A Human Rights Approach to Statelessness in the Middle East

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Abstract. Despite repeated attempts to eliminate statelessness and to provide for the protection of stateless persons, international law has not been able to provide an adequate response to these problems. In the Middle East the problem has continued to grow as social and political change pushes people into becoming stateless and fails to provide those who are stateless with adequate protection. The treaties that have attempted to prevent this practice have failed. At the same time the *lex specialis* aimed at protecting people from the consequences of statelessness have also failed. The result has been a *lacuna* in the protection of stateless persons. This article suggests that a step towards filling this gap might be made by applying general international human rights law to protect stateless persons.

1. INTRODUCTION

> Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the state in question grants to or imposes on its nationals.
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> *Nottebohm* (*Liechtenstein* v. *Guatemala*) (1951–1955).

> If nationality is consent, the state is compulsion.
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> Henri-Frederic Amiel in his *Journal Intime*
> (entry for 17 December 1856)
> (translation by H. Ward, 1892).

Under international law it is the individual's link to a country that creates his or her basic rights and responsibilities as a citizen. This link is important for states because it is the manifestation of the state's authority over its most important resource: its permanent population.[1] This has been the

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1. *See* R. Plender, International Migration Law, 2nd Ed., 39–43 (1988).

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view of international lawyers[2] since the seventeenth century when the Peace of Westphalia[3] confirmed that the "state" is the preeminent actor in international society. Normally this link is manifested in the legal quality of nationality, but when this attribute has been removed without being replaced an individual becomes stateless. Being stateless is perhaps the most vulnerable position in which an individual can find him- or herself under international law. Yet it is a characteristic that describes the plight of an increasing number of individuals around the world and particularly in the Middle East.

Given this context, one can easily understand that the problem of statelessness is as much a problem of individuals as it is of states. In fact, a cogent starting point for the understanding of statelessness under international law is the recognition that states are the international actors who create the regime of international law. Therefore, statelessness, as far as it can be dealt with through international law, requires states to take action. Understanding how states deal with this problem in turn requires identifying the claims and demands that individuals make upon the state, some of which are reflected in international human rights law.

This contribution suggests that much of the traditional state action that has been careful to account for state sovereignty while trying to prevent or mitigate the effects of statelessness has failed to resolve the problem of statelessness or to adequately protect stateless persons. Consequently, the protection of stateless persons has been largely left up to the international human rights law that has evolved to restrict state discretion concerning the granting and withdrawing of nationality and protecting basic human rights of all persons under the jurisdiction of a state. The "human rights approach" to statelessness is thus the concentration of this article and particularly its application to statelessness in the Middle East and North Africa. To indicate the relevance of this approach, however, several steps are necessary. The first of these is to briefly describe statelessness as a problem with which international law is concerned. Second, is the examination of treaties that states have entered into in an attempt to deal with this problem through international law. Third, is the examination of cases whereby states have submitted their disputes concerning nationality to international adjudication. Fourth, is a description of this problem of statelessness in the Middle East and North Africa, which specifies some of the specific cultural and social characteristics of this problem in this region of the world. And finally, this contribution concludes by describing

2. *See*, *e.g.*, S. von Pufendorf, De Jure Nature et Gentium Libri Octo, Chapter 11, Book 8 (1672), translation of 1688 Edition by C.H. Oldfather & W.A. Oldfather, *in* J.B. Scott (Ed.), The Classics of International Law, No. 17 (Washington, D.C., 1934) (describing nationality as the most important attribute an individual can acquire under international law).
3. Treaties of Peace between Spain and the Dutch and the Holy Roman Empire and between France and the Holy Roman Empire (Peace of Westphalia, 14 October 1648), 1 CTS 119–356.

how the human rights approach is well-suited for dealing with statelessness in the Middle East and North Africa.

2. STATELESSNESS

The state's discretion to decide who is a national is linked to the importance of nationals for the state. To be included in the international community a state must, among other requirements, have a permanent population.[4] Defining individuals as nationals may therefore be a means by which a state formally establishes that it has a permanent population. Nationality is also the link that allows a state to exercise diplomatic protection or make claims on an individual's behalf.[5] No state is required to provide protection for its nationals,[6] although recent attempts have moved in this direction.[7] Regardless of the obligation involved, it is unwise for a government to fail to act to protect its own nationals as this may cause observers to question the ability of the government to function effectively and in the interest of its nationals.

Statelessness is an anomaly under international law. It is assumed that an individual has an attachment to a state unless there is evidence to indicate otherwise. Nevertheless, how nationality is bestowed is still a question over which jurists differ. While there is no doubt that nationality can be bestowed by the national law – primarily through the operation of principles referred to as *jus sanguine* and *jus soli*, there is less agreement as to the possibility that international law might bestow nationality. Michael Reiterer has argued that nationality can be bestowed by international law,[8] while Ruth Donner rejects this proposition.[9] The difference lies in their definitions of nationality. Reiterer is referring to "functional nationality," while Donner to the more traditional nationality that is endowed by the discretion of states.[10]

The most serious consequence of statelessness is that an individual is left without a state to protect his or her interest on the international stage

4. Art. 1, 1933 Montevideo Convention on the Rights and Duties of States, 165 UNTS 19 (1933). This Convention lists four attributes that are prerequisites of a state, namely, (1) a permanent population; (2) a defined territory; (3) a government; and (4) the ability to conduct foreign relations. These four prerequisites have been widely recognized as customary international law. *See* I. Brownlie, Principles of International Law, 5th Ed., 70–72 (1998).
5. *See*, *e.g.*, R. Donner, The Regulation of Nationality in International Law, 2nd Ed., 71–74 (1994).
6. M. Bennouna, Preliminary Report on Diplomatic Protection, UN International Law Commission Doc. A/CN.4/484 (4 February 1998), at para. 54.
7. *See* Art. 23, 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, UN General Assembly Res. 45/158, UN Doc. A/RES/45/158 (18 December 1990) (not yet entered into force).
8. M. Reiterer, *Book Review of The Regulation of Nationality in International Law by Ruth Donner*, 81 AJIL 970, 973 (1987).
9. R. Donner, The Regulation of Nationality in International Law 185 (1983).
10. *See* Reiterer, *supra* note 8, at 973.

and thus left to the mercy of other international actors. International tribunals, for example, have seen fit to deny stateless persons the right to international protection. This was stated explicitly by a 1931 international arbitration panel holding that 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.[11]

A similar reasoning has been followed by domestic courts. A United States Court of Appeals, for example, held recently that both corporations and individuals living in Hong Kong have no nationality and thus cannot sue in the United States under provisions of law allowing foreign nationals to bring actions against US companies or citizens.[12] A functional definition of statelessness, therefore, must take into account the loss of individual rights as well as the loss of belonging to a community that might provide protection for individual rights. To address these consequences states have elaborated legal norms in the form of treaties concerning statelessness. What these norms are, and whether or not they are effective, is the subject of the following section.

3. Treaties Concerning Statelessness

Until the early 1900s, statelessness was not perceived to be an international problem.[13] Only after the upheavals caused by World War I, did the massive number of stateless individuals require states to take action.[14] The creation of the League of Nations facilitated action by increasing awareness of the problems of minorities and other vulnerable peoples.[15] The steps taken by states were directed either towards preventing statelessness or towards ensuing some basic human rights for stateless persons. The first attempts to establish international legal obligation through treaties specifically dealing with statelessness were of the latter category. For example, two protocols were produced by the Hague Conference of 1930.[16] Despite the fact that these protocols were ratified by few states[17] they are nevertheless worthy of consideration, if only for their limitations.

