UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

60 YEARS

Expert Meeting

Statelessness Determination Procedures and the Status of Stateless Persons

Summary Conclusions

Expert meeting convened by the Office of the United Nations High Commissioner for Refugees and the Open Society Justice Initiative, Geneva, Switzerland, 6-7 December, 2010 in the context of the 50th anniversary of the 1961 Convention on the Reduction of Statelessness

This second expert meeting on statelessness focused on two practical prerequisites for ensuring the protection of stateless persons: (i) the mechanisms for determining who is stateless and (ii) the status and appropriate standards of treatment for stateless persons once they are recognized as such under national law.[1] Two discussion papers prepared by UNHCR Consultant, Ruma Mandal, informed the meeting. The first paper was entitled *Procedures for Determining whether a Person is Stateless* and the second was entitled *What Status should Stateless Persons receive under National Law?* Thirty-five participants from eighteen countries with experience in government, NGOs, academia, the judiciary, the legal profession and international organizations contributed to the rich debate.

Although the 1954 Convention relating to the Status of Stateless Persons does not prescribe a particular means for determining statelessness, a few States have legislated formal procedures to this end, including by integrating determination of statelessness into existing administrative procedures. Many more States are confronted with situations of statelessness and are being increasingly required to make determinations on nationality – or statelessness – of persons on their territory. At the time of writing, 65 States are party to the 1954 Convention and there is limited State practice regarding statelessness determination procedures and statelessness status. While this expert meeting examined these questions with particular emphasis on how to improve State parties' application of the 1954 Convention, the discussion also explored the pertinence of 1954 Convention standards for non-States parties. In this context, it was

[1] In the context of the 50th anniversary of the 1961 Convention on the Reduction of Statelessness a series of Expert Meetings is being held. The discussions are in preparation for the drafting of guidelines under UNHCR's statelessness mandate on the following five issues: (i) the definition of a "stateless person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons; (ii) the concept of *de facto* statelessness; (iii) procedures for determining whether a person is stateless; (iv) the status and attendant benefits to be accorded to stateless persons under national law; and (v) the scope of international legal safeguards for preventing statelessness among children or at birth.

The meeting was funded by the European Commission

emphasized that the finding that an individual is stateless constitutes a juridically relevant fact.

A significant distinction emerged between two different contexts, the first consisting of countries – many industrialized – that host stateless persons who are predominantly, if not exclusively, migrants or of migrant background; and the second consisting of countries that have *in situ* stateless populations (i.e. those that consider themselves to already be "in their own" country[2]). All participants agreed on the importance of improving protection of stateless persons in both of these contexts. At the same time it was acknowledged that the means by which this is achieved will differ depending on the circumstances of specific populations and countries.

The discussions during this meeting frequently invoked obligations in international human rights law beyond those contained in the 1954 Convention – particularly with respect to guaranteeing a child's right to a nationality as enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). However, it was underscored that the scope of those obligations will be discussed in greater detail in the third expert meeting of this series.

The following summary conclusions do not necessarily represent the individual views of participants or necessarily those of UNHCR, but reflect broadly the key understandings and recommendations that emerged from the discussion.

Statelessness Determination Procedures

The necessity for determination procedures

1. The 1954 Convention relating to the Status of Stateless Persons establishes a standard of treatment which can only be applied by a State party if it knows who the recipients of this treatment should be. As such, it is implicit in the 1954 Convention that States parties identify who qualifies as a stateless person under Article 1 of the Convention for the purpose of affording them the standard of treatment set forth in the Convention. The identification of stateless persons may occur in procedures which are not specifically designed for this purpose. This would be appropriate where such procedures are linked to grant of residence, as is the practice in a number of States. In the absence of such provisions in aliens or immigration laws, a procedure which is aimed at determining statelessness enhances a State's ability to fulfil its obligations under the 1954 Convention.

2. Recognition as a stateless person is not a substitute for acquisition of nationality. In the case of stateless persons *in situ*, where there is a realistic

[2] This terminology was adopted taking into account Article 12(4) of the International Covenant on Civil and Political Rights and the manner in which this provision has been interpreted by the Human Rights Committee (General Comment 27).

prospect of acquisition of citizenship in the near future, it may be inappropriate to conduct a determination of whether they are stateless, in particular where this could delay a durable solution (i.e. the grant of nationality).

Design and location of statelessness determination procedures

3. Determination procedures should be simple and efficient, building to the extent possible on existing administrative procedures that establish relevant facts. Some State practice has, for instance, integrated determination of statelessness in procedures regulating residency rights.

