



***Submission by the Office of the United Nations High Commissioner for Refugees  
in case number 202105598/1/A3 before the Council of State***

## **1. Introduction<sup>1</sup>**

- 1.1 The Office of the United Nations High Commissioner for Refugees ('UNHCR') welcomes the opportunity to submit a written intervention in the case 202105598/1/A3.
- 1.2 UNHCR has been entrusted by the United Nations General Assembly with the mandate to identify and protect stateless persons and to prevent and reduce statelessness.<sup>2</sup> Pursuant to Article 11 of the 1961 *Convention on the Reduction of Statelessness* ('1961 Convention'), UNHCR was designated by the UN General Assembly as the body responsible for examining the cases of persons who claim the benefit of the 1961 Convention and for assisting such persons in presenting their claims to the appropriate national authorities.<sup>3</sup> The 1961 Convention complements the 1954 *Convention relating to the Status of Stateless Persons* ('1954 Convention'), which remains the only international treaty providing standards for the treatment of stateless persons and is therefore of critical importance in ensuring the protection of this vulnerable group.<sup>4</sup> The United Nations General Assembly specifically requested UNHCR to "actively [...] promote accession to" the Statelessness Conventions and, in this context, to "provide relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation".<sup>5</sup>
- 1.3 General Assembly resolution 49/169 calls upon States to assist the High Commissioner to fulfil his responsibilities, under General Assembly resolution 3274 (XXIX) of 10 December 1974, with respect to the reduction of statelessness, including the promotion of accessions to and full implementation of international instruments relating to statelessness. To support States in implementing their obligations, UNHCR issues interpretive guidelines on the meaning of provisions and terms contained in these instruments. These include the *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* ('Handbook on Protection of Stateless Persons');<sup>6</sup> *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*;<sup>7</sup> and *Guidelines on Statelessness No. 5, Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*.<sup>8</sup>

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<sup>1</sup> This *submission* does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. See, UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946: [www.refworld.org/docid/3ae6b3902.html](http://www.refworld.org/docid/3ae6b3902.html).

<sup>2</sup> UN General Assembly resolutions 3274 (XXIV), 31/36, A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI) – 1995, Prevention and Reduction of Statelessness and the Protection of Stateless Persons.

<sup>3</sup> UN General Assembly resolutions 3274 (XXIX) of 10 December 1974 and 31/36 of 30 November 1976.

<sup>4</sup> UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, <https://www.refworld.org/docid/3ae6b3840.html>.

<sup>5</sup> UN General Assembly Resolution 50/152 of 21 December 1995.

<sup>6</sup> UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons*, 30 June 2014: <https://www.refworld.org/docid/53b676aa4.html>.

<sup>7</sup> UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04: <https://www.refworld.org/docid/50d460c72.html>.

<sup>8</sup> UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, May 2020, HCR/GS/20/05: <https://www.refworld.org/docid/5ec5640c4.html>.

1.4 It is pursuant to its mandated responsibilities in relation to the 1954 and 1961 Conventions that UNHCR submits this *amicus curiae* brief to provide neutral and expert information on the interpretation and application of the 1954 Convention. UNHCR will address the legal issues pertaining to the standard of proof in statelessness cases, as well as legal issues pertaining to the interpretation and evaluation of evidence that can be used to determine and/or register a person as stateless. UNHCR will only address the legal issues that arise and will refrain from commenting on the facts of the individual case.

## 2. Statelessness under the 1954 Convention

2.1 When interpreting the 1954 Convention, consideration should be given to the *Vienna Convention on the Law of Treaties* ('VCLT'), which confirms that a treaty shall 'be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in light of its object and purpose.'<sup>9</sup> The 1954 Convention should be interpreted in light of its human rights and humanitarian purpose, which includes securing protection of vulnerable persons whose lack of nationality gives rise to a risk of discriminatory treatment and human rights abuses.<sup>10</sup> As elaborated in the preamble to the 1954 Convention, this includes regulating and improving the status of stateless persons to assure them the widest possible exercise of fundamental rights and freedoms.<sup>11</sup>

