Beyond Sovereignty
The Right to Nationality in International Law

The right of every human being to a nationality has been recognized as such by international law.\(^1\)

ICtHR, Advisory Opinion on the Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, 1984

After analyzing the link between state sovereignty and citizenship, and critically reflecting on the traditional perception of nationality as an internal matter of sovereign states, the discussion in the previous chapter has shown that the paradigm of nationality as a *domaine réservé* no longer holds true. Even though states establish the rules for the acquisition and loss of their respective citizenship and implement them at the domestic level, this does not mean they have unlimited discretion in nationality matters. International law knows clear limitations upon that discretion and, in fact, regulates nationality in a broad number of different instruments. Against this evolution of the international legal framework on nationality, the current chapter now zooms in on the protection of the right to nationality in international law. It analyzes the different existing international standards at the universal and regional levels to identify the provisions that guarantee a right to nationality. The bases for this analysis are, in principle, the sources of international law according to Article 38 ICJ-Statute: international conventions, international custom, general principles of law and soft law — though the focus primarily lies on human rights instruments. Jurisprudence of international and regional tribunals is reviewed where it proves to be particularly pressing for the interpretation of a provision protecting the right to nationality.\(^2\)

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2. Article 38(1)(d) Statute of the International Court of Justice of 26 June 1945, 592 UNTS 119 (‘ICJ-Statute’).
The chapter begins by looking at the most basic provision in international law protecting the right to nationality: Article 15 of the Universal Declaration of Human Rights\(^3\). It then turns to instruments at the universal (11.1) and regional (11.2) levels. The chapter concludes with a discussion of customary international legal standards protecting the right to nationality (111.). This comprehensive mapping shall provide an overview of the different sources for the right to nationality in international law. In doing so, the chapter corroborates the claim that the doctrine of domaine réservé in nationality matters is no longer valid and, at the same time, shows that the right to nationality, in fact, attracts broad international support. It is consistent with international human rights law, protected in a wide range of instruments and, as will be shown in this chapter, interpreted and enforced by different enforcement mechanisms. This will build the foundation for the subsequent discussion in Chapter 5, which looks at the specific rights and obligations tied to the right to nationality that can be derived from this framework.

1 **Article 15 Universal Declaration of Human Rights**

The starting point for any discussion about the recognition of the right to nationality as a fundamental right in modern human rights law is Article 15 of the Universal Declaration of Human Rights.\(^4\) According to Article 15 UDHR:

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

This provision enshrines the right to nationality amidst the most basic rights protecting humanity. With Article 15 UDHR, the right to nationality has been included in the most fundamental catalogue of modern human rights law.\(^5\) How did the right to nationality end up among the guarantees enshrined in the thirty articles of the Universal Declaration? What does the right to nationality

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\(^3\) Universal Declaration of Human Rights of 10 December 1948, adopted by General Assembly Resolution 217 A(III) (‘UDHR’).


according to Article 15 UDHR entail? And what is the legal status of the right? In order to find answers to these questions, the following section will first look at the drafting history of Article 15 UDHR ([1]), explore the scope and content of Article 15 UDHR ([2]) and, finally, discuss the implications of the non-binding nature of the Declaration and ask whether Article 15 has become binding by virtue of customary international law ([3]).

1 **The Drafting History of Article 15 UDHR**

When the Universal Declaration of Human Rights was adopted by the UN General Assembly on 10 December 1948, World War II was barely over. The negotiations for the new instruments took place under the impression of the millions of people killed, displaced and made stateless during the war. The question of how to effectively protect the “inherent dignity and of the equal and inalienable rights of all members of the human family” was pressing. Ultimately, these discussions resulted in a catalogue of universal human rights aimed at protecting all human beings by virtue of their humanity: the Universal Declaration of Human Rights. The rights enshrined in the Declaration created the foundation for the subsequent codification of modern human rights law in the decades since World War II.

Including the right to nationality in the UDHR was visionary, but not uncontroversial. The drafting history of Article 15 UDHR shows that the state representatives had the same concerns that are still being voiced today. They feared that guaranteeing a right to nationality would limit states’ discretion.

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7 Preamble to the UDHR, Recital 1.


in nationality and migration matters too greatly and put their sovereignty in jeopardy. At the same time, there was little doubt that nationality was an issue so central to the protection of individuals that it should be covered in the new instrument.\footnote{Lauterpacht argued in ‘An International Bill of the Rights of Man’, which formed a model for the UDHR, that the issue of nationality ‘touches so significantly upon the question of the status of human personality in international and municipal law that an International Bill of the Rights of Man would be conspicuously incomplete without an attempt to do away with that offensive anomaly’, see Hersch Lauterpacht, \textit{An International Bill of the Rights of Man (Reprint)} (Oxford University Press 2013) 126.}

A preliminary draft for an international bill of rights prepared by the UN Secretariat proposed to include a provision on the right to nationality that would have codified the principle of \textit{jus soli} as a default rule for the acquisition of nationality:

Every one has the right to a nationality.

Every one is entitled to the nationality of the State where he is born unless and until on attaining majority he declares for the nationality open to him by virtue of descent.

No one shall be deprived of his nationality by way of punishment or be deemed to have lost his nationality in any other way unless he concurrently acquires a new nationality.

Every one has the right to renounce the nationality of his birth, or a previously acquired nationality, upon acquiring the nationality of another State.\footnote{UN Commission on Human Rights, Drafting Committee, ‘Draft Outline of International Bill of Rights’ (UDHR Drafting Committee 1947) UN Doc. E/CN.4/AC.1/3, Article 32.}

The Drafting Committee, in charge of preparing an international bill of rights,\footnote{Ruth Donner, \textit{The Regulation of Nationality in International Law} (2nd ed, Transnational Publishers 1994) 188.} shortened this initial proposal in the first session of the negotiations in June 1947. It decided to only include the first paragraph on the right to nationality and deal with the rest in a separate convention.\footnote{UN Commission on Human Rights, Drafting Committee, ‘Report of the Drafting Committee to the Commission on Human Rights, First Session’ (UDHR Drafting Committee 1947) UN Doc. E/CN.4/21 77. See also Johannes Morsink, \textit{The Universal Declaration of Human Rights: Origins, Drafting and Intent} (University of Pennsylvania Press 1999) 83.}

In the second session, the UK representative proposed to add a paragraph according to which persons who do not enjoy the protection of any government
shall be placed under the protection of the UN.\footnote{16} This proposal caused lengthy discussions about the consequences of an involvement of the UN in the realization of the right to nationality and the responsibility of states for the protection of stateless persons. At one point, the American delegate Eleanor Roosevelt even suggested deleting the entire provision, arguing that the problem of statelessness could be dealt with by the UN Economic and Social Council (ECOSOC).\footnote{17} The French representative René Cassin replied that:

The purpose of the right to nationality was to express one of the general principles of mankind and to affirm that every human being should be member of a national group. The United Nations should contribute to putting an end to statelessness by urging the necessary measures upon sovereign states.\footnote{18}

Finally, the Drafting Committee decided to keep the first paragraph according to which “every one has the right to a nationality”\footnote{19} A reference to the duty of states and the UN to prevent statelessness, as suggested by Cassin, was however rejected.\footnote{20}

In the third session the provision on the right to nationality was again under discussion. An amendment submitted by the UK and India suggested to replace the previous wording by the phrase “no one shall be arbitrarily deprived of his nationality”\footnote{21} Uruguay suggested to add “or denied the right to change his nationality”.\footnote{22} Both proposals were adopted.\footnote{23} The initial formulation that everyone has the right to a nationality, by contrast, was omitted. By the end of the deliberations in the Commission on Human Rights, the provision read: “No one shall be arbitrarily deprived of his nationality or denied the right to change his nationality”.\footnote{24}
The draft prepared by the Commission went on to the Third Committee of the UN General Assembly. At this stage, new attempts were made to re-introduce a paragraph guaranteeing a general right to nationality for everyone. This time, the proposal was no longer heavily contested. At the end of the negotiation process the proposal to include a first paragraph guaranteeing everyone the right to a nationality was adopted with a clear majority.

Still subject to heated discussions, however, was the question concerning the role of the UN in the realization of the right to nationality. For some delegations the possible involvement of the UN was a reason to support the inclusion of the right to nationality, whereas others opposed it for exactly the same reason. Namely the US and the UK were against the introduction of an explicit reference to the duties of the UN. Strong opposition was further voiced by communist states, which underlined the importance of the principle of state sovereignty and of limitations of individual rights vis-à-vis the state. The representative of the Soviet Union, Alexei Pavlov, argued that

the question of nationality — by which was meant a specific relationship between a State and the individual — fell entirely within the internal competence of each State. To grant nationality or to take it away was a prerogative of the sovereign States with which no third party should interfere.

