its national, it is necessary to identify which institution(s) is/are the competent authority(ies) for nationality matters in a given country with which he or she has relevant links. Competence in this context relates to the authority responsible for conferring or withdrawing nationality from individuals, or for clarifying nationality status where nationality is acquired or withdrawn automatically. The competent

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<sup>13</sup> A similar approach is taken in Article 2(d) of the 1997 European Convention on Nationality.

<sup>14</sup> This approach reflects the general principle of law set out in Articles 1 and 2 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.

<sup>15</sup> Please note that the terms loss and deprivation are used here in the same manner as in the 1961 Convention: “loss” refers to withdrawal of nationality by operation of law (*ex lege*) and “deprivation” refers to withdrawal of nationality initiated by the authorities of the State.

<sup>16</sup> Please note in this regard that the phrase “under the operation of its law” in Article 1(1) is not synonymous with “by operation of law”. The latter is a term of art (used, for example, in the 1961 Convention) which signifies a mechanism that is automatic in nature. The stateless person definition encompasses nationality that may have been acquired or withdrawn through non-automatic as well as automatic mechanisms.

authority or authorities will differ from State to State and in many cases there will be more than one competent authority involved.<sup>17</sup>

21. Some States have a single, centralized body that governs nationality issues that would constitute the competent authority for the purposes of an analysis of nationality status. Other States, however, have several authorities that can determine nationality, any one of which might be considered a competent authority depending on the circumstances. Thus, it is not necessary that a competent authority be a central State body. A local or regional administrative body can be a competent authority as can a consular official<sup>18</sup> and in many cases low-level local government officials will constitute the competent authority. The mere possibility that the decision of such an official can later be overridden by a senior official does not in itself exclude the former from being treated as a competent authority for the purposes of an Article 1(1) analysis.

22. Identifying the competent authority or authorities involves establishing which legal provision(s) relating to nationality may be relevant in an individual's case and which authority/authorities are mandated to apply them. Isolating the relevant legal provisions requires both an assessment of an individual's personal history as well as an understanding of the nationality laws of a State, including the interpretation and application, or non-application in some cases, of nationality laws in practice.

23. The identity and number of competent authorities in a particular case will depend in particular on the following factors:

- whether automatic or non-automatic modes for the acquisition, renunciation, or withdrawal of nationality need to be considered; and
- whether more than one nationality-related event needs to be examined.

*Evaluating evidence of competent authorities in non-automatic modes of nationality acquisition and withdrawal*

24. Identifying the competent authority where a non-automatic mode of changing nationality status is involved can be relatively straightforward. For mechanisms which are dependent on an act or decision of a State body, that body will be the competent authority.

25. For example, the government department that decides naturalisation applications will be the competent authority in respect of this mechanism. The position of this authority is generally decisive. Some non-automatic modes involving an act of the State do not involve any discretion on the part of the officials concerned; if an individual satisfies the requirements set out in law, the official will be required to carry out a specific act bestowing or withdrawing nationality.<sup>19</sup>

26. In non-automatic modes where an act of the State is required for acquisition of nationality, there will generally be a document recording that act, such as a citizenship certificate. Such documentation will be decisive in proving nationality. In the absence of such evidence it can be assumed that the necessary action was not taken and nationality not acquired.<sup>20</sup> This assumption of non-citizenship can be set aside by subsequent statements, actions, or evidence by the competent authority indicating that nationality was actually conferred.

*Evaluating evidence of competent authorities in automatic modes of citizenship acquisition or loss of nationality*

27. In cases where acquisition or loss of nationality occurs automatically, no State body is actively involved in the change of status and no active step is required of an individual. Such

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<sup>17</sup> It follows from the above that the views of a State body that is not competent to pronounce on nationality status are irrelevant.

<sup>18</sup> Please see below at paragraphs 32-33.

<sup>19</sup> Please note that it cannot be concluded that an individual is a national (or has been deprived of nationality) until such a procedure has been completed, see paragraph 43 below.