4. In principle, statelessness determination procedures should be conducted on an individual basis. Nevertheless, there may be occasions where determination of status on a group or *prima facie* basis may be appropriate, relying on evidence that members of the group satisfy the stateless person definition in Article 1 of the 1954 Convention.

5. States that wish to establish a statelessness determination procedure may consider placing this procedure within a government authority appropriate not only to the national legal and administrative context, but also one that reflects the profile of the stateless population in the country in question, i.e. whether stateless persons are present predominantly in a migration or *in situ* context. Relevant bodies may include citizenship, immigration or asylum authorities, though in some States these issues may be handled by a single entity. Where stateless persons are present predominantly in their "own country," the solution for those individuals *in situ* will generally be acquisition of the nationality of that country and the State body responsible for citizenship would likely be the most appropriate entity, subject to the considerations set out in paragraph 4 above.

6. As some stateless persons are also refugees, certain States parties to the 1954 Convention who are also party to the 1951 Convention relating to the Status of Refugees may wish to fuse statelessness and refugee determination proceedings. The advantages of a fused procedure include avoiding the extra costs of establishing a separate administrative procedure to deal with statelessness given the relatively low number of statelessness cases compared to refugee cases and building on the relevant expertise and knowledge already developed by authorities involved in refugee status determination. Other States might prefer to separate the procedures for determining refugee status and statelessness. The advantages of a separate procedure include awareness-raising about statelessness and developing specialization and expertise within the authority concerned as statelessness raises many issues that are distinct from those considered in refugee status determination.

7. Regardless of where a statelessness determination procedure is placed within the State structure, it is recommended that States provide specialized training on nationality laws and practices, international standards and statelessness to officials responsible for making statelessness determinations. States, in

cooperation with UNHCR and non-governmental organisations, should raise awareness about and publicize the existence of statelessness determination procedures to enhance stateless persons' access to these mechanisms.

8. Under its mandate for statelessness UNHCR can assist States which do not have the capacity or resources to put in place statelessness determination procedures, by conducting determinations itself if necessary and as a measure of last resort. It can also play an advisory role in developing or supporting State procedures.

9. The meeting emphasized one of the underlying principles of international refugee protection: In all circumstances, States must ensure that confidentiality requirements for applications by refugees who may also be stateless are upheld in a statelessness determination procedure. Thus any contact with the authorities of another country to inquire about the nationality status of an individual claiming to be stateless should only take place after any refugee claim has been rejected after proper examination (including the exhaustion of any legal remedies). Every applicant in a statelessness determination procedure should be informed at the outset of the right to raise refugee-related concerns ahead of any enquiries made with foreign authorities.

Procedural safeguards

10. In order to ensure fairness and efficiency, statelessness determination procedures must ensure basic due process guarantees, including the right to an effective remedy where an application is rejected. States should facilitate to the extent possible access to legal aid for statelessness claims. Any administrative fees levied on statelessness applications should be reasonable and not act as a deterrent to stateless persons seeking protection.

11. Where an individual has an application pending in a statelessness determination procedure, any removal/deportation proceedings must be suspended until his or her application has been finally decided upon.

Questions of proof

12. A determination should be made on the basis of all the available evidence.

13. The 1954 Convention requires proving a negative: establishing that an individual is *not* considered as a national by any State under the operation of its law. Because of the challenges individuals will often face in discharging this burden, including access to evidence and documentation, they should not bear sole responsibility for establishing the relevant facts. In statelessness determination procedures, the burden of proof should therefore be shared between the applicant and the authorities responsible for making the determination. It is incumbent on individuals to cooperate to establish relevant facts. If an individual can demonstrate, on the basis of all reasonably available evidence, that he or she is evidently not a national, then the burden should shift to the State to prove that the individual is a national of a State.

14. Determination procedures should adopt an approach to evidence which takes into account the challenges inherent in establishing whether a person is stateless. The evidentiary requirements should not be so onerous as to defeat the object and purpose of the 1954 Convention by preventing stateless persons from being recognized. It is only necessary to consider nationality in relation to States with which an individual applicant has relevant links (in particular by birth on the territory, descent, marriage or habitual residence).

15. While possession of a passport may raise a presumption of nationality, this is rebuttable as some countries issue "passports of convenience" to individuals who are not their nationals.

16. Determining statelessness requires an examination of the practice as well as the law in relation to nationality in the relevant State(s). As such, it is essential that the determining official has access to credible, accurate, and contemporary information. This may be gleaned from a variety of sources – governmental and non-governmental – and cooperation between States and other actors in setting up reliable database(s) of nationality laws and practice should be encouraged.