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11. Dickson Car Wheel Co. (USA) *v.* United Mexican States, 4 RIAA 678 (1931).
12. Matimak Trading Co *v.* Albert Khalily, 118 F.3d 76 (2d Cir., 27 June 1997).
13. Report on Statelessness, UN Docs. E/1112 (1 February 1949) and E/1112/Add.1 (16 May 1949), at Sec. II(1).
14. *Id.*
15. *See* German Settlers in Poland, 1923 PCIJ (Ser. B) No. 6, at 25; and Minority Schools in Albania, 1935 PCIJ (Ser. A/B) No. 64, at 17 (discussing the attention given to minorities within the League of Nations).
16. *See* M. Hudson, International Legislation, Vol. 5, 381 (1936).
17. *See* J.B. Scott, *Nationality:* Jus Soli *or* Jus Sanguinis, 24(1) AJIL 58 (1930) (describing the confusion on the issue of nationality prior to the Hague Conference).

The First Protocol[18] deals with statelessness by providing a formula based on *jus sanguinis maternus* that was to be repeated in subsequent treaties – often with the addition of *jus soli* – in an attempt to allow children to acquire the nationality of the mother when no other option was available. The Second Protocol[19] provides merely that a state must admit an individual who last possessed its nationality. At the same time, the Convention on Certain Questions Relating to the Conflict of Nationality Laws[20] to which the two Protocols were appended clearly articulated the traditional emphasis on state sovereignty in confirming the general rule that it is the state that decides upon a person's nationality according to its own laws.[21]

The Hague Conference failed to resolve the problems of statelessness. As a consequence the problem grew. As World War II engulfed Europe and disrupted life around the world more stateless persons were created and fewer resources were available to deal with their problems. After the War the problem of statelessness was an important issue for the emerging United Nations. The recognition of this concern can be found in a series of resolutions by the Commission on Human Rights,[22] the Economic and Social Council ('ECOSOC')[23] and the General Assembly.[24] Additionally, the UN Secretary-General issued a report citing the organization's mandate according to the 1948 Universal Declaration of Human Rights, which provided for the aspirational right to a nationality.[25] United Nations bodies were quick to respond. At its first session in 1949, the United Nations' International Law Commission ('ILC') took up questions of "nationality including statelessness" with the view towards drafting relevant principles of law to deal with the problem.[26] The same year, the Ad Hoc Committee on Statelessness and Related Problems was formed by the Economic and Social Council.[27] Soon thereafter this later body was transformed into the *de facto* drafting committee for what were to become the 1951 Convention

18. 1930 Protocol Relating to a Certain Case of Statelessness, reprinted *in* 24(3) AJIL 206–210 (Supp. 1930).
19. 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws, reprinted *in* 24(3) AJIL 211–215 (Supp. 1930).
20. The text of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws and its three Protocols can be found, respectively, at 179 LNTS, at 90 (1930); 178 LNTS, at 229 (1930); 179 LNTS, at 116 (1930); and L.N. Doc. C.27.M.11.1931.V.
21. Arts. 1 and 2, Convention on Certain Questions Relating to the Conflict of Nationality Laws, *id.*, at 89.
22. *See* Official Record of ECOSOC, 3rd Year, 6th Sess., Supp. 1, at 13 and 14.
23. ECOSOC Res. 116 D (VI) (2 March 1948).
24. Most notably the Universal Declaration of Human Rights that provides for a right to nationality in Art. 15.
25. *See supra* note 13.
26. Report of the International Law Commission on the Work of Its First Session, 12 April to 9 June 1949, UN GAOR, 4th Sess., Supp. (No. 10), UN Doc. A/925 (12 April-9 June 1949), at paras. 16 and 20.
27. ECOSOC Res. 248 B (IX) (8 August 1949).

related to the Status of Refugees (hereinafter '1951 Refugee Convention')[28] and the two principal United Nations conventions concerning statelessness.

Although the 1951 Refugee Convention did not concern itself with stateless persons *per se*, it is relevant to the protection of stateless persons for at least three reasons. First, the link between the two groups of persons was evident from the start of the United Nations' work as both groups of vulnerable people were initially dealt with together by the single body responsible for drafting a treaty applying to both refugee and stateless persons. Although the work on the Refugee Convention was completed first, the same group then proceeded to draft the 1954 Stateless Convention using the 1951 Refugee Convention as a model. Second, both refugees and stateless persons are individuals in need of protection because of the failure of their state of previous nationality or habitual residence to offer that protection. The obligation of a state, other than the state of nationality or habitual residence, to exercise protection is thus similar in both cases. The claims being made by both of these vulnerable groups were thus very similar. And third, refugees are either *de jure* or *de facto* stateless because of the second reason. This is clearly evidenced in the provision of the 1951 Refugee Convention that requires a host state of a refugee must facilitate his or her acquisition of that state's nationality.[29]

After completing the 1951 Refugee Convention, the United Nations turned its attention to stateless persons. The two most prominent United Nations conventions dealing with statelessness date from 1954 and 1961. Each of these Conventions reflects a different approach to the subject. The 1954 Convention Relating to the Status of Stateless Persons[30] (hereinafter '1954 Convention') provides for the protection of persons who are acknowledged stateless. The 1961 Convention on the Reduction of Statelessness[31] (hereinafter '1961 Convention') is another attempt to mitigate the possibility that statelessness will occur.

The application of the 1954 Convention hinges on a state's determination that an individual is stateless in accordance with the definition provided in Article 1 of the Convention. This definition is broad and considers to be stateless anyone "who is not considered as a national by any State under the operation of its law."[32] Qualifying stateless persons are

28. Convention relating to the Status of Refugees, adopted 28 July 1951, entered into force 22 April 1954, UN General Assembly Res. 429 (V), 5 UN GAOR Supp. (No. 20), at 48, UN Doc. A/1775 (14 December 1950), 189 UNTS 150.
29. *Id.*, at Art. 18.
30. Convention Relating to the Status of Stateless Persons, adopted on 28 September 1954, entered into force 6 June 1960, UN General Assembly Res. 526A (XVII), 360 UNTS 117 (21 state parties as of 17 March 2001).
31. Convention on the Reduction of Statelessness, adopted on 30 August 1961, entered into force 13 December 1975, UN General Assembly Res. 896 (IX), UN GAOR, 9th Sess., Supp. (No. 21), UN Doc. A/2890, 49 (4 December 1954), 989 UNTS 175 (49 state parties as of 17 March 2001), at Art. 3.
32. *Id.*, at Art. 1.

provided an extensive list of rights[33] that echo those provided to refugees in the 1951 Refugee Convention. The similarity is not surprising since the drafters of the 1954 Convention took the Refugee Convention as their starting point.[34] While the 1954 Convention focuses on providing rights to persons who are recognized as stateless, it does contain one provision aimed at ending statelessness in specific situations. This provision provides that the

> Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons […] [and] […] [t]hey shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.[35]

The qualifiers "as far as possible," and "facilitate," however, are strikingly less demanding upon states than comparative language in, for example, human rights treaties concerning the right to nationality.[36]

A significant obstacle to the accomplishment of the aims set out in the 1954 Convention has been the lack of states willing to ratify it. The only states in the Middle East and North Africa to ratify this Treaty are Tunisia, Libya and Algeria. In addition, the 1954 Convention lacks an authoritative body for ensuring a common standard of interpretation,[37] thus allowing states broad discretion to make divergent interpretations of its provisions. Consequently, the 1954 Convention has not been successful in providing stateless persons with protection of their basic human rights or in assisting them in acquiring a nationality.