25 France, Lebanon and Uruguay proposed to re-introduce the phrase “everyone/every human being has the right to a nationality”, see for the French amendment UN Doc. A/C.3/244, p. 1; for the Lebanese UN Doc. A/C.3/269, p. 1; and for the Uruguayan UN Doc. A/C.3/268, p. 2. An amendment proposed by Cuba, by contrast, suggested to replace the current phrase with a provision stating “every person has a right to the nationality to which he is entitled by law and the right to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him”, see UN Doc. A/C.3/232, p. 2.

26 See for the discussion the meeting records, UN Commission on Human Rights, Drafting Committee, ‘Summary Record of the 123rd Meeting, Third Session’ (UDHR Drafting Committee 1948) UN Doc. A/C.3/348 ff.

27 The provision was voted on twice. In the first vote it was adopted by 21 votes to nine with six abstentions, in the second with 31 votes to one and 11 abstentions, see UN Commission on Human Rights, Drafting Committee, ‘Summary Record of the 124th Meeting, Third Session’ (UDHR Drafting Committee 1948) UN Doc. A/C.3/359 and 361.

28 See Morsink (n 15) 82.

29 UN Commission on Human Rights, Drafting Committee, ‘Summary Record 123rd Meeting’ (n 26) 352 ff.

30 See also Manuela Sissy Kraus, Menschenrechtliche Aspekte der Staatenlosigkeit (Pro-Universitate-Verlag 2013) 184.

31 UN Commission on Human Rights, Drafting Committee, ‘Summary Record 123rd Meeting’ (n 26) 355.
Such a right, he argued, would violate Article 7(7) of the UN Charter. Cassin, arguing in favor of including a reference to the UN, maintained that the states:

> could not close their eyes to the fact that, in an international order based on the principle of sovereignty, the existence of persons rejected by their countries was a source of friction. The declaration should proclaim that every human being had the right to a nationality, just as it proclaimed that everyone had the right to marry; it was not called upon to implement either right.

Finally, the Committee decided not to include an explicit reference to the UN in Article 15. The provision, in the wording we know today, was finally adopted by the Third Committee of the UN General Assembly with 38 votes to none and seven abstentions.

This cursory examination of the travaux préparatoires to the Declaration is interesting for three reasons. First, it seems that the inclusion of a provision on nationality per se was not substantially disputed. During the 18 months of deliberation there was a wide consensus that nationality has a human rights dimension and should be covered by a bill of rights even if that entails some limitations for state sovereignty. This general recognition of nationality as a human rights issue probably has to be seen in the context of World War II and the pressing consequences of mass denaturalization and statelessness. Second, the discussions during the drafting process reflect some of the controversies about the characteristics of the right to nationality persisting until today. Whereas the inclusion of the prohibition of arbitrary deprivation of nationality and the right to change one’s nationality were relatively uncontroversial, the right to a nationality in the sense of a general right to acquire nationality per se was not substantially disputed. During the 18 months of deliberation there was a wide consensus that nationality has a human rights dimension and should be covered by a bill of rights even if that entails some limitations for state sovereignty.

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32 Charter of the United Nations of 24 October 1945, 1 UNTS XVI (‘UN Charter’).
33 UN Commission on Human Rights, Drafting Committee, ‘Summary Record 123rd Meeting’ (n 26) 355. This was supported by the representative of the Ukrainian Soviet Socialist Republic, who held that the idea of a right to nationality would violate the principle of national sovereignty, see ibid 358.
34 UN Commission on Human Rights, Drafting Committee, ‘Summary Record 123rd Meeting’ (n 26) 358.
35 UN Commission on Human Rights, Drafting Committee, ‘Summary Record 124th Meeting’ (n 27) 362.
36 Kraus (n 30) 185. See also Donner (n 14) 190; Schram (n 10) 233.
a nationality for everyone was subject to heated debates. Just as in the discussions today, it was criticized that such a right would encroach upon states’ sovereignty and that it would not be possible to implement it in practice. With the decision not to attribute the UN a particular role in the realization of the right to nationality, the delegations effectively weakened the impact of the newly created right to nationality. Third, like discussions about the right to nationality today, the debates very much focused on the plight of statelessness and the right of stateless persons to acquire a nationality. This is also illustrated by the listing of the right to nationality as Article 15, after the guarantees on the right to freedom of movement and to leave any country in Article 13 and the right to asylum in Article 14, and before the right to marry in Article 16 UDHR.

The issue of access to nationality and naturalization in a migratory context for non-citizens who have a nationality, but not that of the state in which they actually live, however, attracted less attention and questions regarding access to political rights for migrants were not discussed in the way they are today.

2 The Scope and Content of Article 15 UDHR

The final version of Article 15 UDHR consists of two separate paragraphs and entails three different guarantees: a right to a nationality according to Paragraph 1 and a prohibition of arbitrary deprivation of nationality and a right to change one’s nationality according to Paragraph 2. With this basic structure, Article 15 UDHR provided the basis for all subsequent codifications of the right to nationality in international law. Given this central role of Article 15 UDHR in the international legal framework it is worthwhile having a closer look at the interpretation of this provision.

The notion of ‘nationality’ is not defined in the Declaration. Nevertheless, it is clear from the drafting history that the term refers to legal membership in the (nation) state. The terminology of ‘everyone’ and ‘no one’ indicates that Article 15 UDHR applies to all human beings irrespective of whether they have

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40 Initially the provision was to be listed in the chapter on liberties, after the guarantees on political rights and before the provisions on rights of aliens, see UN Commission on Human Rights, Drafting Committee, ‘Plan of the Draft Outline of International Bill of Rights’ (UDHR Drafting Committee 1947) UN Doc. E/CN.4/AC.1/3/Add.2.
a nationality in the first place — or they are stateless — and irrespective of what nationality they have.\textsuperscript{42} Even though it is often argued that Article 15(1) grants a right to nationality only for stateless persons and does not apply to persons who already possess a nationality, this interpretation is not supported by the wording of Article 15 itself. In that sense, Article 15 also relates to migration and must be understood in the context of Articles 13 and 14 UDHR. All three provisions guarantee special rights for migrants, forcibly displaced and stateless persons.\textsuperscript{43} Finally, Article 15 UDHR applies without temporal or geographical limitations.\textsuperscript{44}

The right to have a nationality according to Paragraph 1 guarantees everyone a nationality. This implies, on the one hand, that no one should be without nationality.\textsuperscript{45} In case someone does not have a nationality they should have an opportunity to obtain a nationality.\textsuperscript{46} Whether it should, on the other hand, be interpreted as granting an entitlement to a particular nationality or to more than one nationalities will be discussed in the following section.

The second paragraph of Article 15 UDHR covers both the right not to be arbitrarily deprived of one’s nationality, as well as the right to change one’s nationality. As Mirna Adjami and Julia Harrington point out, Article 15(2) entails “a distinction between the deprivation of nationality — which is the withdrawal of nationality already conferred, protected by human rights standards — and the denial of access to nationality” if one wants to change nationality.\textsuperscript{47} Under Article 15(2) only the arbitrary deprivation of nationality is prohibited. Deprivation of nationality, as such, is allowed if it is not arbitrary. The provision itself, however, does not specify when deprivation is to be considered arbitrary. In the drafting process this sparked vivid discussions. Some delegations suggested to use “illegally” or “unjustly” instead of arbitrary.\textsuperscript{48} A majority, however, opted for the notion of arbitrariness arguing that it would cover situations in which deprivation of nationality occurs without a legal basis or in
a fundamentally unjust manner.\textsuperscript{49} Thus, Article 15(2) requires that deprivation procedures observe certain minimum procedural and substantive standards.\textsuperscript{50} The right to change one's nationality covers individuals' right to assume a new nationality and waive their former. This implies both a right to renounce one's former nationality and a corresponding right to acquire a new nationality.\textsuperscript{51} It is argued that test of arbitrariness also applies to the second part of Article 15(2).\textsuperscript{52} This, however, would limit the right to change one's nationality to a prohibition of arbitrary denial to change one's nationality. Such interpretation seems too narrow. The right to change one's nationality should rather be understood as a right to give up one's nationality upon acquisition of another, except if such change of nationality itself is arbitrary.