<sup>20</sup> Applications for naturalization or other documents submitted through a non-automatic nationality procedure do not qualify as sufficient evidence regarding a State's determination on that individual's nationality status.

change occurs by operation of law (*ex lege*) when prescribed criteria are met. In most countries, nationality is acquired automatically either through birth on the territory or descent. Nationality is also acquired automatically by most individuals affected by State succession.<sup>21</sup> Some laws provide for automatic loss of nationality, when certain conditions are met, such as prescribed periods of residency abroad, failure to register or make a declaration within a specific period.

28. Where nationality is acquired automatically, documents are typically not issued by the State as part of the mechanism. In such cases, it is generally birth registration that provides proof of place of birth and parentage and thereby provides evidence of acquisition of nationality, either by *jus soli* or *jus sanguinis*, rather than being the formal basis for the acquisition of nationality.

29. When automatic modes of nationality acquisition or loss are under consideration, the competent authority is any State institution that is empowered to make a determination of an individual's nationality status in the sense of clarifying that status, rather than deciding whether to confer or withdraw it. Examples of such bodies are passport authorities or, in a limited number of States, civil registration officials (where nationality is indicated in acts of civil registration, in particular birth registration). It is possible that in a particular case, more than one competent authority will emerge as a number of bodies may legitimately take positions regarding an individual's nationality in the course of their designated activities.

#### *Considerations where State practice contravenes automatic modes of acquisition of nationality*

30. Where the competent authorities treat an individual as a non-national even though he or she would appear to meet the criteria for automatic acquisition of nationality under the operation of a country's laws, it is their position rather than the letter of the law that is determinative in concluding that a State does not consider such an individual as a national. This scenario frequently arises where discrimination against a particular group is widespread in government departments or where, in practice, the law governing automatic acquisition at birth is systematically ignored and individuals are required instead to prove additional ties to a State.<sup>22</sup>

#### *Assessing nationality in the absence of evidence of the position of competent authorities*

31. There may be cases where an individual has never come into contact with a State's competent authorities, perhaps because acquisition was automatic at birth and a person has lived in a region without public services and has never applied for identity documents or a passport. In such cases, it is important to assess the State's general attitude in terms of nationality status of persons who are similarly situated. If the State has a good record in terms of recognising, in a non-discriminatory fashion, the nationality status of all those who appear to come within the scope of the relevant law, for example in the manner in which identity card applications are handled, this may indicate that the person concerned is considered as a national by the State. However, if the individual belongs to a group whose members are routinely denied identification documents issued only to nationals, this may indicate that he or she is not considered as a national by the State.

#### *Role of consular authorities*

32. The role of consular authorities merits particular consideration. A consulate may be the competent authority responsible for conducting the necessary step in a non-automatic mechanism. This occurs, for example, where a country's laws require children born to their

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<sup>21</sup> In some cases of State succession, however, citizenship of a successor State is not automatic and non-automatic modes of citizenship acquisition are employed instead. Please see the International Law Commission, *Articles on the Nationality of Natural Persons in Relation to Succession of States with Commentaries*, 1999, for an overview of State practice.

<sup>22</sup> Where a State's laws provides for automatic acquisition of nationality, but in practice a State places additional requirements on individuals to acquire nationality, this does not negate the automatic nature of the nationality law. Rather, it indicates that the State in practice does not consider those who do not satisfy their extra-legal requirements as nationals, potentially rendering them stateless under the Article 1(1) definition.

nationals overseas to register with a consulate as a prerequisite for acquiring the nationality of the parents. As such, the consulate in the country of such a child's birth will be the competent authority and its position on his or her nationality will be decisive, assuming no subsequent mechanism has also to be considered. If an individual is refused such registration or is prevented from applying for it, he or she is not considered as a national for the purposes of Article 1(1).