The alternative approach to statelessness – to prevent it in the first place – is taken by the 1961 Convention. This Convention tries to reduce the possibility that a person will become stateless by providing that any loss of nationality because of a change in personal status shall be conditioned on the possession or acquisition of another nationality.[38] This covers the loss of nationality because of marriage, divorce, legitimation, adoption,

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33. *See supra* note 30, at Arts. 3 and 4, 12–24 and 26. The rights include the right to non-discriminatory treatment (Art. 3); religion (Art. 4); personal status (Art. 12); movable and immovable property (Art. 13); artistic and industrial property (Art. 14); association (Art. 15); access to justice (Art. 16); employment (Art. 17); self-employment (Art. 18); practice of the liberal professions (Art. 19); rationing (Art. 20); housing (Art. 21); public education (Art. 22); public relief (Art. 23); labor rights (Art. 24); social security rights (Art. 24); freedom of movement (Art. 26).
34. *See* C.A. Bachelor, *Stateless Persons: Some Gaps in International Protection*, 7 Int'l J. Refugee L. 232, 244 (1995) (describing how the 1954 Convention was initially intended it to be a protocol to the Refugee Convention).
35. *See supra* note 31, at Art. 32.
36. *See infra* notes 150-155.
37. UN High Commissioner for Refugees ('UNHCR') may provide humanitarian assistance to stateless persons despite the risk that such assistance might exclude a stateless person from the protection of the 1954 Convention according to Art. 1(2)(i) of this Treaty. *See infra*, at note 128.
38. *Supra* note 31, at Arts. 5 and 6.

or change in the nationality of a person's parents or spouse. The Convention also provides that a state may not permit a person to renounce its nationality if that would render them stateless.[39] And an elaborate provision provides that a national of a contracting state shall not lose his nationality so as to become stateless on the grounds of departure or residence abroad.[40] The exceptions to this rule are in the case of naturalized citizens who reside abroad for a period of seven or more consecutive years and who fail to indicate their wish to retain that nationality.[41] Another exception is made for nationals born and residing abroad after having attained majority.[42] Other than those limited circumstances, a person shall not lose his nationality if that would render him stateless.[43]

Other provisions of the 1961 Convention follow a similar logic of setting out a general principle and then enumerating exceptions. Article 8(1), for example, provides that a contracting state shall not deprive a person of his nationality if that would render him stateless.[44] However, other provisions of Article 8 set out exceptions to this general rule[45] which relate to residency,[46] fraud,[47] or, national interests.[48] Where a state invokes an exception the person concerned must be provided a fair hearing by a court or other independent body.[49] The 1961 Convention also provides special rules that mitigate the loss of nationality in cases of state succession.[50]

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39. *Id.*, at Art. 7(1)(a).
40. *Id.*, at Art. 7(3).
41. *Id.*
42. *Id.*
43. *Id.*, at Art. 7(6).
44. *Id.*, at Art. 8(1).
45. *Id.*, at paras. 2–4.
46. *Id.*, at Art. 2(2)(a) (under the same circumstances as are described in Art. 7(4) and (5)).
47. *Id.*, at Art. 2(2)(b) (if one's nationality has been acquired by misrepresentation or fraud).
48. *Id.*, at Art. 3(3) (if at the time of becoming party to the Treaty the state concerned specifies that it retains the right in its national law to remove nationality in certain other circumstances related to the individual entering into the service of a foreign state, swearing allegiance to a foreign state, or when the person concerned has acted in a manner seriously prejudicial to the vital interests of the state).
49. *Id.*, at Art. 2(4).
50. *Id.*, at Art. 10. The rule provides for the parties to agree to which nationality the affected person will take or for the state in whose territory the affected person has his or her habitual residence to become the state of nationality. *Also see* Draft Articles on Nationality in Relation to the Succession of States, Report of the International Law Commission on the Work of Its Fifty-first Session, 3 May to 23 July 1999, UN GAOR, 54th Sess., Supp. (No. 10), UN Doc. A/54/10 (1999). These draft articles, which are currently under consideration by the United Nations Law Commission, reiterate the basic right to nationality and the duty incumbent upon states to prevent statelessness. The primary means of preventing statelessness is by the assumption that an individual is the national of the country in which he or she is habitually resident; and through a right to opt for the nationality of one of the states involved in a situation of succession as enumerated in Part II of the draft when a close connection to such a state is present. For more information about the work of the International Law Commission *see* the website of the International Law Commission at http://www.un.org/law.ilc/index.htm; and V. Morris & A. Pronto, *The Work of the Sixth Committee at the Fifty-Fourth Session of the UN General Assembly*, 94(3) AJIL 582, at 583 and n. 4 (2000).

In an attempt to create a supervisory organ despite the reservations of states, the 1961 Convention calls upon states to "promote the establishment […] of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority."[51] In 1975, the UNHCR was designated to fulfill this limited responsibility as an intermediary for stateless persons.[52]

As in the case of the 1954 Convention, a major obstacle to the implementation of the 1961 Convention is its lack of widespread acceptance. Only 49 states have ratified the 1961 Convention and even among those who have ratified it, its application remains limited. In the Middle East and North Africa, only Tunisia and Libya have ratified this Convention and neither has taken significant steps to ensure its full implementation. Because the UNHCR's role as an intermediary between states and stateless persons only applies in states that have ratified the 1961 Convention, this means of protection is also therefore limited.

In 1973, a Convention was entered into in Berne with the aim of reducing the incidences of statelessness.[53] An innovative provision of this Convention prohibits a child from acquiring the nationality of a refugee father.[54] This provision attempts to ensure that the refugee child is able to always acquire a nationality, preferably that of his or her mother. This Convention too, however, has received very limited support.

There have also been regional efforts aimed at reducing incidents of statelessness. The efforts in the Middle East and North Africa will be discussed below,[55] however, it is relevant to describe the European Convention on Nationality that entered into force in 2000.[56] This effort falls into the category of treaties aimed at preventing statelessness. It reaffirms the right to nationality and the right not to be arbitrarily deprived of one's nationality. It also recognizes that "in matters concerning nationality, account should be taken both of the legitimate interests of States and those of individuals,"[57] and it reaffirms the principle that "each State shall determine under its own law who are its nationals."[58] The Convention "establishes principles and rules relating to the nationality of natural persons […] to which the internal law of States Parties shall conform."[59] These principles include:[60]

51. *Supra* note 31, at Art. 11.
52. C.A. Batchelor, *UNHCR and Issues Related to Nationality*, 14 Refugee Survey Quarterly 91, 94 (1995). *Also see* Conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons No. 78 (XLVI) (1995).
53. Berne Convention of 13 September 1973 aiming at the reduction of the number of cases of statelessness.
54. *Id.*, at Art. 2.
55. *See infra* Section 5 entitled "Statelessness in the Middle East and North Africa."
56. 2000 European Convention on Nationality, ETS No. 166, entered into force 3 January 2000.
57. *Id.*, at the Preamble.
58. *Id.*, at Art. 3.
59. *Id.*, at Art. 1.
60. *Id.*, at Art. 4.

a) everyone has the right to a nationality;
b) statelessness shall be avoided;
c) no one shall be arbitrarily deprived of his or her nationality.

In a somewhat vague provision, the Convention requires states to provide for the possibility of naturalization of persons lawfully and habitually resident on their territory,[61] and in particular to facilitate the naturalization of spouses and children of nationals and those born on their territory.[62] To mitigate the vague nature of this provision the Convention stipulates that "in establishing the conditions for naturalization, [a state] shall not provide for a period of residence exceeding ten years before the lodging of an application."[63]

Like the 1961 Convention, the European Convention provides for a general duty not to allow statelessness, but then allows for numerous broad exceptions. These exceptions include when the person in question has voluntarily acquired another nationality;[64] voluntarily served in a foreign military force;[65] acted in a manner that is seriously prejudicial to the vital interests of the state party;[66] habitually resided abroad with no genuine link with the state party;[67] or, in the case of a minor child, the reasons for acquiring nationality are no longer fulfilled.[68] In none of these cases is it permitted to withdraw nationality if it would lead to the person becoming stateless.[69] The only circumstances in which a state can withdraw nationality causing a person to become stateless is when the nationality has been obtained by fraud.[70] Thus residence and national interest as provided for in the 1961 Convention cannot be taken into consideration. Loss of nationality at the initiative of the individual is permissible under Article 8, but not if the person concerned would thereby become stateless.[71]

The due process safeguards in the 1961 Convention are also extended by providing not only that a decision concerning loss of nationality "be open to an administrative or judicial review in conformity with [a state's] internal law,"[72] but also that "decisions relating to the acquisition, retention, loss, recovery or certification of [a state's] nationality contain reasons in writing."[73] Finally, discrimination on the grounds of sex, religion, race,

61. *Id.*, at Art. 6(3).
62. *Id.*, at Art. 6(4).
63. *Id.*, at Art. 6(3).
64. *Id.*, at Art. 7(1)(a).
65. *Id.*, at Art. 7(1)(b).
66. *Id.*, at Art. 7(1)(d).
67. *Id.*, at Art. 7(1)(e).
68. *Id.*, at Art. 7(1)(f). This might be because, for example, the child acquires or possesses the foreign nationality of its adoptive parents.
69. *Id.*, at Art. 7(3).
70. *Id.*
71. *Id.*, at Art. 8(1).
72. *Id.*, at Art. 12.
73. *Id.*, at Art. 11.

colour, or national or ethnic origin is prohibited in the laws or practices concerning nationality.[74]

In addition to the above efforts there have also been attempts relating to the nationality of women[75] and to the issue of copyright.[76] The former efforts provide protection against arbitrary loss of nationality and the latter provide for the protection of certain intellectual property rights of persons who are stateless.