2.2 Article 1(1) of the 1954 Convention defines a stateless person as "a person who is not considered as a national by any State under the operation of its law".<sup>12</sup> The 1954 Convention is silent on how States are to determine or register whether an individual is stateless. It does, however, include an implicit procedural obligation on States to identify stateless persons within their jurisdiction, because, unless stateless persons are identified, the rights conferred by the 1954 Convention would be rendered nugatory.<sup>13</sup> Recognition of statelessness thus plays an essential role in accessing a secure legal status and in enjoying the rights afforded to stateless persons under the 1954 Convention.<sup>14</sup>

2.3 The obligation to identify stateless persons also implies that States need to consider the evidence that can be presented by individuals claiming to be stateless and the extent to which they can prove that they are stateless. This can be referred to as the burden and standard of proof. It is important that States maintain a realistic burden and standard of proof so not to undermine the object and purpose of the 1954 Convention, namely, to ensure that stateless persons enjoy the widest possible exercise of their human rights and that all those who fall within the Convention's reach benefit from its provisions.

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<sup>9</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331: [www.refworld.org/docid/3ae6b3a10.html](http://www.refworld.org/docid/3ae6b3a10.html), Article 31(1).

<sup>10</sup> UNHCR, *Submission by the United Nations High Commissioner for Refugees in the case of AS (Guinea) v. Secretary of State for the Home Department before the Court of Appeal (Civil Division)*, 20 February 2018, C5/2016/3473/A: <https://www.refworld.org/docid/5a9d54884.html>, para. 15

<sup>11</sup> See the preamble to the 1954 Convention relating to the status of stateless persons; The United Nations Secretary-General further recognises that "*the phenomenon of statelessness itself violates the universal human right to a nationality*", explains that discrimination (e.g. against racial/ethnic groups, religious/linguistic minorities and women) is both a common root cause and a consequence of statelessness, and emphasises that "*stateless persons have protection needs distinct from those of other non-citizens*", as "[s]tatelessness results in widespread denial of human rights... stateless persons cannot enjoy full equality with citizens in any country... Statelessness often leads to limits on access to birth registration, identity documents, education, health care, legal employment, property ownership, political participation and freedom of movement. Women are at heightened risk of statelessness, rendering them particularly susceptible to a range of abuse. Stateless children also suffer acute vulnerabilities...". See UNSG, *Guidance Note of the Secretary General: The United Nations and Statelessness (2011)*, June 2011: <https://www.refworld.org/docid/4e11d5092.html>, p 2, 6, 7 & 12.

<sup>12</sup> A finding that an individual satisfies the test in Article 1(1) is declaratory, rather than constitutive, in nature, akin to recognition that a person is a refugee. UNHCR Handbook on Protection of Stateless Persons, note 5 above, para. 16.

<sup>13</sup> UNHCR, Handbook on Protection of Stateless Persons, note 5 above, paras 8 and 10.

<sup>14</sup> *Ibid.*, para. 9.

### 3 Situation in the Netherlands

- 3.1 The Netherlands does not have an established Statelessness Determination Procedure, leaving many stateless persons without the possibility of having their statelessness formally determined and subsequently registered in the population register (Personal Records Database).<sup>15</sup> Stateless persons are thus deprived of the possibility of benefitting from the rights contained in the 1954 Convention.
- 3.2 The Netherlands has a large number of persons registered with ‘nationality unknown’ in the Personal Records Database.<sup>16</sup> Some stateless persons yet to be identified may be among this group. They find themselves in a disadvantaged position because of the absence of clear regulations and/or guidelines at national level on the determination and registration of statelessness.
- 3.3 Stateless persons registered with ‘nationality unknown’, even where they have evidence of their statelessness, in practice cannot rely on an effective procedure to establish their statelessness or correctly register their statelessness in the population register. This is due to the absence of a statelessness determination procedure as well as to the application of an excessively high standard of proof (‘irrefutable’) by municipalities in procedures to register and amend personal data in the Personal Records Database. Requiring stateless persons to *irrefutably prove*<sup>17</sup> their statelessness in order to be registered as stateless in the population register undermines the object and purpose of the 1954 Convention.