33. Consulates might be identified as competent authorities in other respects. Where individuals seek assistance from a consulate, for example to renew a passport or to obtain clarification of their nationality status, a consulate is legitimately required to take a position on that individual's nationality status within its powers of consular protection. In doing so, it acts as a competent authority. This is also the case when it responds to enquiries from other States regarding an individual's nationality status. Where a consulate is the only competent authority to take a position on an individual's nationality status, its position is typically decisive. Where other competent authorities have also taken positions on an individual's nationality status, their positions must be weighed up against any taken by consular authorities.<sup>23</sup>

#### *Enquiries with competent authorities*

34. In some cases an individual or a State may seek clarification of that individual's nationality status with competent authorities. This need typically arises where an automatic mode of acquisition or loss is involved or where an individual may have acquired or been deprived of nationality through a non-automatic mechanism, but lacks any documentary proof of this. Such enquiries may be met either with silence or a refusal to respond from the competent authority. Conclusions regarding a lack of response should only be drawn after a reasonable period of time. If a competent authority has a general policy of never replying to such requests, no inference can be drawn from this failure to respond based on the non-response alone. Conversely, when a State routinely responds to such queries, a lack of response will generally provide strong confirmation that the individual is not a national. Where a competent authority issues a pro forma response to an enquiry and it is clear that the authority has not examined the particular circumstances of an individual's position, such a response carries little weight. In any case, the position of the competent authority on a nationality status enquiry will need to be weighed up against the position taken by any other competent authority, or authorities, involved in an individual's case.<sup>24</sup>

#### *Inconsistent treatment by competent authorities*

35. The assessment of the positions of competent authorities becomes complex when an individual has been treated by various State actors inconsistently. For example, an individual may have been allowed to receive public benefits, which by law and in practice are reserved for nationals, but on reaching adulthood is denied a passport. Depending on the specific facts of the case, inconsistent treatment may be an instance of a national's rights being violated, the consequence of that person never having acquired nationality of that State, or the result of an individual having been deprived of or losing his or her nationality.

36. In cases where there is evidence that an individual has acquired nationality through a non-automatic mechanism dependent on an act of a State body, subsequent denial by other State bodies of rights generally accorded to nationals indicates that his or her rights are being breached. That being said, in certain circumstances the nature of the subsequent treatment may point to the State having changed its position on the nationality status of that individual, or that nationality has been lost or withdrawn.

37. Even where acquisition or withdrawal of nationality may have occurred automatically or through the formal act of an individual, State authorities nonetheless will often subsequently

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<sup>23</sup> Please see paragraph 37 on the relative weight to be given to bodies tasked with issuing identity documents which mention nationality status.

<sup>24</sup> Please note that in cases of a non-automatic change in nationality status that requires an act of a State, the existence (or lack of) documents normally issued as part of the State's action will be decisive in establishing nationality. Please see paragraph 28.

confirm that nationality has been acquired or withdrawn. This is generally undertaken through procedures for the issuance of identity documents. In relation to mechanisms for acquisition or loss of nationality either automatically or through the formal act of an individual, greater weight is warranted regarding the view of the competent authorities responsible for issuing identity documents that constitute proof of nationality, such as passports, certificates of nationality and, where they are only issued to nationals, identity cards.<sup>25</sup>

#### *Nationality acquired in error or bad faith*

38. Where the action of the competent authority in a non-automatic mechanism is undertaken in error (for example, because of a misunderstanding of the law to be applied) or in bad faith, this does not in itself invalidate the individual's nationality status so acquired. This flows from the ordinary meaning of the terms employed in Article 1(1) of the 1954 Convention. The same is true if the individual's nationality status changes as a result of a fraudulent application by the individual or one which inadvertently contained mistakes regarding material facts. For the purposes of the definition, conferrals of nationality under a non-automatic mechanism are to be considered valid even if there is no legal basis for such conferral.<sup>26</sup> However, in some cases the State, on discovering the error or bad faith involved in the nationality procedure in question, will subsequently have taken action to deprive the individual of nationality and this will need to be taken into account in determining the State's position of the individual's current status.

39. The impact of fraud or mistake in the acquisition of nationality is to be distinguished from the fraudulent acquisition of documents which may be presented as evidence of nationality. These documents will not necessarily support a finding of nationality as in many cases they will be unconnected to any nationality mechanism, automatic or non-automatic, which actually was applied in respect of the individual.

#### *Impact of appeal/review proceedings*

40. In instances where an individual's nationality status has been the subject of review or appeal proceedings, whether by a judicial or other body, its decision must be taken into account. In States that generally respect the rule of law,<sup>27</sup> the appellate/review body's decision typically would constitute the position of the State regarding the individual's nationality for the purposes of Article 1(1) if under the local law its decisions are binding on the Executive.<sup>28</sup> Thus, where authorities have subsequently treated an individual in a manner inconsistent with a finding of nationality by a review body, this represents an instance of a national's rights not being respected rather than the individual not being a national.