Contacting foreign authorities

17. Information provided by foreign authorities is sometimes of central importance for determinations on statelessness. However, contact with such authorities does not need to be sought in every case, in particular where there are already adequate elements of proof. Under no circumstances should contact be made with authorities of a State against which an individual alleges a well-founded fear of persecution unless it has definitively been concluded that he or she is not a refugee or entitled to a complementary form of protection.

18. Flexibility may be necessary in relation to the procedures for making contact with foreign authorities to confirm whether or not an individual is its national. Some foreign authorities will only accept inquiries that come directly from another State while others are only open to contact from individuals. In some cases UNHCR's assistance in making contact with, and obtaining a response from, foreign authorities may be necessary and the Office should offer its support in this regard as appropriate.

19. When contacting foreign authorities, States may set time-limits for a response as it is in the interest of both States and stateless applicants that statelessness determination proceedings be expeditious. However, some cases might present particularly complex circumstances that will require more time for resolution. Additional time may be warranted, in particular where there is evidence that an individual may in fact be a national of a specific State but has yet to receive official attestation of this.

20. In some instances the lack of response of foreign authorities may be evidence that an individual is not considered a national of that country.

Status of Stateless Persons at the National Level

21. Whether or not an individual is stateless is a matter of fact, and recognition of an individual's statelessness is declaratory of that fact.

22. International human rights law applies to stateless persons irrespective of their legal status in the country in which they find themselves.

Individuals awaiting determination

23. States should ensure that provision is made in line with the relevant provisions of the 1954 Convention and international human rights law for the needs of persons awaiting determination of their statelessness status. States should afford applicants for statelessness determination a minimum set of rights (including work, education, healthcare and housing rights), subject to this being consistent with the requirements of the 1954 Convention and the norms on non-discrimination contained in international human rights law. States should take particular care to avoid the arbitrary detention of applicants for statelessness status and consider alternatives to detention pending determination of statelessness status.

Individuals recognized as stateless

24. For stateless individuals within their own country, as opposed to those who are in a migration context, the appropriate status would be one which reflects the degree of attachment to that country, namely, nationality.

25. When States recognize individuals as being stateless, they should provide such persons with a lawful immigration status from which the standard of treatment envisaged by the 1954 Convention flows. Having a lawful status contributes significantly to the full enjoyment of human rights.

26. In some cases stateless persons may have a right of residence in the State pursuant to international human rights law, for example under Article 12 of the ICCPR. Current practice demonstrates that most States with determination procedures grant a status in national law, including the right of residence, upon recognition, often in the form of fixed-term, renewable residence permits.

27. While the 1954 Convention does not explicitly prescribe a right of residence to be accorded upon a person's recognition as stateless, granting such a right is reflected in current State practice to enable stateless individuals to live with dignity and in security. Participants agreed that this approach is the best means of ensuring protection of stateless persons and upholding the 1954 Convention. Without such status, many stateless persons may be deprived of the protection of the Convention. Nonetheless, it was also discussed whether

in a limited set of circumstances it may not be necessary to provide for residence upon recognition. One view was that this would be the case for stateless persons in a migration context who can immediately return to a State of former habitual residence where they enjoy permanent residence as well as the full range of civil, economic, social and cultural rights and have a reasonable prospect of acquiring nationality of that State. Similarly, while a form of protection (including some kind of immigration status), may be necessary in the short term, grant of residence may not be necessary where an individual can acquire or re-acquire nationality of another State within a reasonable period of time through simple, accessible and purely formal procedures, where the authorities do not have any discretion to refuse to take the necessary action.

28. States should facilitate family reunification for recognized stateless persons who receive a right of residence.

Stateless individuals who are recognized as refugees

29. If a stateless person is simultaneously a refugee, he or she should be protected according to the higher standard which in most circumstances will be the standard of treatment foreseen under international refugee law (supplemented by international human rights law). Thus, where a stateless individual qualifies for asylum as a refugee under national law and this is more favourable in substance compared to the immigration status awarded to stateless persons, States should accord such individuals refugee status or the rights which flow from such status.

Determination Procedures in States that are not Party to the 1954 Convention

30. States that are not party to the 1954 Convention are nonetheless bound by provisions of international human rights law to respect the rights of stateless persons within their territory (for example, the prohibition against arbitrary detention pursuant to Article 9(1) of the ICCPR and the obligation to ensure that every child has a nationality pursuant to Article 24(3) of the ICCPR and Article 7(1) of the CRC). Statelessness is, therefore, a juridically relevant fact in this context. Moreover, non-party States may find it useful to establish statelessness determination procedures and a number have actually done so. In addition, such States may find helpful guidance in the provisions of the 1954 Convention with respect to their response to statelessness, for example, with regard to the provision of identity and travel documents to stateless persons.