### 4 Standard of proof for establishing and registering statelessness

- 4.1 The definition of a stateless person in Article 1(1) of the 1954 Convention requires proof of a negative: it requires an applicant to prove that they are *not* considered as a national by any State under the operation of its law. This presents significant evidentiary and practical challenges to applicants and informs how evidentiary rules in statelessness procedures are to be applied in order to meet the object and purpose of the 1954 Convention.<sup>18</sup>
- 4.2 Given the nature of statelessness, applicants for statelessness status are often unable to substantiate their claim with much, if any, documentary evidence. Because they are stateless and they are not recognized as nationals by any State, stateless persons might not have (had) any access to documentation proving their identity and (absence of) nationality, both in the present and in the past. The authorities assessing the person’s status should take this into account, where appropriate giving sympathetic consideration to testimonial explanations regarding the absence of certain kinds of evidence.<sup>19</sup>
- 4.3 To ensure that all those who fall within the 1954 Convention’s reach benefit from its provisions, and considering the inherent difficulties in proving statelessness, an appropriate standard of proof needs to be adopted. Adapting the standard of proof to the situation of stateless persons is warranted, first in recognition of the evidentiary and practical difficulties inherent in proving statelessness, and, second

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<sup>15</sup> ‘Basisregistratie Personen (BRP)’ in Dutch.

<sup>16</sup> According to the most recent statistical data, 36,267 persons are registered as stateless or with nationality unknown in the Personal Records Database, see <https://opendata.cbs.nl/#/CBS/nl/dataset/84727NED/table>.

<sup>17</sup> Afdeling Bestuursrechtspraak Raad van State, ECLI:NL:RVS:2020:3098, 23 December 2020. Para. 6.1 provides: “Gelet hierop en op het feit dat [appellant] geen brondocumenten heeft overgelegd waaruit onomstotelijk blijkt dat hij staatloos is, heeft het college terecht de registratie van de nationaliteit van [appellant] als ‘onbekend’ gehandhaafd”.

<sup>18</sup> UNHCR, Handbook on Protection of Stateless Persons, note 5 above, para. 88.

<sup>19</sup> *Ibid.*, paras 90-91. On the related obligation of EU Member States to take into account the difficulties persons are facing in producing documentary evidence, as well as their explanations as to why they are unable to produce such documents, see CJEU, C-635/17. In this judgment, the Court of Justice has ruled that an application (for family reunification, in this case) may not be rejected solely on the ground that the person has not provided official documentary evidence and that the explanation given by the person to justify the inability to provide such evidence has been deemed implausible solely on the basis of general country of origin information, without taking into consideration the specific circumstances of the person and the “particular difficulties they have encountered, according to their testimony, before and after fleeing their country of origin” (para. 81)

because of the fundamental importance of the substantive rights conferred on stateless persons by the 1954 Convention.<sup>20</sup> States are therefore advised in UNHCR's Handbook on Protection of Stateless Persons to adopt the same standard of proof as that required in refugee status determination, namely, that a finding of statelessness would be warranted where it is established to a 'reasonable degree' that an individual is not considered as a national by any State under the operation of its law.<sup>21</sup>

4.4 Requiring a high standard of proof of statelessness would undermine the object and purpose of the 1954 Convention. A high standard of proof which stateless persons cannot meet due to the particular difficulties inherent in proving a negative and proving statelessness, prevents them from enjoying the very protection offered by the 1954 Convention.

## **5 Scope of proving statelessness: State(s) with which the person enjoys a relevant link**

5.1 UNHCR's Handbook on Protection of Stateless Persons advises that the lack of a stateless person's nationality does not need to be proven in relation to every State in the world. 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, adoption or habitual residence. In some cases, this may limit the scope of investigation to only one State (or to an entity which is not a State).<sup>22</sup> For cases known to UNHCR in the Dutch context, at the time of registration in the Personal Records Database by the municipality, the country or countries with whom the person has a relevant link will have already been identified in the asylum or return procedure. Municipalities can rely on the previously identified country or countries, and therefore evidence only needs to be examined in relation to that country or those countries.