Even though Article 15 UDHR is not binding and remains “of a promissory and rather platonic nature”, its codification in the UDHR has anchored the right to nationality in modern international human rights law.\textsuperscript{53} With its three elements, Article 15 built the model for all subsequent codifications of the right to nationality.\textsuperscript{54} However, the provision also anticipated some of the tensions that limit the effectiveness of the right to nationality as a human right until today. The guarantees enshrined in Article 15(2) are relatively concrete, have a clear addressee and limit states' sovereignty only to a minor extent. Moreover, they are based on a situation where persons already have a nationality that can be lost or changed and which can be withdrawn. The right to a nationality according to Paragraph 1, in comparison, remains relatively vague and unspecified. Emmanuel Decaux argues that the ex post assumption of the possession of a nationality in Paragraph 2 without clarifying ex ante the acquisition of a nationality in Paragraph 1 fails to acknowledge the underlying problem of nationality and statelessness.\textsuperscript{55} Thereby, the acquisition and possession of a specific nationality risks remaining hypothetical. The discussion in section ii of this chapter will show that this is a common flaw of provisions guaranteeing

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\item \textsuperscript{49} See for the discussions UN Commission on Human Rights, Drafting Committee, ‘Summary Record 123rd Meeting’ (n 26) 348 ff. See also Zilbershats (n 46) 16.
\item \textsuperscript{50} Adjami and Harrington (n 37) 104.
\item \textsuperscript{51} Donner (n 14) 190.
\item \textsuperscript{52} Johannes M Chan, ‘The Right to a Nationality as a Human Right’ (1991) 12 Human Rights Law Journal 1, 3; Zilbershats (n 46) 17.
\item \textsuperscript{54} Kraus (n 30) 202. See in more detail Chapter 4, ii.
\item \textsuperscript{55} Emmanuel Decaux, ‘Le droit à une nationalité, en tant que droit de l’homme’ (2011) 22 Revue trimestrielle des droits de l’homme 237, 241.
\end{itemize}
the right to nationality. First, however, it shall be discussed whether Article 15 UDHR has acquired the status of customary law.

3 The Customary Nature of Article 15 UDHR

The main flaw of Article 15 UDHR is its non-binding nature. The UDHR is not a treaty, but purely declaratory and hence not legally binding.\(^{56}\) The provisions of the UDHR, therefore, in principle are merely manifestations of intent and do not actually grant entitlements for individuals or impose obligations on states. Nevertheless, as the basic instrument of modern international human rights law, the UDHR carries particular legal weight and cannot be compared to other non-binding UN resolutions.\(^{57}\) Its provisions are written in a language that suggests entitlements for individuals and obligations for states rather than just proclaiming ideals. Moreover, the rights set out in the Declaration have been found to constitute authoritative interpretation for the general obligation of UN member states to ensure the respect for, and observance of, human rights and fundamental freedoms as set out in Article 55 UN Charter.\(^{58}\)

One might thus ask whether the UDHR has acquired the status of customary international law and become a binding standard. The question of whether there is a sufficient international practice of states and a corresponding opinio juris is subject to much debate.\(^{59}\) Some authors argue that the Declaration has

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acquired the status of customary international law.\textsuperscript{60} They maintain that its catalogue of rights has since its adoption been codified in binding legal instruments and that there are hardly any obligations in the Declaration that states would not have to fulfill or secure anyway.\textsuperscript{61} Others, by contrast, find that states have always insisted that the UDHR is not binding.\textsuperscript{62} Moreover, they argue that there is hardly a coherent, universal general practice to guarantee all the rights enshrined in the Declaration.\textsuperscript{63} Not all rights of the Declaration have been directly codified in binding, universal instruments — among them, notably, Article 15 UDHR.\textsuperscript{64} Therefore, it is difficult to convincingly conclude that the UDHR \textit{in toto} has become customary international law.\textsuperscript{65}

Most scholars, however, agree that many of the provisions of the Declaration have individually become part of customary international law.\textsuperscript{66} Is this also true for Article 15 UDHR? Some still maintain that this is not the case.\textsuperscript{67} They argue that few sources would substantiate such a claim.\textsuperscript{68} An increasing number of authors, however, argue that Article 15 forms the basis for a customary right to a nationality.\textsuperscript{69} The latter position is supported by jurisprudence. Most prominently, the IACtHR has repeatedly reaffirmed the customary nature of the right to nationality. In its \textit{Advisory Opinion on the Proposed Amendments...
to the Naturalization Provisions of the Constitution of Costa Rica it held that “[t]he right of every human being to a nationality has been recognized as such by international law”. 70 Most recently, the African Commission on Human and People's Rights affirmed in the case of Anudo v Tanzania that the UDHR, including, namely, Article 15, forms part of customary international law. 71 On national level, domestic courts have equally made reference to Article 15 UDHR despite its non-binding character. 72 Overall, following the majority of scholars Article 15 UDHR has, or is at least about to become, part of customary international law. 73

For now, we can conclude that despite the dispute about its binding nature the inclusion of the right to nationality in the Universal Declaration of Human Rights must be considered a milestone. The atrocities of World War II have shown that nationality is not only crucial to effectively access human rights, it has become apparent that having a nationality has a direct human rights’ dimension. Thus, the ‘right to have rights’ was codified in the UDHR. Since its adoption, Article 15 UDHR frames nationality in a human rights context and signals its potential as an individual right: everyone should have a nationality, no one should be arbitrarily deprived of her nationality and everyone should have the right to change one's nationality. Therefore, Article 15 is as important as it is remarkable for the development of modern international human rights law. It has built the foundation for the inclusion of the right to nationality in countless subsequent binding instruments. 74 The following section will explore how the model of Article 15 UDHR has been transposed in binding international instruments at the universal and regional levels and assess whether these standards succeed in establishing a more robust foundation for the right to nationality.

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70 Advisory Opinion OC-4/84 (n 1) para 34.
72 See Chan (n 52) 3. The immediate question whether Article 15 UDHR has become customary international law in the sense of Article 25 of the German Constitution has, however, been left open by the German Bundesverwaltungsgericht in a case concerning the naturalization of an Iraqi refugee, see Urteil 1 C 20/88 [1988] BVerwG 1 C 20.88 para 35. See also Urteil 10 C 50/07 [2009] BVerwG 10 C 50.07 para 18.
73 Kraus (n 30) 205; Stefanie Schmahl, Kinderrechtskonvention: mit Zusatzprotokollen (2. Aufl., Nomos 2017) 132. See also below Chapter 4, III.
The Right to Nationality in International Law

Article 15 UDHR has codified the right to nationality as one of the cornerstones of modern human rights law. Never again should individuals lose their rights because they are not nationals of a state or have lost such nationality. Nationality — as becomes apparent — is so important for the enjoyment of human rights, it itself has the character of a human right. This is the promise made by Article 15 UDHR. How, then, was this promise implemented in the universal human rights treaties that were supposed to transpose the aspirations of the Universal Declaration in binding law? The following section looks at the codification of the right to nationality in treaty law at both the universal (11.1) and the regional (11.2) levels. The universal level provides the foundation for the codification of the right to nationality. The focus here lies on the instruments adopted within the framework of the of the United Nations. The regional instruments complement the international legal framework and offer the possibility of a more tightly knit web of protection and stronger enforcement mechanisms, namely in the European context with the ECtHR. The relevant instruments in the Americas (11.2.1), in Europe (11.2.2), on the African continent (11.2.3), in the Middle Eastern and North African region (11.2.4), as well as in Asia and the Pacific region (11.2.5) shall be discussed. The analysis shows that the level of protection of the right to nationality in regional instruments varies significantly. From the high standard enshrined in the American Convention of Human Rights to the weak level of protection in the Asian context the legal instruments at regional level have transposed the standards set at the universal level differently.

Ultimately, this review of the relevant legal sources for the right to nationality on universal and regional levels will confirm that the human right to nationality is not new to international human rights law but has its foundation at the very core of the modern international human rights regime. While not all provisions are equally strong, overall there is a large body of provisions that grant a number of enforceable individual rights relating to nationality and set clear limits to state discretion when it comes to the regulation of acquisition and loss of citizenship. Together these standards form the basis for the human right to nationality.

75 See Chapter 2, III.
1. The Right to Nationality at Universal Level

At universal level the UDHR has been transposed in the nine core UN human rights treaties. Of those nine treaties, six guarantee the right to nationality in one form or another. The International Covenant on Civil and Political Rights, the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) all protect aspects of the right to nationality. The two UN Statelessness Conventions and the 1951 Convention relating to the Status of Refugees complement this system and create certain obligations for states when it comes to the protection of stateless persons and the reduction of statelessness through naturalization. Thereby, these instruments contribute to further developing the right to nationality.

In addition to the human rights treaties (1.1.1) and the framework for the protection of stateless persons and refugees (1.1.2), the section briefly looks at soft law instruments covering the right to nationality (1.1.3).

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77 See also the website of the UN Office of the High Commissioner on Human Rights, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx.

78 The right to nationality is not guaranteed by the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85; and the International Convention for the Protection of All Persons from Enforced Disappearance, 23 December 2006, 2716 UNTS 3.

79 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (‘ICCPR’).


81 Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979, 1249 UNTS 13, ‘CEDAW’).

82 Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965, 660 UNTS 195, ‘CERD’).

83 Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3 (‘CRPD’).

84 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, 2220 UNTS 3 (‘CMW’).