The above efforts indicate that the international community has to date attempted to deal with the problem of statelessness by either creating legal norms preventing statelessness or by creating norms that provide basic rights for stateless persons. This strategy has, however, had little impact both because too few states have ratified the major conventions and because no adequate mechanism exists to enforce the rules. The result has been treaties that function as statements of unfulfilled aspirations and the continuing problem of statelessness. Another consequence has been that disputes between states have been left to the realm of *ad hoc* adjudications in which the decision making authorities have often had to fashion the principles of law with insufficient guidance from states. To understand the results of these efforts the next section examines examples of international adjudicatory decisions concerning stateless persons.

4. Cases Involving Nationality and Statelessness

When the earliest disputes arose between states concerning stateless persons they were usually between two states that were denying duties that might be incumbent upon them should they be found to be the state of nationality.[77] Thus, beginning in the early 1900s, states regularly litigated cases involving questions of nationality before international tribunals.[78] A common feature of these cases was the agreement that questions of nationality were predominately a question of internal affairs. In 1923, the Permanent Court of International Justice supported this view when it issued

74. *Id.*, at Art. 5. States are also to be guided by the principle of non-discrimination between citizens by birth and naturalized citizens.
75. Convention on the Nationality of Married Women, adopted 29 January 1957, entered into force 11 August 1958, General Assembly Res. 1040 (XI), UN Doc. A/RES/1040(XI), 309 UNTS 65 (69 state parties as of 17 March 2001). Art. 1 of this Convention provides that "neither the celebration nor dissolution of marriage" between a national and an alien, "nor the change of nationality by the husband during the marriage, shall automatically affect the nationality of his wife."
76. Protocol 1 Annexed to the Universal Copyright Convention as Revised at Paris on 24 July 1971 Concerning the Application of that Convention to Works of Stateless Persons and Refugees.
77. *See* P. Weiss, Nationality and Statelessness in International Law 230–251 (1979).
78. *See* M.S. McDougal & L.-C. Chen, Human Rights and World Public Order 949–951 (1980) (while the cases cited herein concern questions of dual nationality they nevertheless illustrate the point that states have considered questions of nationality as relevant to their relations).

an advisory opinion stating clearly that nationality was in principle a matter reserved to domestic jurisdiction.[79] The Court, however, also pointed out that "the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states."[80] The tension between state sovereignty and attempts to provide some basic safeguards to individuals thus remained unresolved.

While states attempted to promulgate legislation nationality disputes continued to arise between and within states. These disputes led to cases before domestic and international bodies. And these cases began to establish criteria for determining who was a national of a state and upon what basis a state could deprive an individual of his or her nationality. The early cases dealt with the former issue and the more recent ones with the latter issue. A brief examination of examples of both types of cases is relevant to understanding modern international law relating to nationality and statelessness.

As early as 1880, an international tribunal established the concept of effective link as the basis for a valid nationality. The *Canevaro Case*[81] before a Tribunal convened by the Permanent Court of Arbitration held that Peru was not required to recognize the claimant's Italian nationality where the claimant had more effective links to another country. In this case, the links were with the country from which compensation was being claimed and thus the claim was found to be invalid. Subsequently, another Tribunal – one convened by the Permanent Court of Arbitration in the *Salem Case* – held that the 'effective link doctrine' was not "sufficiently established" in international law.[82] The dispute over what constitutes effective nationality came to a head in the often-cited *Nottebohm Case*. In 1955, the *Nottebohm Case*[83] reached the International Court of Justice, the principle judicial organ of the United Nations. This case involved Mr Nottebohm whose property had been confiscated by the Government of Guatemala. The basis for the confiscation was Guatemala's refusal to recognize Liechtenstein's grant of nationality to Mr Nottebohm, who had been German since birth. The Court had to decide whether the Government of Liechtenstein could exercise diplomatic protection over a person claiming to be its national and on whose behalf it wished to exercise protection. The Court decided that Mr Nottebohm's connections with Liechtenstein were not sufficient to allow that country to claim Mr Nottebohm as a national for the purpose of opposing an interest of the Government of Guatemala. The Court based its decision on the determination of 'effective links' between Mr Nottebohm and each country. The Court determined that the effective links between Mr Nottebohm and Liechtenstein did not

79. Nationality Decrees issued in Tunis and Morocco, Advisory Opinion, 1923 PCIJ (Ser. B) No. 4.
80. *Id.*, at 24.
81. Affaire Canevaro (Italy *v.* Peru), XI UN RIAA 397–410 (3 May 1912).
82. Salem Case (Egypt *v.* U.S.A.), II UN RIAA 1161–1237 (20 January 1932).
83. 1955 ICJ Rep. 4.

exist. At the same time, it opined that strong links did exist between Guatemala and Mr Nottebohm because he had lived there for many years. As a consequence, Mr Nottebohm was left without a means of recourse against the confiscation of his property because nationals have no right to compensation for the taking of property by their own state, while foreign nationals do have such a right under international law. Although Mr Nottebohm was not made stateless he was denied the protection of his right to property to the same extent that stateless persons are often denied their human rights.

The *Nottebohm* decision was followed several years later, by an arbitration tribunal deciding a case referred to as *Flegenheimer*.[84] The Tribunal found that an individual did not have effective links to a state that claimed him as its national. This time the individual involved had acquired nationality not merely by naturalization, but by birth under the laws of the country in question.[85] Mr Flegenheimer had, however, according to the Tribunal, forfeited his original nationality by acquiring another nationality.[86] Therefore, when his acquired nationality was removed by the state that had granted it, Mr Flegenheimer became stateless.[87] Furthermore, he did not re-acquire his former nationality, as this required an affirmative action by the German state, which had never taken place. Thus the Arbitration Tribunal saw fit to deny Mr Flegenheimer's claim to a nationality even if this decision caused him to become stateless.

In the *North-Transsylvania Nationality Case*,[88] an individual living in North-Transsylvania first acquired Roumanian nationality under the provisions of two treaties and then Hungarian nationality by operation of law.[89] Subsequently, the individual lost his nationality under another Hungarian law.[90] The Court of Appeal of Berlin held that the individual's argument that he had become Roumanian again when Hungary ceded North-Transsylvania to Roumania was not valid.[91] The individual had become stateless when he lost the Hungarian nationality and he had never acquired another nationality. In so holding the Court stated that "[t]he naturalization of a foreigner living abroad, even if he is stateless, can only take place with his consent."[92] In this holding emphasis appears to have been placed on the individual's consent at the time the nationality is granted. While this deference to the will of the individual may have been out of respect for the individual's free will, the result is also prejudicial to the individual's attempts to avoid statelessness in this case. In the end, the failure to allow

84. Flegenheimer Claim, 25 ILR 91 (1958) (Italian-United States Conciliation Commission).
85. *Id.*, at 96.
86. *Id.*
87. *Id.*
88. 43 ILR 191 (1965).
89. *Id.*, at 192. *See* Sec. 4 of the Hungarian Statute of 6 October 1940 (GAXXVI: 1940).
90. *Supra* note 88, at 192. *See* Hungarian Decree 5070/45 M.E.
91. *Supra* note 88, at 194.
92. *Id.*

an individual to reacquire a nationality that he or she has lost evidences a very state-centric approach to international law that makes the individual subservient to the interest of state sovereignty.