5.2 UNHCR would like to emphasize that municipalities or other authorities cannot simply reject a request for the registration of statelessness by merely stating that a person might perhaps have obtained the nationality of another country. Similarly, UNHCR considers that the assessment that a person *could* be entitled to citizenship at some point in the future, is not relevant to the assessment of statelessness, as statelessness "is to be assessed as at the time of determination" and is "neither a historic nor a predictive exercise".<sup>23</sup> This equally applies to the registration of statelessness at the municipal level.

## **6 Examining and weighing evidence for the registration of statelessness**

6.1 Providing and assessing all facts and evidence to establish and register statelessness is a collaborative procedure. The applicant has a duty to be truthful, to provide as full an account of his or her position as possible and to submit all evidence reasonably available, which the national authorities are to consider.<sup>24</sup>

6.2 Facts and evidence reasonably available to be considered may include documentary evidence, the applicant's statements and the legislation and general situation in the State(s) with which the applicant has a relevant link. The registration may involve considering relevant evidence collected in completed asylum or return procedures (if available). In the Dutch context of return procedures, the national authorities (*in casu*: the Repatriation and Departure Service) would have already reached out to the country of origin or country of habitual residence to inquire about return possibilities; therefore, an official response or lack thereof from embassies and/or consulates is often already on file and available to the authorities.

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<sup>20</sup> UNHCR, *Submission by the United Nations High Commissioner for Refugees in the case of AS (Guinea) v. Secretary of State for the Home Department before the Court of Appeal (Civil Division)*, 20 February 2018, C5/2016/3473/A: <https://www.refworld.org/docid/5a9d54884.html>, para. 10.

<sup>21</sup> UNHCR, Handbook on Protection of Stateless Persons, note 5 above, paras 90-91.

<sup>22</sup> *Ibid.*, paras 17-18 and 92.

<sup>23</sup> *Ibid.*, para. 50. See also, UNHCR, *Amicus curiae of the United Nations High Commissioner for Refugees regarding the interpretation of the 1954 Convention Relating to the Status of Stateless Persons before the Borgarting Court of Appeal of Norway*, 3 September 2018: <https://www.refworld.org/docid/5b9272b74.html>, para. 17.

<sup>24</sup> UNHCR, Handbook on Protection of Stateless Persons, note 5 above, para. 87-89.

- 6.3 The kinds of evidence that may be relevant can be divided into two categories: evidence relating to the individual's personal circumstances and evidence concerning the laws and other circumstances in the country in question.<sup>25</sup>
- 6.4 If available, evidence concerning the individual's personal circumstances and personal history may help to identify which States and nationality procedures need to be considered in determining an applicant's nationality status. The UNHCR *Handbook on Protection of Stateless Persons* provides a non-exhaustive list of types of evidence to be considered.<sup>26</sup> The following can be considered as evidence in registering a person as stateless: the testimony of the applicant (e.g. statements during his interview); identity documents (e.g. birth certificate, family booklet); medical certificates/records (e.g. vaccination booklet); and response or lack of response from a foreign authority to an enquiry regarding nationality status of an individual.<sup>27</sup> Further, the authority responsible to establish or register statelessness may consider documents containing relevant information on the nationality of an applicant's parents, spouse and children (e.g. identity and travel documents of family members).<sup>28</sup> UNHCR wishes to emphasize that the availability of evidence, and which evidence will be relevant to consider, will depend on the facts and circumstances of the individual stateless person concerned.
- 6.5 Municipalities can also consider information concerning the circumstances in the country or countries under consideration. Relevant information could cover evidence regarding nationality and other relevant laws, their implementation and practices of relevant States, as well as the general legal environment in those jurisdictions in terms of respect by the executive branch for judicial decisions.<sup>29</sup> Accurate and up-to-date country-related information can be obtained from a variety of sources, governmental and non-governmental. The complexity of nationality law and practice in a particular State may justify recourse to expert evidence in some cases.
- 6.6 Further, when considering relevant country-related information, the personal circumstances and history of the individual concerned should be taken into account. These may include personal circumstances of the applicant (e.g. belonging to a minority), as well as particular circumstances of the specific place where the applicant resided in the past (e.g. taking into account deviating practices of nationality laws in a specific region).<sup>30</sup> If an applicant belongs to a certain group whose lack of nationality or inability to access naturalization procedures is reported by objective information, this will be relevant and should thus be taken into account.
- 6.7 UNHCR recommends that where limited or no documentary evidence is presented, additional weight will be given to an applicant's written and/or oral statement, country of origin information and any results of enquiries with States.<sup>31</sup>