86 Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (‘1951 Refugee Convention’, ‘CSR’).

87 See also Adjami and Harrington (n 37) 98.
1.1 The UN Core Human Rights Treaties

1.1.1 Article 24(3) International Covenant on Civil and Political Rights

Based on the standards set out in the UDHR, the International Covenant on Civil and Political Rights together with its sister treaty, the ICESCR, forms the foundation of today’s international human rights framework. Many of the civil and political rights enshrined in the UDHR were transposed to the ICCPR, but not Article 15 UDHR. During the negotiations of the two Covenants it was found to be too controversial to include a binding, general right to nationality for every person. Instead, the state parties decided to only include a right to nationality for children in the ICCPR, following the model of the UN Declaration of the Rights of the Child. However, not even the inclusion of a right to a nationality for children was uncontroversial. It was argued that states could not be obliged to grant its nationality to all children born on their territory irrespective of the circumstances. Invoking states’ sovereignty in nationality matters, delegates stressed that “naturalisation could not be a right of the individual but was accorded by the State at its discretion”. Moreover, the recently adopted Convention on the Reduction of Statelessness was used both as an excuse not to include a general right to nationality in the Covenant — as the Convention would provide better protection — and, at the same time, as evidence for the lack of consensus on nationality matters due to the small number of ratifications. Nevertheless, the drafters ultimately adopted Article 24(3) ICCPR with the aim of addressing childhood statelessness and providing children with additional protection.

According to Article 24(3) ICCPR “every child has the right to acquire a nationality”. It is obvious that the personal scope of Article 24 is limited to

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88 See Walter Kälin and Jörg Künzli, Universeller Menschenrechtsschutz: der Schutz des Individuums auf globaler und regionaler Ebene (4. Aufl., Helbing Lichtenhahn Verlag 2019) 44.
90 See Chan (n 52) 4; Decaux (n 55) 244.
92 UN General Assembly, Third Committee (n 91) 19.
93 Chan (n 52) 5.
children.\textsuperscript{95} It applies to children irrespective of their nationality, ie also to migrant and stateless children.\textsuperscript{96} A close reading of Article 24(3) ICCPR reveals that the provision — other than Article 15(1) UDHR, which generally declares a ‘right to a nationality’ — speaks of the right of children to acquire a nationality. What does this mean? The \textit{traveaux préparatoires} suggest that the term ‘acquire’ was introduced to indicate that Article 24(3) did not impose a general obligation on states to grant its nationality to all children born on their territory.\textsuperscript{97} Hence, some authors argue that the right to acquire a nationality is more limited than a general right to a nationality.\textsuperscript{98} Given that states wanted to prevent limitations on their sovereignty, the term \textit{acquire} is supposed to indicate that the provision offers less protection — the right to acquire a nationality as a right to nationality ‘light’, so to speak.\textsuperscript{99} Douglas Hodgson, for example, argues that the wording of Article 24(3) implies that “a child merely possesses a right to be considered eligible for the acquisition of a nationality upon satisfaction of domestic law requirements”.\textsuperscript{100} In other words, states are free to determine the conditions for the acquisition of nationality for children and should retain the competence to decide how to fulfill Article 24(3) ICCPR.\textsuperscript{101} Others, by contrast, maintain that Article 24(3) should be interpreted with the overall aim of preventing statelessness. From that perspective Article 24(3) requires more than the mere possibility of a discretionary naturalization procedure. Instead, it would mean that Article 24(3) obliges states to provide for a meaningful possibility for children to acquire nationality through naturalization or by descent if they ...
would otherwise be stateless. Hence, following that latter position, the term ‘acquire’ does not necessarily imply a limited substantive scope of application.

Apart from the scope of Article 24(3) ICCPR, the content of the provision also raises questions. Article 24(3) states that every child has the right to acquire nationality without, however, specifying which state would be under an obligation to grant its nationality and how such acquisition should be accomplished. Just as Article 15 UDHR, Article 24(3) ICCPR does not directly identify the addressee of the obligation to grant nationality. Manfred Nowak criticizes that wording of Article 24(3) as "so laconic that it raises serious problems of interpretation". He argues that leaving the question of how nationality should be acquired entirely to the domestic legislation would render the right completely void of substance. A systematic interpretation of Article 24(3) ICCPR in the context of the other provisions of the Covenant offers guidance. Under Article 24(2) ICCPR, state parties to the Covenant have an obligation to immediately register the births of all children, ie all children born on their territory. Analogously, Article 24(3) should be interpreted as applying to all children born on a state’s territory. Such interpretation would be consistent with the position of the Human Rights Committee, according to which Article 24(3) does not “afford an entitlement to a nationality of one’s own choice”. The state of birth is not any state of one’s own choice, but a state to which a clear and unique connection exists. Hence, the addressee of the child’s right to a nationality should be the state where the child is born.

This raises the question whether Article 24(3) ICCPR obliges states to grant nationality to all children born in the territory? The drafting history does not

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103 See also Decaux (n 55) 245.
104 Nowak (n 89) 561. See also Worster, ‘The Obligation to Grant Nationality under Treaty Law’ (n 102) 207.
105 Nowak (n 89) 560. See also Kraus (n 30) 211.
106 Nowak (n 89) 561.
107 Human Rights Committee, ‘General Comment No. 17’ (n 94) para 7.
108 See also Nowak (n 89) 561. A systematic interpretation of Article 24(3) in conjunction with Article 24(2) would also clarify that ideally, a child would be given access to nationality at or immediately after its birth, see Gerard-René de Groot, ‘Children, Their Right to a Nationality and Child Statelessness’ in Alice Edwards and Laura van Waas (eds), Nationality and Statelessness under International Law (Cambridge University Press 2014) 145.
109 Gorji-Dinka v Cameroon (n 95) para 4.10. See also Human Rights Committee, ‘General Comment No. 17’ (n 94) para 8.
110 See also Worster, ‘The Obligation to Grant Nationality under Treaty Law’ (n 102).
111 See Fripp (n 45) 265. See also Chapter 5, III.3.1.
support such a conclusion. A number of states explicitly opposed an entitlement to nationality for all children on the territory. The HRCttee has, so far, interpreted Article 24(3) ICCPR similarly restrictively. It found that the provision shall “not necessarily make it an obligation for States to give their nationality to every child born in their territory” (emphasis added). Nevertheless, the HRCttee has repeatedly recommended that states confer their nationality to all children born on their territory, if they would otherwise be stateless. Moreover, the HRCttee has clarified the obligations under Article 24(3) ICCPR in the recent case of Denny Zhao v The Netherlands. The case concerned a boy born in the Netherlands to a mother who herself was born in China but had no identity documentation herself. The boy was registered by the Dutch authorities as having “unknown nationality”. The mother unsuccessfully tried to obtain or confirm Chinese nationality on behalf of her son. At the same time, Dutch law did not allow to change the annotation of “unknown nationality” in the civil registry to “stateless”. The boy effectively remained without any legal status, not able to acquire the status and protection of statelessness or to acquire any nationality. The Human Rights Committee noted in its communication on the case that the impossibility to change his registration status and be recognized as stateless or acquire an nationality prevented Denny Zhao from effectively enjoying his right to acquire a nationality, amounting to a violation of Article 24(3). Article 24(3) ICCPR thus obliges states to ensure that children present on their territory have access to a statelessness determination procedure and the possibility to acquire a nationality.

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112 See also Chan (n 52) 5; Zilbershats (n 46) 18.
113 See UN General Assembly, Third Committee (n 91).
114 Human Rights Committee, ‘General Comment No. 17’ (n 94) para 8.
116 Denny Zhao v The Netherlands, Communication No. 2978/2016 [2020] HRCttee UN Doc. CCPR/C/130/D/829/18/2016. The communication is the first that deals directly with the interpretation of Article 24(3) ICCPR.
117 ibid 2.3.
118 ibid.
119 ibid 8.5.
Moreover, Article 24(3) ICCPR only speaks on the acquisition of nationality and does not refer to the withdrawal or the change of nationality. Is the withdrawal of nationality not covered by Article 24(3) ICCPR? In the case of *Rajan and Rajan v New Zealand* the HRCtte was able to leave the question of whether the revocation of citizenship violates Article 24(3) if it results in a child becoming stateless unanswered. However, a human rights approach to nationality would imply that Article 24(3) ICCPR also prohibits the revocation or deprivation of citizenship if it occurs arbitrarily, on a discriminatory basis or if a child thereby becomes stateless, even though such a prohibition is not explicitly mentioned in the provision. Finally, in the sense of a transversal obligation, Article 24(3) ICCPR, in conjunction with Article 24(1), prohibits discrimination regarding the acquisition of nationality between legitimate children, children born out of wedlock, children of stateless parents and based on the nationality status of one or both parents of a child. Where domestic law foresees a right to a nationality, such right must be accessible for all children born on the territory.