The result of the described reasoning is two fold. First, an individual may not be able to invoke the benefits of nationality on an international plane where a genuine link to a state of nationality does not exist.[93] This consequence emphasizes the importance of the link of nationality on the international plane. It also indicates that states, through their traditional international adjudicatory mechanisms, have given priority to intergovernmental relations at the expense of basic individual rights. Second, these precedents indicate that an individual can lose his or her nationality despite the lack of intention to do so. Again, this evidences the privileging of governmental authority over individual rights. It may thus be concluded that states and their adjudicative bodies have failed to provide a satisfactory means of preventing statelessness or for protecting the basic rights of stateless persons.

5. Statelessness in the Middle East and North Africa

Despite repeated attempts by the international community to regulate statelessness through international law serious problems remain around the world.[94] The Arab countries have been especially affected by the problem of statelessness. In the Middle East and North Africa there are an estimated 120,000 Bidoon in Kuwait,[95] 150,000 Kurds in Syria,[96] and in territory controlled by Israel as well as elsewhere in the Middle East and North Africa millions of Palestinians, who are stateless.[97] Among the three states just mentioned, only Israel has ratified the 1954 Convention Relating to Stateless Persons, but this has had little consequence as Israel continues to deny the rights established in that Convention to Palestinians living in

93. In 1961, the effective links principle was supported by the Harvard Draft Convention on State Responsibility that acknowledged that a state was not entitled to bring a claim on behalf of a national who lacks a genuine connection to that state. Harvard Law School, Research in International Law, *Responsibility of States*, 23 AJIL 131–239 (Special Supplement, 1929). It should be noted, however, that whatever the value of the Harvard Drafts, they are almost exclusively based on the thinking of US academics and therefore do not reflect the opinion of the wider world community. Furthermore, although viewed as an important source of references in the United States, the draft is not legally binding and reflects merely the proposal of a non-governmental organization that has never been accepted outside of the United States.
94. Human Rights Watch, *Nationality and Statelessness*, accessed on 12 November 2001, at http://www.hrw.org/campaigns/race/nationality.htm#6.
95. Human Rights Watch, *Kuwait, Promises Betrayed: Denial of Rights of Bidun, Women and Freedom of Expression*, 12(2)(E) Human Rights Watch Report 2000 (October 2000).
96. Human Rights Watch, World Report 1999, 374 (1999).
97. *See supra* note 94.

areas under its control as well as to deny these persons the ability to rely on the Convention before its courts.[98]

Furthermore, regional attempts by Arab countries to resolve problems of statelessness have had limited effect. In the Middle East and North Africa, these efforts are most notably mandated by the Charter of the League of Arab States that dates from 1942.[99] Consequently, in 1954, Syria, Jordan, Saudi Arabia, Egypt, Lebanon, Iraq, Libya, and Yemen signed an agreement to cooperate on matters of citizenship.[100] This Treaty incorporates values shared by many of the predominantly Muslim populations of Arab states and applies to the nationals of the eight states.[101] The primary principle is that nationality follows the male *jus sanguine*.[102] This is true for wives as well as for children under the age of majority.[103] A woman, however, is allowed to regain her original nationality if her marriage ends for any reason.[104] A principle applicable to this case, as well as others, is that a person cannot retain two or more nationalities.[105] For the first two years after the entry into force of this Treaty for an individual's state, an individual who could have adopted the nationality of one or more Arab states, or who had the nationality of more than one Arab state, can adopt one of these nationalities.[106] Individuals born outside his or her state of habitual residence, but in another Arab state, have until one year after his or her eighteenth birthday to do the same.[107] Finally, each change concerning one's nationality requires the approval of one's country of origin and must be notified to all the Arab governments concerned.[108] The fact that the Treaty is limited to Arab states both in its application and in terms of the problems of nationality is a *lacuna* that remains a handicap, especially in light of the fact that many affluent Arabs obtain the nationality of non-Arab states. That only eight of the twenty-two Arab states have ratified it also devalues its effectiveness in the Middle East and North Africa. And finally, the absence of an enforcement or monitoring mechanism is a significant limitation that plagues this Treaty as it does every other convention dealing specifically with statelessness or nationality.

To better understand the problem of statelessness in the Middle East and North Africa and to evaluate possible responses it is valuable to examine the situation of some stateless persons. The stateless persons

98. Human Rights Watch, Human Rights Watch Report 2002, 440–452 (2002).
99. Art. 2, 1942 Charter of the League of Arab States.
100. Nationality Agreement between Arab States, Annexed to LOS Res. No. 776, Sess. 21 (5 April 1954).
101. *Id.*, at Art. 1.
102. *Id.*, at Arts. 2 and 4.
103. *Id.*
104. *Id.*, at Art. 3.
105. *Id.*, at Arts. 3, 6, 7 and 8.
106. *Id.*, at Art. 8.
107. *Id.*, at Art. 7.
108. *Id.*, at Arts. 6 and 9.

described are the Bidoon in Kuwait, the Kurds in Syria, and the Palestinians who are spread throughout the Middle East and North Africa, among other places of exile.

5.1. Bidoon of Kuwait

The Bidoon[109] of Kuwait are nomadic Arabs who inhabited the Arabian Peninsula for centuries before many of them settled in the territory of Kuwait in the latter part of the 20th Century.[110] Before 1991, there were an estimated 250,000 Bidoon in Kuwait.[111] Many of them held positions of responsibility in the Kuwaiti civil service and military.[112] Today this number is less than half. Through means of discrimination based on their identity as Bidoon, the Government of Kuwait has chipped away the human rights of the Bidoon and forcibly made many of them stateless and effectively removed many from the country.[113]

Although since 1959 Kuwaiti nationality has been reserved for those who could prove continuous residence since 1920,[114] the Government of Kuwait had been tolerant towards the Bidoon and thus few problems arose.[115] The Bidoon had many rights including the rights to work, subsidized housing, education and health care.[116] Only political rights such as the right to vote were denied.[117] This situation, however, nurtured a false sense of security in the Bidoon as few took steps to acquire Kuwaiti nationality.

After Iraq's invasion of Kuwait in 1991, this mood changed. Because of their transient characteristics, the Bidoon were the subject of suspicion. Some had indeed joined the Iraqi army under threat of death for

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109. Bidoon is an abbreviation of an Arab phrase that literally means "without nationality" or stateless. The Arabic word can be transliterated phonetically as "bidun a-jensia."
110. A. Hassan, *The Plight of the Kuwaiti Bidoons People*, a Paper presented at the SHAML Regional Workshop on Statelessness in the Arab world held in Ayia Napa, Cyprus, 2–3 November 2001 (not yet published).
111. U.S. Committee on Refugees, "Bidoon," accessed at http://www.refugees.org/world/countryrpt/mideast/2000/kuwait.htm (21 December 2001).
112. A.N. Longva, Walls Built on Sand: Migration, Exclusion and Society in Kuwait 188 (1997).
113. *See* Human Rights Watch, Middle East, The Bedoons of Kuwait: "Citizens without Citizenship" (New York: Human Rights Watch, 1995).
114. *See* Kuwaiti Nationality Law No. 15/1959 from 1959. The 1948 Citizenship Decree had included the classical principles of *jus soli* and *jus sanguinis* as the basis for the acquisition of Kuwaiti nationality. *See* M.A. Tetreault, Stories of *Democracy* 43–44 (2000). The 1959 law eliminated the *jus sanguinis* category of children of Arab or Muslim fathers who had been born in Kuwait. The seven amendments between 1960 and 1987 each time provided for greater restrictions. For example, the number of annual nationalizations were limited, the required uninterrupted residency periods were increased, and naturalization was eventually limited to Muslims.
115. *See*, *generally*, *supra* note 113.
116. Human Rights Watch, 2000 Annual Report (2000), accessed on 25 December 2001, at http://www.hrw.org/reports/2000/kuwait/kuwait-04.htm.
117. *Id.*

failure to do so, but many others had joined the Kuwait resistance.[118] Those who left Kuwait were denied re-entry based on the claim that they were not Kuwaiti's, some were deported based on suspicion of having collaborated with the Iraqi occupying force and some were denied the right to acquire Kuwaiti nationality. The latter was accomplished in disregard of the evidence that many Bidoon had lived their entire lives in Kuwait.[119]