ANNEX 1

Expert Meeting on Statelessness Determination Procedures & Statelessness Status at the National Level

CICG Conference Center, Room 5, 3d Floor
Geneva, Switzerland
6 and 7 December 2010

Agenda[3]

Monday, 6 December 2010

09:00 – 09:30 Registration

09:30 – 10:00 Opening remarks
UNHCR will briefly outline why it is focusing on development of guidance on the determination of statelessness, in particular under the 1954 Convention relating to the Status of Stateless Persons.

10:00 – 11:00 DETERMINATION PROCEDURES
- Form and location of statelessness determination procedures, including in relation to refugee status determination procedures

11:00 – 11:30 *Break*

11:30 – 13:00 DETERMINATION PROCEDURES (cont.)
- Contact with foreign authorities regarding nationality status
- Procedural guarantees: decision-making, suspensive effect, and appeal/review
- Procedures for determining *de facto* statelessness

13:00 – 14:15 *Lunch break*

14:15 – 16:00 ISSUES PERTAINING TO EVIDENCE
- Burden and standard of proof
- Forms of evidence

16:00 – 16:15 *Break*

16:15 – 17:30 ISSUES PERTAINING TO EVIDENCE (cont.)

[3] Timing is indicative and subject to modification based on progress in discussions. Each item will be briefly introduced by the author of the discussion paper, followed by discussion.

Tuesday, 7 December 2010

09:00 – 09:45 STANDARDS OF TREATMENT OF STATELESS PERSONS IN INTERNATIONAL LAW: INTERNATIONAL HUMAN RIGHTS LAW

Note: Throughout the morning, discussion will take into account differences in treatment based on circumstances such as whether individuals are inside or outside "their own country," as well as different causes of statelessness

09:45 – 11:00 STATELESSNESS STATUS AT THE NATIONAL LEVEL IN STATES PARTY TO THE 1954 CONVENTION

- Graduation of rights in the 1954 Convention based on degree of attachment between the stateless individual and the contracting State
    - Standards of treatment for stateless persons prior to and during determination procedures
    - Standards of treatment for stateless persons post-recognition
- Right of residence
- Application of 1954 Convention standards in contracting States that do not have determination procedures

11:00 - 11:30 *Break*

11:30 - 13:00 STATELESSNESS STATUS AT THE NATIONAL LEVEL IN STATES PARTY TO THE 1954 CONVENTION (cont.)

13:00 - 14:15 *Lunch break*

14:15 – 15:45 STATELESSNESS STATUS AT THE NATIONAL LEVEL

- Value of the standards set out in the 1954 Convention in non-States parties
- Implications of 1954 Convention standards for status of *de facto* stateless persons

15:45 - 16:15 *Break*

16:15 - 17:00 Concluding remarks and closure of the meeting

ANNEX 2

List of participants*

Kohki Abe, Kanagawa University, Japan

Maha Al Bargas, Kuwaiti Human Rights Society, Kuwait

Carmelita Ammendola, Ministry of the Interior, Italy

Juliana Bello, National Refugee Commission, Argentina

Maria del Carmen des Rio, National Immigration Institute, Mexico

Stefanie Grant, Equal Rights Trust, United Kingdom

René de Groot, Maastricht University, Netherlands

Laurie Fransman, Legal Practitioner, United Kingdom

Guy Goodwin-Gill, Oxford University, United Kingdom

Gábor Gyulai, Hungarian Helsinki Committee, Hungary

Catriona Jarvis, International Association of Refugee Law Judges, United Kingdom

Sebastian Köhn, Open Society Justice Initiative, United States

Sanda Kundrate, Office of Citizenship and Migration Affairs, Latvia

Reinhard Marx, Legal Practitioner, Frankfurt/Main, Germany

Jane McAdam, University of New South Wales, Sydney, Australia

Benoît Meslin, Office français de protection des réfugiés et apatrides, France

Tamás Molnár, Ministry of Interior, Hungary

Valery Napisanov, Federal Migration Service, Russian Federation

Nick Oakeshott, Asylum Aid, United Kingdom

Ricardo Paras III, Department of Justice, Philippines

Sriprapha Petcharamesree, Mahidol University, Thailand

Brandon Prelogar, Department of Homeland Security, United States

Richard Tyndorf, Immigration and Refugee Board, Canada

Carlos Vargas Pizzaro, Ministry of Foreign Affairs, Costa Rica

For UNHCR, Mirna Adjami, Jorunn Brandvoll, Ruma Mandal, Mark Manly**,** Janice Marshall, Juan Carlos Murillo, Pierfrancesco Maria Natta, Andrew Painter, Laura van Waas, Alia al-Khatar-Williams, Emilie Wiinblad

*Institutional affiliation given for identification purposes only.