The absence of a general right to nationality in the ICCPR has been described as “one of the glaring omissions in the transposition of the Universal Declaration”. Nevertheless, the codification of the right to nationality for children in Article 24(3) of the Covenant has been an important step in the recognition of nationality as a human right. Today, the provision as such is not largely questioned anymore. There is a growing consensus that Article 24(3) ICCPR — despite the term ‘acquire’ — obliges states to grant nationality to all children concerned did not become stateless as she still had a second nationality, see *Keshva Rajan and Sashi Kantra Rajan v New Zealand, Communication No 820/1998* [2003] HRCtte UN Doc. *ccpr/c/78/d/820/1998* para 7.5. The complaint was declared inadmissible. See also *Deepan Budlakoti v Canada, Communication No 2264/2013* [2018] HRCtte UN Doc. *ccpr/c/122/d/2264/2013*.

See eg Nowak who argues that the revocation of citizenship would violate the right to acquire a nationality if a child would thereby become stateless, even if the acquisition of nationality was fraudulent, Nowak (n 89) 562.

Human Rights Committee, ‘General Comment No. 17’ (n 94) para 8; de Groot, ‘Children, Their Right to a Nationality and Child Statelessness’ (n 108) 146. See also Chapter 5, iii.2.1.

See eg the Concluding Observations on Ecuador where the HRCtte found that refugee children were prevented from acquiring Ecuadorean citizenship despite an entitlement in the domestic legislation. The Committee did however not make an explicit reference to Article 24(3). See Human Rights Committee, ‘CO Ecuador 1998’ (n 96) para 18.

Only the UK has reservations in place against Article 24(3) ICCPR, see the list of declarations and reservations, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>. The UK maintained that it might be necessary to “reserve the acquisition and possession of citizenship [...] to those having sufficient connection with the United Kingdom.”
children born on the territory if they would otherwise be stateless. This conclusion is corroborated by other provisions which equally guarantee the right of the child to a nationality, starting with the CRC.

1.1.2 Article 7 and 8 Convention on the Rights of the Child
The Convention on the Rights of the Child, adopted in 1989, entails two provisions that touch upon the right to nationality, Articles 7 and 8. Article 7(1) CRC states that:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. (emphasis added)

Article 7(2) CRC adds:

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

In addition, Article 8 guarantees the child's right to preserve his or her identity:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity. (emphasis added)

The inclusion of a right to nationality for children in the CRC as such was not controversial. Already the first draft for the new instrument on children's rights proposed a provision stating that “the child shall be entitled from his birth to a name and a nationality.” In the subsequent discussions, however, many

126 See eg Human Rights Committee, ‘CO Cambodia 2015’ (n 115) para 27. See also van Waas, Nationality Matters (n 115) 59; Worster, ‘The Obligation to Grant Nationality under Treaty Law’ (n 102) 208. See in more detail Chapter 5, II.3.1.

representatives raised the concern that including a right to a nationality would impinge on states’ sovereignty if it were to grant stateless children an entitlement to the nationality of the state they were in. They feared that such a right would introduce the principle of *jus soli* for all states. In order to avoid extensive obligations for state parties, and to ensure that the standard adopted was compatible both with the *jus soli* and the *jus sanguinis* system, the drafters decided to follow the model of Article 24(3) ICCPR and to only speak of a right to *acquire* a nationality. Article 8 CRC was only included in a later stage of the drafting process at the initiative of Argentina. The new provision was supposed to provide a safeguard for children to preserve their personal, legal and family identity. Today, the right to a nationality enshrined in the CRC is the right to nationality with the widest geographical reach, given that the Convention has been ratified by all states but the US. Article 7 CRC has been made subject to reservations only by Kuwait, which declared that Article 7 only applies to children of unknown parentage, as well as Monaco and the United Arab Emirates, which stated that the provision shall not affect domestic nationality legislation.

The personal scope of the right to nationality in Article 7 and the right to identity in Article 8 CRC is limited to children. Articles 7 and 8 CRC apply to

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129 See eg the concerns raised by the Federal Republic of Germany, UN Commission on Human Rights, ‘Report of the Secretary-General’ (n 128) 30 para 3.


133 See for the list of declarations and reservations the UN Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en. Several states have in recent years withdrawn their reservations to Article 7 which underlines the growing acceptance of the right to nationality for children.

134 Article 1 CRC defines children as human beings below the age of eighteen, unless the domestic law foresees a lower age of majority. This is one of the differences to Article 24(3) ICCPR, see above Chapter 4, II.1.1.1, note 95.
all children within the jurisdiction of a member state, including non-national, refugee, irregular migrant or stateless children.135

Article 7(1) CRC enshrines the child’s right to acquire a nationality. Article 7(2) complements this and specifies the obligations states have when implementing the right to acquire a nationality.136 The rationale is to prevent statelessness and to oblige states to take all necessary measures to ensure that every child has a nationality.137 As in the case of Article 24(3) ICCPR, it is difficult to identify the addressee of the right to nationality and to specify concrete obligations.138 Usually, Article 7(1) CRC was interpreted as not amounting to a general right to a nationality for children.139 Accordingly, the CtteeRC found that the provision does not oblige states to grant their nationality to every child born in their territory.140 Nevertheless, the Committee also stressed that granting nationality automatically to every child born on the territory if they would otherwise be stateless would be the ideal solution.141 Moreover, states generally have to ensure that all children acquire a nationality in order to comply with

136 Stein (n 130) 607.
138 Rodrigues and Stein (n 98) 397.
139 Doek (n 97) 26.
140 Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 137) para 24. So far, the CtteeRC has only interpreted Article 7 and 8 CRC in General Comments and Concluding Observations but not decided any cases. Two cases invoking Article 8 were rejected as inadmissible, see AHA v Spain, Communication No 001/2014 [2015] CtteeRC UN Doc. CRC/C/69/D/1/2014; JABS v Costa Rica, Communication No 005/2016 [2017] CtteeRC UN Doc. CRC/C/74/D/5/2016. See also Doek (n 97) 28.
141 Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 137) para 24. See also Committee on the Rights of the Child, ‘Concluding Observations on the Third to Fifth Periodic Reports of Latvia’ (CtteeRC 2016) UN Doc. CRC/C/LVA/CO/3-5 para 35.
the aim of preventing and reducing statelessness. This means that states are obliged to take proactive measures to ensure that a child can exercise its right to a nationality. This includes an obligation to ensure that a child can either acquire a nationality elsewhere or, alternatively, can establish its statelessness in a statelessness determination procedure. As a consequence, as the CRC committee held in the case of *A.M. (on behalf of M.K.A.H.) v Switzerland*, states may not deport a child if its nationality is not established. Hence, the obligation to respect, protect and fulfill the child’s right to acquire a nationality under Article 7 CRC does not only fall on the state of birth, but on all states with which the child has a sufficient link, be it based on decent, residence or another connecting factor. In conjunction with Article 2(1), Article 7 CRC prohibits discrimination in nationality matters. Nationality legislation must be implemented in a non-discriminatory manner. Finally, Article 7 CRC must be interpreted in a manner that respects the best interests of the child (Article 3 CRC).

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144 ibid.
145 See de Groot, ‘Children, Their Right to a Nationality and Child Statelessness’ (n 108) 147.
146 Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 137) para 25. On the prohibited ground of ethnicity, see Committee on the Rights of the Child, ‘Concluding Observations on the Fifth Periodic Report of Pakistan’ (CtteeRC 2016) UN Doc. CRC/C/PK/CO/5 para 66. On the prohibited ground of disability, see ‘Concluding Observations on the Combined Third to Fifth Periodic Reports of Senegal’ (CtteeRC 2016) UN Doc. CRC/C/SEN/CO/3-5 para 33. On the ground of (irregular) migrant status, see ‘CO Chile 2015’ (n 135) para 32; ‘Concluding observations on the fourth period report of the Netherlands’ (CtteeRC 2015) UN Doc. CRC/C/NLD/CO/4 para 33.
147 See also Doek (n 97) 27. Namely on grounds such as residence status or gender, Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 137) para 25; Committee on the Rights of the Child, ‘Concluding Observations on the Combined Third to Fifth Periodic Report of Nepal’ (CtteeRC 2016) UN Doc. CRC/C/NPL/CO/3-5 para 26 f; Committee on the Rights of the Child, ‘Concluding Observations on the Second Periodic Report of Barbados’ (CtteeRC 2017) UN Doc. CRC/C/BRB/CO/2 para 29.
The obligation to undertake specific measures to protect and fulfill the child’s right to a nationality is reinforced by Article 8(1) CRC. That provision safeguards the right of a child to preserve an identity. The Convention itself does not define precisely the notion of ‘identity’, but it states that the child’s nationality, name and family relations are part of their identity.\textsuperscript{149} In scholarship Article 8 CRC has been interpreted as requiring states to adopt measures to ensure that the relevant elements of a child’s identity, including his or her nationality, are registered, that the child has access to such information and is issued with identity documents.\textsuperscript{150} Donner even interprets Article 8(1) as granting the child an independent right to a nationality.\textsuperscript{151} It is argued that Article 8(1) CRC, moreover, obliges states to ensure that the loss of nationality by a parent has no automatic effect on the nationality of a child. A child should be allowed to retain his or her nationality, especially if he or she would otherwise be stateless.\textsuperscript{152} Article 8(2) CRC, therefore, protects the child against arbitrary deprivation of its identity, including nationality. In combination with the principle of best interests of the child, this amounts to a prohibition of deprivation of nationality for children if such deprivation would result in statelessness.\textsuperscript{153}