Due to international pressure, in June 1999, the Government of Kuwait agreed to a program to "naturalize about 11,000 Bidoon and grant permanent residence status to the remainder."[120] As described by the U.S. Committee for Refugees, this program

> would grant citizenship to Bidoon counted in the 1965 census who were more than 21 years old and whose parents were naturalized, or who had a Kuwaiti mother. Bidoon not registered in the 1965 census would be granted permanent residency, permitting them access to employment, medical care, and educational benefits.[121]

While the program appeared to be a step back to the pre-1991 situation, even under this new policy most applications for nationality failed.[122] The modality of denying claims was to refer nationality claims to the state security office that acted in secrecy to routinely deny applications.[123] The plan also offered the Bidoon the alternative of signing affidavits stating that they were not Kuwaiti nationals in return for temporary (5 year) residency permits.[124] Immediately after 27 June 2000 when the offer expired, Kuwait announced that the Bidoon who had not signed affidavits would be subject to deportation as illegal aliens.[125]

As a result, Bidoon continue to remain with few legal protections. In its comprehensive report in October 2000, Human Rights Watch documented violations of numerous rights of the Bidoon, including, their right to leave and return to their own country; the right to a nationality; the rights of children to special protections; and the right to marry and found a family.[126] Within Kuwait little can be done to change this situation as

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118. *See*, *generally*, *supra* note 113.
119. *See* U.S. Committee for Refugees web site claiming that

> [o]f the Bidoon whom USCR interviewed during its October 1999 site visit, all maintained that they and their families had lived their entire lives in Kuwait and therefore would refuse any status short of citizenship.

Available at http://www.refugees.org/world/countryrpt/mideast/2000/kuwait.htm, accessed on 23 November 2001.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. Human Rights Watch, *supra* note 95, at Sec. IV, "Discrimination Based on Origins and Status: The Bidun."
125. *Id.*
126. *Id.*

national law prohibits legal challenges to the government's immigration policy.[127]

Nevertheless, acting under its mandate to assist stateless person under the 1961 Convention on the Reduction of Statelessness, UNHCR has assisted just over 1,300 Bidoon with legal representation, counseling, and by intervening with the Government of Kuwait.[128] As a result, UNHCR and the Government of Kuwait now sometimes discuss individual cases of stateless Bidoon,[129] but a more comprehensive solution or one based on legal obligations remains elusive.

Kuwait is not a party to treaties dealing specifically with statelessness, however, it is a party to the 1966 International Covenant on Civil and Political Rights and the 1989 Convention on the Rights of the Child.

5.2. Kurds in Syria

The Kurds are an ethnic and national group of people that come from an area that spans several countries in the Middle East. Although never forming their own country in modern times, they have established several autonomous regions. For example, two Kurdish factions govern significant regions in northern Iraq. In most cases, the Kurds have been accepted as nationals in the countries where they are present, even if they have not always been treated as equals to other nationals. In Turkey, for example, although officially nationals, the mistreatment of the Kurds has been the subject of repeated rulings by the European Court of Human Rights.[130]

Syria is a notable exception to the practice of granting Kurds nationality, although not to the practices of mistreatment. Human Rights Watch describes the stateless Kurds in Syria as persons

> who have been arbitrarily denied the right to Syrian nationality in violation of international law. These Kurds, who have no claim to a nationality other than Syrian, are literally trapped in Syria: not only are they treated in a discriminatory fashion in the land of their birth but also they do not have the option of relocating to another country because they lack passports or other internationally recognized travel documents.[131]

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127. *See* Art. 2 of the Kuwaiti Judicial Service Code; and Art. 1(5) of the Formation Division of the Court of General Jurisdiction to Review Administrative Cases Law, Law 20/1981.
128. *Supra* note 119.
129. *Id.*
130. *See* Arslan *v.* Turkey, Appl. No. 23462/94, Judgment of 8 July 1999; Ceylan *v.* Turkey, Appl. No. 23556/94, Judgment of 8 July 1999; Erdogdu *v.* Turkey, Appl. No. 25723/94, Judgment of 15 June 2000; Gerger *v.* Turkey, Appl. No. 24919/94, Judgment of 8 July 1999; Incal *v.* Turkey, 1998 ECHR; Karatas *v.* Turkey, 1999 ECHR; Okçuoglu *v.* Turkey, 1999 ECHR; Özgür Gündem *v.* Turkey, 2000 ECHR; Polat *v.* Turkey, 1999 ECHR; Yasa *v.* Turkey, 1998 ECHR; and Zana *v.* Turkey, 1997 ECHR, all accessed at http://www.echr.coe.int/Eng/Judgments.htm on 21 February 2002.
131. Human Rights Watch, *Syria: The Silenced Kurds*, 8(4)(E) Human Rights Watch Report (October 1996), accessed at http://hrw.org/reports/1996/Syria.htm.

This situation has existed since 1962 when Syria conducted a one-day census of Hasakeh province in northeastern Syria.[132] The results of the census were used to determine who was entitled to Syrian nationality.[133] Many Kurds were denied the right to nationality without adequate reasons. Speculation was rife that the motivation behind the Syrian actions may have been the acquisition of territory that was rich in oil and fertile for agriculture.[134] Whatever the reason, the Syrian Government has persistently denied Kurds equal human rights to marry freely, to freedom of expression, freedom of movement and to a nationality. The situation in which the Kurds find themselves continues to the present day.

Syria is not a party to any of the treaties concerning statelessness, but it is a party to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, both of which provide for the above rights.

5.3. Palestinians

The stateless situation of the Palestinians emanates from a combination of factors. Foremost, are the 1948 invasion and conquest of the Palestinian homeland by armed settlers who later created the state of Israel.[135] In addition, the policies of neighboring countries in responding to the problems of statelessness caused by Israeli's invasion have varied from providing nationality to Palestinians to withdrawing their nationality and thus contributing to their statelessness.

Today, almost four million Palestinians are outside of their place of habitual residence.[136] Many of these are stateless because they do not have the nationality of the state in which they reside. Although some have Palestinian nationality – which is recognized by the members of the League of Arab states – the failure of the Palestinians to officially form their own state substantially weakens the value of this nationality outside the Middle East and North Africa. This preliminary obstacle to resolving the problems of stateless Palestinians requires a political solution in order to establish the legal situation by which Palestinians can acquire their own unique nationality. Until this takes place Palestinians will inevitably be left to the mercy of friendly states that grant them favorable status, but always incompletely protected under international law.[137]

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132. Syrian Government Decree No. 93 (October 1962).
133. *Supra* note 131.
134. *Id.*
135. Israel allowed some Palestinians to acquire Israeli nationality, but only if they registered by 1 March 1952, which was impossible for many who had been displaced by war. *See* Israeli Nationality Law, 1952, 6 Laws of the State of Israel 50 (1951–1952).
136. L. Takkenberg, The Status of Palestinian Refugees 80 (1998).
137. *See*, for example, LOS Res. 1547/S31 of 9 March 1959 concerning "Granting the nationality of some Arab states to Palestinian refugees," reiterating the League's position that Palestinians should not be granted the nationality of member states, but should be treated as favorably as possible.