## **7 Approaching foreign authorities**

- 7.1 As noted above, reaching out to the competent authorities with which an applicant has links may provide further evidence of a person's statelessness and can form the basis of his or her registration as being stateless. Information provided by foreign authorities is sometimes of central importance to proving statelessness, although not necessarily in cases where there is otherwise adequate proof.<sup>32</sup> Where

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<sup>25</sup> UNHCR, *Handbook on Protection of Stateless Persons*, note 5 above, para. 83 and onwards

<sup>26</sup> *Ibid.*, see para. 84 for the complete (non-exhaustive) list.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, para. 85

<sup>30</sup> *Ibid.*, para. 86.

<sup>31</sup> *Ibid.*, para. 94; See also, UNHCR, *Comments by the United Nations High Commissioner for Refugees (UNHCR) on the draft Law Proposal aiming at establishing a Statelessness Determination Procedure in the Netherlands*, November 2016, para. 17.

<sup>32</sup> UNHCR, *Handbook on Protection of Stateless Persons*, para. 96.

authorities make enquiries with foreign authorities regarding the nationality or statelessness status of an individual, such as in the return procedures in the Netherlands, they must consider the weight to be attached to the response or lack of response from the State in question.<sup>33</sup>

- 7.2 Enquiries with foreign authorities (be it by the applicant or by the authorities) may be met with silence or a refusal to respond by the competent authority. Conclusions regarding a lack of response should only be drawn after a reasonable period of time. A lack of response after a reasonable period of time will generally provide strong confirmation that the individual is not a national,<sup>34</sup> and may even be considered evidence of an individual's lack of access to the nationality of the state concerned. This should be taken into account when considering whether a person has proven their statelessness to a reasonable degree. Further, 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.<sup>35</sup>
- 7.3 Under no circumstances should the state authorities make contact with, or should an individual be requested to contact the authorities of a State against which an individual alleges a well-founded fear of persecution unless it has definitively been concluded that they are neither a refugee nor entitled to a complementary form of protection.<sup>36</sup>

## 8 Conclusions

- 8.1 UNHCR wishes to emphasize that when a person approaches national authorities with the request to register their nationality status in the population register as stateless or to change their nationality status from 'unknown' to stateless, the standard of proof of '*reasonable degree*' should be applied. Maintaining the standard of proof of '*reasonable degree*' appropriately takes into consideration the significant evidentiary and practical challenges faced by stateless persons to prove that they are not considered as a national by any State. This would also be in line with the object and purpose of the 1954 Convention.
- 8.2 Various types of evidence can be considered in proving a person's statelessness to a reasonable degree. UNHCR wishes to highlight that a letter by embassies or consulates stating that an applicant is not a citizen of the country concerned; is not entitled to a passport; or containing information of a similar scope (*pro forma*), can be considered as proof of a person's statelessness. Furthermore, depending on the individual circumstances of the person concerned, the lack of a response of an embassy or consulate can, after a reasonable period of time, also be considered as proof that the individual is not considered as a national of that State.
- 8.3 Statelessness only needs to be proven in relation to those countries with which the person has a relevant link, through birth on territory, descent, marriage, adoption or habitual residence.

UNHCR, February 2022

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<sup>33</sup> *Ibid.*, para. 98.

<sup>34</sup> *Ibid.*, para. 41.

<sup>35</sup> *Ibid.*, para. 98.

<sup>36</sup> *Ibid.*, para. 96.