In combination, Articles 7 and 8 CRC grant the child a right to nationality, irrespective of the status of their parents.\textsuperscript{154} Overall, the right of the child to acquire a nationality under the CRC overlaps with the sister provision in the ICCPR.\textsuperscript{155} However, with the combination of Articles 7 and 8 the CRC goes beyond Article 24(3) ICCPR and clearly also protects the right not to be deprived of one’s nationality. Moreover, the universal application of the CRC gives the child’s right to a nationality under Articles 7 and 8 a particular weight. Virtually every state must respect the right of the child to a nationality.\textsuperscript{156}


\textsuperscript{149} See also Schmähl (n 73) 135.
\textsuperscript{150} Doek (n 97) 29.
\textsuperscript{151} Donner (n 14) 200.
\textsuperscript{152} Doek (n 97) 30.
\textsuperscript{153} See also Molnár (n 148) 81.
\textsuperscript{154} See Donner (n 14) 200.
\textsuperscript{155} Fripp (n 45) 273; Worster, ‘The Obligation to Grant Nationality under Treaty Law’ (n 102) 210.
\textsuperscript{156} Worster, ‘The Obligation to Grant Nationality under Treaty Law’ (n 102) 207.
1.1.3 Article 29 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The third universal human rights instrument that guarantees a child’s right to nationality is the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Article 29 CMW states that:

Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality.

The obligations under Article 29 CMW are similar to those under Article 24(3) ICCPR and Article 7 CRC. Like Article 24(3) ICCPR and Article 7 CRC, the scope of Article 29 CMW is limited to children. In addition, the personal scope of the CMW is limited to migrant workers and their families. In contrast to the ICCPR and the CRC, Article 29 CMW does not refer to acquiring a nationality. It plainly states that “each child of a migrant worker shall have the right [...] to a nationality.”

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has interpreted Article 29 as obliging state parties to “take all appropriate measures to ensure that children are not deprived of a nationality.” One dimension of Article 29 CMW is to protect access to

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157 The practical impact of the CMW, however, is limited. So far, it has been ratified by 51 states, most of them migrant sending countries. All of them are also state parties to the CRC and the ICCPR. See also Paul De Guchteneire and Antoine Pécout, ‘Introduction: The UN Convention on Migrant Workers’ Rights’ in Ryszard Cholewinski, Antoine Pécout and Paul De Guchteneire (eds), Migration and Human Rights: The United Nations Convention on Migrant Workers’ Rights (Paris: UNESCO Publishing; Cambridge, England: Cambridge University Press 2009) 1. The only reservation made to Article 29 by Sri Lanka has been withdrawn in 2016, see the list of declarations and reservations <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&clang=_en>.

158 Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 137) para 23.

159 A migrant worker is a “person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national” (Article 2(1) CMW).


161 Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, ‘General Comment No. 1 (2011) on Migrant Domestic Workers’ (CtteeMW 2011) UN Doc. CMW/C/GC/1 para 58; Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, ‘General Comment No. 2 (2013) on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families’ (CtteeMW 2013) UN Doc. CMW/C/GC/2 para 79.
nationality for children of migrant workers, especially if the parents are in an irregular situation.\textsuperscript{162} The CtteeMW has repeatedly underlined the importance of ensuring the rights of migrant children to nationality and citizenship.\textsuperscript{163} Naturalization procedures should be simple and quick in order to allow migrant children to acquire the nationality of the state of residence within a reasonable period of time.\textsuperscript{164} Moreover, the cmw equally prohibits discrimination regarding the transmission or acquisition of nationality and states that nationality laws should be implemented in a non-discriminatory manner.\textsuperscript{165}

1.1.4 Article 9 Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women turns the focus to discrimination and the right to nationality.\textsuperscript{166} According to Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that

\begin{itemize}
\item \textsuperscript{162} See Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, ‘Concluding Observations on the Second Periodic Report of Mexico’ (CtteeMW 2011) UN Doc. cmw/c/mex/CO/2 para 39. See also the first draft of the Convention which only stated that a child shall not be deprived of its right to a nationality due to “the irregularity of its own situation or that of its parents, […] with a view to reducing statelessness”, see UN General Assembly, Third Committee, ‘Text of the Preamble and Articles of the International Convention on the Protection of the Rights of All Migrant Workers and Their Families to Which the Working Group Provisionally Agreed During the First Reading’ (UN General Assembly 1983) A/C.3/38/WG.1/CRP.2/Rev.1, Article 30.
\item \textsuperscript{163} See eg Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, ‘Concluding Observations on the Initial Report of Timor-Leste’ (CtteeMW 2015) UN Doc. cmw/c/tls/CO/1 para 39; Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, ‘Concluding Observations on the Initial Report of Turkey’ (CtteeMW 2016) UN Doc. cmw/c/tur/CO/1 para 65.
\item \textsuperscript{164} Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, ‘Concluding Observations on the Combined Second and Third Periodic Reports of Senegal’ (CtteeMW 2016) UN Doc. cmw/c/sen/CO/2-3 para 22 f.
\item \textsuperscript{165} Committee on the Protection of the Rights of All Migrant Workers and their Families and Committee on the Rights of the Child (n 137) para 25. See also Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, ‘Concluding Observations on the Initial Report of Nigeria’ (CtteeMW 2017) UN Doc. cmw/c/nga/CO/1 para 28.
\item \textsuperscript{166} The cedaw, just as the cerd, is a discrimination treaty which does not directly enshrine new rights, but guarantees that persons affected by certain categories of discrimination, namely gender and race, can effectively exercise their general human rights without any discrimination.
\end{itemize}
neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Thus, Article 9 CEDAW does not grant a right to nationality as such, nor does it directly obligate states to facilitate the acquisition of nationality for women.\textsuperscript{167} Instead, it prohibits discrimination on the basis of sex or gender in the acquisition and transmission of nationality, or more generally, on equality in the application of nationality laws.\textsuperscript{168} Hence, Article 9 CEDAW has the character of an equality norm.\textsuperscript{169}

Article 9 CEDAW is based on the CNW\textsuperscript{170} and the CNMW.\textsuperscript{171} During the negotiations for the CEDAW, the inclusion of a provision on nationality was proposed by the Philippine delegation.\textsuperscript{172} Again, a controversy arose around


\textsuperscript{168} See also Committee on the Elimination of All Forms of Discrimination against Women, ‘General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women’ (CtteeEDAW 2014) UN Doc. CEDAW/C/ GC/32 para 51.


\textsuperscript{170} Convention on the Nationality of Women, 26 December 1933, OAS Treaty Series No. 4 (‘CNW’).

\textsuperscript{171} Convention on the Nationality of Married Women, 20 February 1957, 309 UNTS 65 (‘CNMW’).