After the 1948 war, Jordan was the only Arab country to grant fleeing and forcibly displaced Palestinians its nationality.[138] It did so by annexing the West Bank and declaring all Palestinians to be Jordanian nationals under its laws.[139] Again in 1967, after a second war, as many as 400,000 Palestinians were forced to flee and half remained outside the country.[140] In 1988, however, in consequence of Jordan's renunciation of its claim to the West Bank, Palestinians were henceforth issued temporary travel documents and no longer granted Jordanian nationality.[141]

While Jordan may have decided to jettison its full responsibility for Palestinians by ending its forty-year practice of granting them nationality under certain conditions, other countries in the Middle East and North Africa have tolerated the statelessness of the Palestinians by denying them basic human rights from the start. No other country, for example, granted Palestinians its nationality to the same extent as did Jordan. Furthermore, some countries failed to even respect the most basic human rights of Palestinians. Lebanon, for example, has been criticized by the United Nations Relief and Works Agency ('UNRWA') and the Committee on the Rights of the Child, for treating stateless Palestinians inhumanely by limiting their access to basic services[142] or by failing to strive for a solution to the problem of statelessness.[143] Syria, although more tolerant of the Palestinians in its country, has had equally serious delinquencies in its treatment of these individuals.[144]

The United Nations' efforts have also come up short as concerns the question of stateless Palestinians. While the United Nations has created the UNRWA, this body has done little to provide a durable solution for stateless Palestinians. Its mandate does not extend to dealing with long-term problems, but is limited to providing Palestinians with the bare necessities of life. As a result it has only been able to make *ad hoc* representations on behalf of stateless Palestinians in particular cases and has been unable to make a significant contribution towards changing the treatment of these people in the Middle East.

Outside the Middle East, there are also few examples of states that have

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138. *See* LOS Res. 2455/S50 of 3 September 1968 concerning "Issuing Jordanian Passports to Gaza Strip emigrants"; and LOS Res. 2491/S51 of 16 March 1969 concerning "Issuing Palestinians with temporary passports."
139. Jordanian Nationality Law of 1954.
140. *Supra* note 136, at 81.
141. Palestinians who lived permanently in Jordan were allowed to retain their Jordanian passports, although they continued to assert their Palestinian identity.
142. UNRWA, Report of the Commissioner-General 15 (2000). *Also see* H. Khashan, *Palestinian Resettlement in Lebanon: Behind the Debate*, accessed at http://www.arts.mcgill.ca/MEPP/PRRN/papers/khashan.html on 21 January 2002.
143. *See* Report of the Committee on the Rights of the Child, Concluding Observations, UN Doc. A/53/41 (7 July 1998), at para. 34 (where the Committee "notes the need for special efforts to protect the rights of children in especially difficult circumstances, including abandoned and stateless children" *id.*).
144. *See supra* note 136, at 167.

sought to provide a durable solution for stateless Palestinians. While some states have granted Palestinians their nationality on the same basis as of other stateless persons, other countries such as Canada have deported stateless Palestinians.[145]

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While demographic trends show that some stateless populations are dwindling, this is not the case among the Kurds and the Palestinians.[146] Furthermore, the fewer stateless Bidoon in Kuwait may be in part due to their forcible expulsion or their being denied readmission. Thus these troubling statistics indicate that the problem of refugees in the Middle East and North Africa is continuing. At the same time, international efforts in the realm of treaties dealing specifically with the problems of stateless persons have been unsuccessful in dealing with this problem. Among these failures are the treaties and resolutions of Arab states on the question of statelessness, which may have complicated the situation more, rather than contributed to a solution. While statelessness in the Middle East and North Africa may be more of a political than a legal problem, there are reasons to believe that legal texts and action may contribute to providing stateless persons basic protections of their fundamental human rights. It is suggested, in the section that follows, that in order for this to be the case attention should be directed towards human rights treaties rather than the *lex specialis* of treaties dealing with problems of statelessness. Because human rights treaties are more widely accepted among Arab states, offer direct or indirect implementation mechanisms, and indicate acceptable priorities for immediate action, it is suggested that these treaties offer the best opportunity for combating statelessness and protecting the rights of stateless persons in the Middle East and North Africa.

6. International Human Rights Law as a Response to Statelessness

The approaches in the treaties and cases above are based on the recognition that all persons have a right to a nationality and that all stateless persons have basic human rights. However, as indicated, both the norms and their interpretation suffer from some basic shortcomings. Both have been subject to limitations imposed by state sovereignty. In the case of treaties, the majority of states have exercised their sovereignty by not ratifying the treaties, and therefore their provisions lack widespread con-

145. F. Kutty, *Canadian Chronicle: Stateless Palestinians Ordered Deported From Canada*, Washington Report on Middle East Affairs 56 (May/June 1998).
146. G. Sheffer, *Middle East Diasporas: Introduction and Readings*, 1(2) Middle East Review of International Affairs (1997), accessed at http://www.biu.ac.il/SOC/besa/meria/journal/1997/issue2/jv1n2a4.html (10 December 2001).

sensus. Even if these treaties were widely ratified they lack the institutions necessary to ensure their authoritative implementation and interpretation. In the cases that have come before the adjudicatory bodies, the decision makers appear to be constantly struggling with the dilemma of states' failure to articulate a coherent body of the norms. Adjudicatory bodies have found that states enjoy a broad degree of discretion over questions of nationality. As a consequence, the attempts to prevent statelessness or to protect stateless persons through adjudication or treaties have been equally successful.[147]

International human rights law addresses many of these weaknesses in a manner, that is suggested, can provide better protections for the rights of stateless persons as well as mitigate the chance that an individual will become stateless. To understand how this corpus of law can assist it is necessary to first understand how international human rights law has concerned itself with stateless persons.

As already indicated above, the first United Nations' efforts to address the problem of statelessness referred to the Universal Declaration of Human Rights as their inspiration.[148] Subsequent instruments of international human rights law have often explicitly provided for the right to a nationality. Examples[149] of the provisions of human rights treaties providing for this right are Article 24 of the International Covenant on Civil and Political Rights ('ICCPR');[150] Article 7 of the Convention on the Rights of the Child ('CRC');[151] Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD');[152] and Article 9 of the Convention on the Elimination of All Forms of

147. *See*, *generally*, *supra* note 34.
148. *See supra* note 13 and the accompanying text.
149. *Also see* International Labour Organization Convention No. 118, Convention concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, entered into force 25 April 1964 (38 states are party to this treaty including the Arab states of Egypt, Jordan, Syria, Mauritania, Tunisia, Libya and Iraq). While there is no provision providing for the right to a nationality in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, it is undoubtedly a civil and political right for which the due process provisions apply. In addition, the European countries are an exception in that all states of the Council of Europe are expected to adopt the European Convention on Nationality, *supra* note 56, that does specifically provide for this right.
150. 999 UNTS 171, adopted 16 December 1966, opened for signature 19 December 1966, entered into force 23 March 1976, UN General Assembly Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 53, UN Doc. A/6316 (1966).
151. UN General Assembly Res. 44/25, 44 UN GAOR Supp. (No. 49), at 167, UN Doc. A/RES/44/49 (12 December 1989), at 166, reprinted *in* 28 ILM 1448 (1989), adopted 20 November 1989, entered into force 2 September 1990. *Also see* Declaration of the Rights of the Child, *in* Declaration of the Rights of the Child, UN General Assembly Res. 1386 (XIV), UN GAOR, 14th Sess., Supp. (No. 16), at 19 and 20, UN Doc. A/4354 (20 November 1959) (principal 3).
152. 660 UNTS 195, adopted 21 December 1965, opened for signature 7 March 1966, entered into force 4 January 1969, UN General Assembly Res. 2106, 20 UN GAOR Supp. (No. 14), at 47, UN Doc. A/6014 (1965).

Discrimination against Women ('CEDAW');[153] Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;[154] and Article 20 of the American Convention on Human Rights.[155]

Using these provisions, international human rights bodies have sometimes ventured farther in search of protecting stateless individuals than have states generally. The Inter-American Court of Human Rights, for example, has expressed its opinion that while:

> [i]t is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the States in that area, and that the manner in which States regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the State are also circumscribed by the obligations to ensure the full protection of human rights.[156]

This statement by the Inter-American Court has been followed by other bodies and indicates the willingness of human rights bodies to put individual human rights above state concerns of sovereignty. This is something that the international tribunals deciding upon cases between states have not been willing to do.