41. A different approach may be justified in countries where the executive is able to ignore the positions of judicial or other review bodies (even though these are binding as a matter of law) with impunity. This may be the case, for example, in States where a practice of discriminating against a particular group is widespread through State institutions. In such cases, the position of State authorities that such groups are not nationals would be decisive rather than the position of judicial authorities that might uphold the nationality rights of such groups.

42. There may be situations where the judgment of a court in a case not directly concerning the individual nevertheless has legal implications for that person's nationality status. If the judgment alters, as a matter of domestic law, such a person's nationality status, this will generally be conclusive as to his or her nationality (subject to the qualification regarding rule of law set out in the preceding paragraph). This may arise, for example, where in a particular

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<sup>25</sup> Indeed, other authorities may consult with this competent authority when taking a position on the individual's nationality.

<sup>26</sup> This situation must be distinguished from one where a non-national is merely treated to the privileges of nationality.

<sup>27</sup> "Rule of law" is described in the UN Secretary-General's 2004 Report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* as:

"... a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards..."

<sup>28</sup> The exception would be where under the domestic law the judicial finding is only a recommendation and is not binding in nature on the authorities.

case the interpretation of a provision governing a mechanism for automatic acquisition has the effect of bringing a whole body of people within the ambit of that provision without any action required on their or the government's part.<sup>29</sup>

### *Temporal Issues*

43. An individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question. Therefore, if an individual is partway through a process for acquiring nationality but those procedures are yet to be completed, he or she cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention.<sup>30</sup> Similarly, where requirements or procedures for loss, deprivation or renunciation of nationality have only been partially fulfilled or completed, the individual is still a national for the purposes of the stateless person definition.

### *Voluntary Renunciation of Nationality*

44. Voluntary renunciation relates to an act of free will whereby an individual gives up his or her nationality status. This generally takes the form of an oral or written declaration. The subsequent withdrawal of nationality may be automatic or at the discretion of the authorities.<sup>31</sup> In some States voluntary renunciation of nationality is treated as grounds for excluding an individual from the coverage of Article 1(1). However, this is not permitted by the 1954 Convention. The treaty's object and purpose, of facilitating the enjoyment by stateless persons of their human rights, is equally relevant in cases of voluntary as well as involuntary withdrawal of nationality. Indeed, in many cases the renunciation may have pursued a legitimate objective, for example the fulfilment of conditions for acquiring another nationality, and the individual may only have expected a very short spell as stateless. The question of an individual's free choice is not relevant when determining eligibility for recognition as stateless under Article 1(1); it may, however, be pertinent to the matter of the treatment received thereafter. Those who have renounced their nationality voluntarily might be able to reacquire such nationality, unlike other stateless persons. The availability of protection in another State may have an impact on the status to be awarded on recognition and, as such, this issue is explored in the Status Guidelines.

### *Concept of Nationality*

45. In assessing the nationality laws of a State it is important to bear in mind that the terminology used to describe a "national" varies from country to country. For example, other labels that might be applied to that status include "citizen", "subject", "national" in French, and "nacional" in Spanish. Moreover, within a State there may be various categories of nationality with differing names and associated rights. The 1954 Convention is concerned with ameliorating the negative effect, in terms of dignity and security, of an individual not satisfying a fundamental aspect of the system for human rights protection; the existence of a national-State relationship. As such, the definition of stateless person in Article 1(1) incorporates a concept of national which reflects a formal link, of a political and legal character, between the individual and a particular State. This is distinct from the concept of nationality which is concerned with membership of a religious, linguistic or ethnic group.<sup>32</sup> As such, the treaty's concept of national is consistent with the traditional understanding of this term under international law; that is persons over whom a State considers it has jurisdiction on the basis of nationality, including the right to bring claims against other States for their ill-treatment.

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<sup>29</sup> For example, this would be the case where a court rules that a provision of the nationality legislation governing automatic acquisition of nationality by individuals born in the territory prior to a specific date applies to an entire ethnic group, despite statements to the contrary by the government.