\textsuperscript{172} Radha Govil and Alice Edwards, ‘Women, Nationality and Statelessness’ in Alice Edwards and Laura Van Waas (eds), \textit{Nationality and Statelessness under International Law} (Cambridge University Press 2014) 184; Vučković Šahović, Doek and Zermatten (n 160).

the question whether the interests of *jus soli* and *jus sanguinis* states could be reconciled.\[174\] Moreover, the potential creation of dual nationality due to equal transmission rights for women caused concerns among states.\[175\] Ultimately, the states agreed that women should be granted equal rights with men regarding the nationality of their children without, however, specifying how nationality is to be transmitted from parents to children.\[176\] An issue of concern remains the high number of reservations to Article 9 CEDAW.\[177\] The CtteeEDAW has repeatedly criticized these reservations and called upon states to withdraw them.\[178\] It argued that the reservations undermine the core object and purpose of the Convention and have limited validity and legal effect considering the range of international human rights instruments that enshrine rights to nationality and non-discrimination.\[179\] In its individual communication procedure the CtteeEDAW has, however, so far never found a violation of Article 9 CEDAW.\[180\]

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174 Goonesekere (n 167) 236. See also Caroni and Scheiber (n 173) para 15.
175 Rehof (n 173) 108 f.
176 Caroni and Scheiber (n 173) para 18. A proposal for a right for both spouses to acquire each other’s nationality which was supposed to guarantee the unity of the nationality of the family was heavily criticized and rejected, see ibid 19.
177 Monaco, Korea and the United Arab Emirates have made a reservation concerning the entire Article 9. The Bahamas, Bahrain, Brunei Darussalam, Democratic People’s Republic of Korea, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia and Syria have made a reservation with regard to the obligation to grant women equal rights in the transmission of nationality according to Article 9(2) CEDAW. In addition, France and UK made a declaration on the interpretation of Article 9 in consensus with their domestic law. See for the list of reservations, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsig_no=IV-8&chapter=4&lang=en. Several states have withdrawn their reservations, for instance Algeria, Ireland, Liechtenstein, Thailand or Iraq. See further Goonesekere (n 167) 249 ff; van Waas, *Nationality Matters* (n 115) 66 n 76.
179 CtteeEDAW, ‘General Recommendation No. 32’ (n 168) para 58.
Article 9 CEDAW is the first provision in an international treaty that actually takes a rights’ approach on the question of women’s nationality. While it does not grant women a general right to nationality, it protects women’s right to equal treatment in nationality matters. It stipulates that nationality laws and policies may not discriminate on the basis of sex, sexual orientation or gender identity, culture, marital status or any combination thereof. It also prohibits indirectly discriminatory regulations such as, for example, naturalization requirements that are more difficult to meet for women than for men. Article 9 further obliges states to actively protect women against discrimination in nationality matters. Finally, states should promote women’s equality in nationality matters and undertake necessary measures to achieve full formal and substantive gender equality. This can include proactive measures aimed at supporting women’s right to nationality such as, for example, measures to support migrant women in accessing nationality through naturalization. Article 9(1) CEDAW guarantees equal rights of women and men in acquiring, changing or retaining one’s nationality. Neither marriage to a foreign national nor change of nationality by the husband during the marriage shall automatically lead to a change in a woman’s nationality, render her stateless or force upon her the nationality of her husband. Thus, Article 9(1) rejects the principle of dependent nationality that links the women’s nationality to that of her father or husband, which has historically governed women’s citizenship. As the CtteeEDAW stated in General Recommendation No. 21 “nationality should be capable of change by an adult woman”. In case of binational couples or children of binational parents, this can imply the recognition and acceptance of dual nationality.
Article 9(2) CEDAW obliges states to grant women equal rights with men with respect to the nationality of their children. Women shall have the same right to transmit their nationality to their children. This applies both to biological and adopted children or children born in surrogate arrangements, as well as children born in and out of wedlock. Article 9(2) rejects patrilinear systems of nationality attribution, which was a significant innovation at the time of adoption of the Convention. The provision has a twofold aim. On the one hand it aims at achieving full equality for women and men in nationality matters. On the other hand, it also aims at protecting children against statelessness. This illustrates the close linkage between the right of women to a nationality and the right of children to a nationality. The Committee has, furthermore, repeatedly stressed that dual nationality cannot be raised as an argument against giving women equal rights in the transmission of nationality.

Thus, while Article 9 CEDAW does not guarantee a right to nationality for women as such, it grants women equal rights with men in nationality matters, requires non-arbitrary methods of transmission of nationality and prohibits any discrimination in law, or in fact, against women in nationality matters. For that reason, Article 9 CEDAW provides a central additional safeguard for women’s nationality rights.

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members do not have the same nationality, see also Caroni and Scheiber (n 173) para 28; Goonesekere (n 167) 242.


193 Caroni and Scheiber (n 173) para 47; Goonesekere (n 167) 243; Govil and Edwards (n 172) 186. See also Alice Edwards, ‘Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women’ (UN High Commissioner for Refugees (UNHCR) 2009) PPLAS/2009/02 40 <http://www.refworld.org/docid/4a8a8bda2.html>.

194 CtteeEDAW, ‘General Recommendation No. 32’ (n 168) para 61.

195 Goonesekere (n 167) 243. See also Knop and Chinkin (n 167) 557.


197 Goonesekere (n 167) 238.

198 Caroni and Scheiber (n 173) para 29.
1.1.5 Article 5 Convention on the Elimination of All Forms of Racial Discrimination

The 1965 Convention on the Elimination of All Forms of Racial Discrimination also addresses nationality from a non-discrimination perspective. However, nationality has a dual role in the CERD-system. On the one hand, the Convention prohibits discrimination against a particular nationality and protects the right to a nationality. On the other, the Convention itself allows for a distinction between citizens and non-citizens on the basis of nationality. According to Article 1(2) CERD, provisions of the Convention do not apply to distinctions, exclusions, restrictions or preferences made by a state party between citizens and non-citizens. Thus, the CERD allows for preferential treatment of a state’s own citizens. Article 1(3) adds that nothing in the Convention may be interpreted as affecting domestic legislation concerning nationality, citizenship or naturalization, confirming states’ competence to legislate on nationality matters. Hence, states may also privilege certain groups or even ethnicities or nationalities in nationality matters. Because of this, Foster and Baker describe Article 1(3) CERD as a “lingering remnant of state discretion.” However, as Article 1(3) clarifies, such provisions may not discriminate against any particular nationality. In other words, Article 1(3) CERD does not generally prohibit differential treatment on the basis of nationality, but it prohibits discrimination against any particular nationality in nationality, citizenship or naturalization matters. While states may treat their own citizens differently from all other non-citizens, any differential treatment of a particular nationality compared to another nationality is in violation of CERD if such differential

200 See also Roberta Clerici, ‘Freedom of States to Regulate Nationality: European Versus International Court of Justice?’ in Nerina Boschiero and others (eds), International Courts and the Development of International Law (t mc Asser Press 2013) 846; Goonesekere (n 167) 238.
202 Foster and Baker (n 201) 103.
203 Mahallic and Mahallic (n 201) 79. See also Committee on the Elimination of Racial Discrimination, ‘Concluding Observations on the Seventeenth to Nineteenth Periodic Reports of France’ (CtteeERD 2016) UN Doc. CERD/C/FRA/CO/17-19 para 11.
treatment cannot be justified.\textsuperscript{205} This is the case, “if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”\textsuperscript{206} Ion Diaconu points out that the term ‘nationality’ in Article 1(3) \textsc{cerd} also includes the ethnic origin of a person so that

the three terms ‘nationality, citizenship or naturalisation’ should be understood as meaning all norms on issues related to citizenship (conditions, modalities of acquisition, withdrawal, loss and others) which must not discriminate on grounds of national origin.\textsuperscript{207}

Following this approach, the provision has to be interpreted broadly.\textsuperscript{208} It also covers discrimination based on nationality status, eg against citizens with dual citizenship.\textsuperscript{209}

Article 5(d)(iii) \textsc{cerd} specifies that states have an obligation to guarantee the right to equality before the law in the enjoyment of the right to nationality.\textsuperscript{210} The prohibition of discrimination in nationality matters obliges states to prevent any discrimination against non-citizens that denies access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization.\textsuperscript{211} The right to nationality under Article 5(d)(iii) also covers
Deprivation of nationality. Deprivation of citizenship on the basis of race, color, descent, or national or ethnic origin is a breach of the obligation to ensure non-discriminatory enjoyment of the right to nationality. If denial of citizenship results in a disadvantage, or in discrimination that impedes access to employment, education, health care or social benefits, this too could amount to a violation of the Convention’s anti-discrimination principles. Furthermore, Article 5(d)(iii) also entails an implicit obligation to prevent and reduce statelessness, particularly childhood statelessness. Stateless persons and persons of undetermined nationality should be allowed to register and regularize their status, as the CtteERD has pointed out repeatedly in its Concluding Observations on state parties’ reports. Finally, the Committee
on the basis of Article 5(d)(iii) calls upon states to regularize the status of former citizens residing in the territory in cases of state succession.\textsuperscript{217} Foster and Baker criticize that the Committee’s approach to nationality matters is not consistent enough.\textsuperscript{218} Nevertheless, its practice allows us to draw certain conclusions regarding the protection of a right to nationality under the \textit{CERD}. It can be argued that the provisions in the Convention reinforce the right to nationality by obliging states to prohibit and eliminate racial discrimination in all its forms in nationality matters and to guarantee the full enjoyment of the right to nationality. While states may make a distinction between nationals and non-citizens, and may also treat certain groups more favorably in nationality matters, Articles 1(3) and 5(d)(iii) \textit{CERD} prohibit any discrimination against a particular nationality or a specific person on the grounds of race, color or national or ethnic origin.\textsuperscript{219}

\textbf{1.1.6 Article 18 Convention on the Rights of Persons with Disabilities}

The Convention on the Rights of Persons with Disabilities, the youngest of the nine UN core human rights treaties, goes beyond a mere non-discrimination approach and enshrines among its catalogue of rights a general right to nationality.\textsuperscript{220} Article 18 \textit{CRPD} recognizes the right of persons with disabilities to liberty of movement and to nationality on an equal basis with others.\textsuperscript{221} Paragraph 1 states that:

States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

- Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of their disability;

\begin{itemize}
\item \textsuperscript{217} CtteeERD, ‘General Recommendation No. XXX’ (n 204) para 17. See also Committee on the Elimination of Racial Discrimination, ‘CO Sudan 2015’ (n 213) para 19.
\item \textsuperscript{218} Foster and Baker (n 201) 126.
\item \textsuperscript{219} \textit{ibid} 144.
\item \textsuperscript{221} See also Rachele Cera, ‘Article 18 [Liberty of Movement and Nationality]’ in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), \textit{The United Nations Convention on the Rights of Persons with Disabilities: A Commentary} (Springer International Publishing 2017) 344.
\end{itemize}
Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, [...].