Perhaps even more important than the right to a nationality is the right not to lose one's nationality once it has been acquired. As Human Rights Watch has observed, "[i]n the Middle East, statelessness most frequently stems from the deprivation of nationality, often as a result of conflict over the composition of a state and its borders."[157] An example of this is the deprivation of Jordanian nationality that Palestinians suffered when King

153. General Assembly Res. 34/180, adopted 18 December 1979, entered into force 3 September 1981, UN Doc. A/RES/34/180 (22 January 1980).
154. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by UN General Assembly Res. 45/158 of 18 December 1990 (not yet in force), reprinted *in* United Nations, Human rights: a compilation of international instruments, Vol. 1, Part 2 (Universal instruments), UN Doc. ST/HR/1/Rev.5(Vol.I/Part2) (1994), at 554–593.
155. O.A.S. T.S. No. 36 at I, O.A.S. Off. Rec. OEA/Ser. L/V/11.23 doc. rev.2, signed 22 November 1969, entered into force 18 July 1978 (there are two additional protocols to this Convention, one adds economic, social and cultural rights and the other abolishes the death penalty).
156. Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion, No. OC-4/84 (1984), at para. 32.
157. *Statement by Human Rights Watch to the First Preparatory Committee for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, accessed at http://www.hrw.org/campaigns/race/hrw-statement1.htm on 1 November 2001.

Hussein severed ties between the West Bank and Jordan in 1988.[158] It is perhaps in the realm of the withdrawal of nationality where international human rights law can have the most impact. Even the relatively conservative American Law Institute's *Restatement (Third) of Foreign Relations Law (of the United States)*, for example, is willing to recognize that states have increasingly

> accepted some limitations on involuntary termination of nationality, both to prevent statelessness, and in recognition that denationalization can be an instrument of racial, religious, ethnic or gender discrimination, or of political repression.[159]

Not only may the explicit right to nationality prevent statelessness, but so may the application of other human rights such as the right to a due process in consideration of one's civil and political rights and the prohibitions of discrimination. Concerning the latter, it has been argued that,

> the emerging peremptory norm (*jus cogens*) of nondiscrimination will […] make unlawful many types of denationalization. In sum, the whole complex of more fundamental policies for the protection of human rights, as embodied, for instance, in the United Nations Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights and other related instruments and programs, global as well as regional, may eventually be interpreted to forbid use of denationalization as a form of 'cruel, inhuman and degrading treatment or punishment.'[160]

International human rights law also provides protections for stateless persons because it applies to every person under the jurisdiction of a state regardless of their nationality, or lack thereof. Thus, the human rights treaties that a state has ratified are legally binding between the state and a stateless person.

Unlike the regime of statelessness that provides for few enforcement mechanisms, international human rights law prohibits the consequence of a person not having an available remedy for a violation of human rights in any state that is party to any of the leading human rights treaties that provide for the protection of every individual under the jurisdiction of a state regardless of nationality. It is exceptional that human rights may be limited on the basis of nationality or lack thereof.[161] The norm is that

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158. L. Takenberg, The Status of Palestinian Refugees in International Law 184–185 (1998).
159. American Law Institute, Restatement (Third) of Foreign Relations Law, Sec. 211, Comment c (1987).
160. M.S. McDougal, *Nationality and Human Rights: The Protection of the Individual in External Areas*, 83 Yale L. J. 900, at 949–950 (1974).
161. By exception, the International Covenant on Economic, Social and Cultural Rights allows states – and then only developing countries without the necessary economic withal – to deny human rights to non-nationals. *See* Art. 2(3), International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS No. 14531.

human rights apply without distinction as to nationality.[162] This principle is embedded in the leading human rights instruments and expressed succinctly in the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live.[163]

International human rights law also has a legitimizing effect that can promote a state in the eyes of other states by providing a standard to determine whether a state is acting consistently with the expectations of the international community. This may provide significant encouragement for a state to ensure that it respects the right to nationality or other human rights of stateless persons. Douglass Cassel describes this effect when he points out that

> [i]nternational law may shape national law. Formally, obligatory international norms can legitimize and fortify the organizing and consciousness-raising efforts of non-governmental organizations. Their work in turn often leads to further development of both international and national rights law.[164]

Almost every major human rights treaty includes the duty to implement it through national legislation.[165] Thus as Arab states increasingly adopt new human rights treaties and implement those to which they are already party, this law will have an increasingly influential effect on national legislation and practices. Thus even if legitimacy is subject to the national and international political processes, the fact that the overwhelming number of states – including all of those in the Middle East and North Africa – have ratified human rights treaties provides a powerful weapon for those seeking to ensure common minimum standards of human dignity.

International human rights law provides criteria by which individuals may make legitimate claims against a state. In some cases these claims may be brought before international tribunals. For example, all north-African Arab states, with the exception of Morocco, are parties to the 1981 African Charter of Human and Peoples' Rights and thus amendable to the jurisdiction – including over individual complaints – of the African Commission of Human and Peoples' Rights.[166] Even where these claims may not be able to be brought before an international human rights body, there will always be an international forum to whose attention they may be brought, at least for general consideration. For example, both the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights will accept and consider information con-

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162. *See* R. Higgins, Problems and Process 95–96 (1994).
163. UN General Assembly Res. 40/144 (13 December 1985).
164. D. Cassel, *Does International Human Rights Law Make a Difference?*, 2 Chi. J. Int'l L. 121, at 122 (2001).
165. *See*, *e.g.*, *supra* note 150: Art. 2(2) ICCPR; Art. 4 CRC; Art. 2(1)(d) CERD; and Art. 2(b) CEDAW.
166. Although the African Charter on Human and Peoples' Rights does not contain an express right to a nationality it does include the analogous rights to protection against discrimination (Art. 2) and the right to recognition of one's legal status (Art. 5).

cerning the arbitrary denial or removal of nationality. This is the case, although a significant number of violations must be reported to either of these bodies to get any public action.[167]

Finally, it is suggested that an appropriate starting point for ensuring that the human rights of stateless persons are not merely relegated to the realm of rhetoric may be the rights of children. The legal regime – or otherwise said, the consensus of states – is most developed as concerns children's rights. This is clearly evidenced by the almost universal ratification that the Convention on the Rights of the Child has received.[168] It is also evidenced in the fact that widely accepted provisions for a right to nationality are often aimed at children. Article 24 of the International Covenant on Civil and Political Rights, which has been ratified by almost 150 states, provides that "[e]very child has the right to acquire a nationality."

Tackling the problem of statelessness by looking at children first makes the subject somewhat more palatable to countries with nationality laws that are the most problematic. This is clear in the Middle East and North Africa, where the Convention on the Rights of the Child has received anonymous approval with few reservations, while treaties dealing with statelessness have received very limited acceptance. For many countries in the region it is possible to discuss a resolution of the problems of statelessness at birth and to provide for the rights of stateless children, while these same issues concerning adults become extremely political issues. This is not to say that all countries in the Middle East and North Africa will be receptive to eliminating statelessness at birth or to providing stateless children equal rights. It is reasonable to suggest, however, based on the receptivity of these countries to previous attempts to prioritize children in the realm of human rights, that a 'children first' approach will have greater chances of success.

For stateless persons around the world and particularly in the Middle East and North Africa this hope has been absent for so long that generations of stateless persons have been created. If this continues the legitimacy of the state-based system will become undermined by the very populations that it was originally established to protect.

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167. Under ECOSOC Res. 1235 and Res. 1503, the Commission on Human Rights and its subsidiary bodies such as the Sub-Commission, may debate the human rights situation in states about which they have received allegations of widespread and serious violations of human rights. The 1235 procedure is private, but the 1503 procedure can lead to a public debate and condemnation of a state that is found to have committed widespread and serious violations of human rights.
168. Arts. 7 and 8, *supra* note 151.