<sup>30</sup> The same approach applies where the individual has not pursued or exhausted a remedy in relation to denial or withdrawal of nationality.

<sup>31</sup> Voluntary renunciation is to be distinguished from loss of nationality through failure to comply with formalities, including where the individual is aware of the relevant requirements and still chooses to ignore them.

<sup>32</sup> This meaning of nationality can be found, for example, in the refugee definition in Article 1A(2) of the 1951 Refugees Convention in relation to the phrase "well-founded fear of being persecuted for reasons of race, religion, nationality..." (emphasis added).

46. Where States grant a legal status to certain groups of people over whom they consider to have jurisdiction on the basis of a nationality link rather than a form of residence, then a person belonging to this category will be a “national” for the purposes of the 1954 Convention. Generally, at a minimum, such status will be associated with the right of entry, re-entry and residence in the State’s territory but there may be situations where, for historical reasons, entry is only permitted to a non-metropolitan territory belonging to a State. The fact that different categories of nationality within a State have different rights associated with them does not prevent their holders from being treated as a “national” for the purposes of Article 1(1). Nor does the fact that in some countries the rights associated with nationality are fewer than those enjoyed by nationals of other States or indeed fall short of those required in terms of international human rights obligations.<sup>33</sup> Although the issue of diminished rights may raise issues regarding the effectiveness of the nationality and violations of international human rights obligations, this is not pertinent to the application of the stateless person definition in the 1954 Convention.<sup>34</sup>

47. There is no requirement of a “genuine” or an “effective” link implicit in the concept of “national” in Article 1(1).<sup>35</sup> Nationality, by its nature, reflects a linkage between the State and the individual, often on the basis of birth on the territory or descent from a national and this is often evident in the criteria for acquisition of nationality in most countries. However, a person can still be a “national” for the purposes of Article 1(1) despite not being born or habitually resident in the State of purported nationality.

48. Under international law, States have broad discretion in the granting and withdrawal of nationality. This discretion may be circumscribed by treaty. In particular, there are numerous prohibitions in global and regional human rights treaties regarding discrimination on grounds such as race, which apply with regard to grant, loss and deprivation of nationality.<sup>36</sup> Prohibitions in terms of customary international law are not so clear, though one example would be deprivation on the grounds of race.

49. Bestowal, refusal, or withdrawal of nationality in contravention of international obligations must not be condoned. The illegality on the international level, however, is generally irrelevant for the purposes of Article 1(1). The alternative would mean that an individual who has been stripped of his or her nationality in a manner inconsistent with international law would nevertheless be considered a “national” for the purposes of Article 1(1); a situation seemingly inconsistent with the object and purpose of the 1954 Convention.<sup>37</sup>

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<sup>33</sup> Please note that it is the rights *generally* associated with nationality that are relevant, not whether such rights are actually observed in a specific individual’s experience.

<sup>34</sup> Historically, there does not appear to have been any requirement under international law for nationality to have a specific content in terms of rights of individuals, as opposed to it creating certain inter-State obligations.

<sup>35</sup> These concepts have arisen in the field of diplomatic protection that is the area of customary international law that governs the right of a State to take diplomatic and other action against another State on behalf of its national whose rights and interests have been injured by the other State. The International Law Commission recently underlined why these concepts should not be applied beyond a narrow set of circumstances, please see page 33 of its *Articles on Diplomatic Protection with commentaries*, 2006 available at [http://untreaty.un.org/ilc/guide/9\\_8.htm](http://untreaty.un.org/ilc/guide/9_8.htm).

<sup>36</sup> An example is Article 9 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women which guarantees that all women should have equal rights as men in their ability to confer nationality on their children and with respect to acquisition, change, or retention of their nationality (typically upon marriage to a foreigner).

<sup>37</sup> The exception to the general approach may be situations where the breach of international law amounts to a violation of a peremptory norm of international law. In such circumstances, States may be under an obligation not to recognise situations flowing from that violation as legal. This may involve non-recognition of the nationality status, including perhaps, how this status is treated in an Article 1(1) determination. The exact scope of this obligation under customary international law remains a matter of debate.