Article 18(2) adds that children with disabilities shall have the right to acquire a nationality.

Article 18 CRPD was only included at a late stage in the drafting process. However, other than with previous instruments, the proposal for a right to a nationality in principle was not controversial. Drawing on the models established by Article 24(3) ICCPR and Article 7 CRC, the drafters highlighted the importance of the right to liberty of movement and to nationality for persons with disabilities for the full enjoyment of their rights. Moreover, they noted that the rights to liberty of movement and to nationality are interlinked and mutually dependent, as free movement and choice of residence in practice require a nationality and identity documents. Discussions, however, arose again around the question of which state would be obliged to grant a nationality. Some countries argued that the right to acquire a nationality should only refer to the nationality acquired at birth and not a nationality acquired later in life. Nevertheless, Article 18 CRPD was broadly accepted. Only two reservations are in place against Article 18 CRPD: one by Kuwait and one by

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225 Rothfritz (n 222) 456.

Malaysia. Interestingly, a number of states have objected the reservations arguing that Article 18 codifies fundamental principles and denying the right to nationality is incompatible with the object and purpose of the CRPD.228

Article 18(1)(a) CRPD enshrines a general right to nationality covering acquisition, change and deprivation of nationality. The aim of the provision is to ensure that persons with disabilities can enjoy their right to nationality on an equal basis with others.229 The right to nationality applies to all persons with disabilities. It goes beyond other instruments and establishes a general right to nationality for adults and children. Article 18(1)(a) not only explicitly prohibits arbitrary deprivation of nationality, but also deprivation of nationality based on a person’s disability. The right of children with disabilities to a nationality is dealt with specifically in Article 18(2) CRPD. States must register children with disabilities immediately after their birth and to safeguard the acquisition of a nationality to prevent statelessness.230

Article 18 CRPD primarily entails a negative obligation for states not to interfere with the right to nationality; not to hinder persons with disabilities from accessing a nationality — for example, by setting naturalization

227 Monaco has lodged a declaration that the Convention does not imply that persons with disabilities should be afforded rights superior to those afforded to persons without disabilities, especially in terms of nationality. Thailand withdrew its reservation in 2015. See the list of reservations <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en>.

228 Namely Austria, Belgium, Germany, Hungary, Ireland, the Netherlands, Portugal, the Slovak Republic, Sweden and Switzerland. See also Cera (n 221) 351.

229 ibid 344.

requirements that persons with disabilities face particular difficulties fulfilling.\textsuperscript{231} Naturalization procedures must be accessible for persons with disability on an equal basis.\textsuperscript{232} This puts limits on the increasingly wide-spread use of language and civic knowledge tests in naturalization procedures.\textsuperscript{233} Similarly, requirements relating to participation in the labor market or a minimum income must not restrict equal opportunities of persons with disabilities to apply for naturalization.\textsuperscript{234} Access to nationality in the sense of Article 18, however, not only covers acquiring citizenship through naturalization but also birthright acquisition. States have a negative obligation to refrain from any measures that limit the right of persons with disabilities to acquire a nationality at birth.\textsuperscript{235} Second, Article 18 obliges states not to impede the right of persons with disabilities to change their nationality, to allow for dual nationality on an equal basis and not to arbitrarily or on the ground of disability deprive a person of his or her nationality.\textsuperscript{236} Third, full enjoyment of the right to nationality under Article 18 entails unrestricted access to documentation for persons with disabilities.\textsuperscript{237} Finally, Article 18 obliges states to put in place specific


\textsuperscript{232} See also Committee on the Rights of Persons with Disabilities, ‘CO UAE 2016’ (n 230) 35.

\textsuperscript{233} Cera (n 221) 347.

\textsuperscript{234} See also the respective case law of the Swiss Federal Court according to which the special circumstances of persons with disabilities have to be taken into account, BGE 135 I 49; BGE 139 I 169.

\textsuperscript{235} The CtteeRPD eg expressed concern that the practice in the Dominican Republic not to apply \textit{jus soli} to children of Haitian descent might violate Article 18, see Committee on the Rights of Persons with Disabilities, ‘Concluding Observations on the Initial Report of the Dominican Republic’ (CtteeRPD 2015) UN Doc. CRPD/C/DOM/CO/1 para 36.

\textsuperscript{236} For example, the CtteeRPD expressed concern about legislation in Uganda which denies persons with psychosocial or intellectual disabilities the possibility of dual citizenship, see Committee on the Rights of Persons with Disabilities, ‘CO Uganda 2016’ (n 230) para 36.

positive measures to ensure the effective access of persons with disabilities to a nationality.\textsuperscript{238} Article 18 \textsc{crpd} can be subject to limitations.\textsuperscript{239} Any restriction must, however, be provided by law, be necessary to protect national security, public order, public health or morals or the rights of freedoms of others, and must be consistent with the other rights recognized in the Convention.\textsuperscript{240} Moreover, it must be proportionate to the aim pursued.\textsuperscript{241} One guarantee in Article 18, however, is absolute: a deprivation of nationality that is arbitrary or that is based on disability can never be justified.\textsuperscript{242} Depriving a person of his or her nationality because that person has a disability would amount to a direct discrimination and aim at directly excluding persons with disabilities as such.\textsuperscript{243}

Creating a strong right to nationality covering access to nationality, access to proof of nationality in the form of documents, change of nationality and deprivation of nationality for both adults and children, Article 18 \textsc{crpd} goes beyond most other provisions codifying the right to nationality.\textsuperscript{244} It foresees the limitations of the right to nationality but, at the same time, recognizes that deprivation of nationality on the basis of disability, as well as arbitrary deprivation of nationality, can never be justified. Considering, moreover, that the introduction of Article 18 was not particularly disputed and that the \textsc{crpd} is relatively young, the provision shows that the right to nationality is to be recognized as an international human right that imposes — depending on the legal source — specific duties and obligations for states.\textsuperscript{245}

The analysis of the different UN human rights treaties shows how the codification of the right to nationality has evolved. While the general right to nationality of Article 15 \textsc{udhr} was not transposed in the \textsc{iccpr}, but instead reduced to a rather vague right for children to acquire a nationality, the subsequent instruments have contributed to its consolidation. The almost universally applicable Article 7 \textsc{crc} — and its sister provisions in Article 24(3) \textsc{iccpr} and Article 29 \textsc{cmw} — is increasingly interpreted as imposing an obligation on

\textsuperscript{238} See also Cera (n 221) 346.
\textsuperscript{239} Rothfritz (n 222) 460.
\textsuperscript{240} The state representatives were referring to the qualifications for restrictions provided for in Article 12(3) \textsc{iccpr}. See Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, ‘Seventh Session, Daily Summary’ (n 223).
\textsuperscript{241} Rothfritz (n 222) 469 f.
\textsuperscript{242} \textit{ibid} 461.
\textsuperscript{243} \textit{ibid}.
\textsuperscript{244} \textit{ibid} 459.
\textsuperscript{245} See also Cera (n 221) 343; Rothfritz (n 222) 462.
states to grant nationality. Or at least, to children born on their territory if they would otherwise be stateless. Article 9 *CEDAW* and Article 5 *CERD* exemplify the prohibition of discrimination that applies in nationality matters — be it regarding discriminatory naturalization requirements, gender discrimination in the transmission of nationality or discriminatory grounds for loss of citizenship. Article 18 *CRPD*, finally, goes beyond the equality aspect and reinforces a general right to nationality, which should apply to everyone irrespective of disability and secure equal, non-discriminatory and non-arbitrary access to nationality, enjoyment of nationality regarding access to identity documents and protection from loss of nationality. Thus, the core UN human rights treaties manifest that states have repeatedly, and for many years now, accepted limitations upon their sovereignty in nationality matters and recognized nationality as a human right. The UN treaty bodies on their part have contributed to concretizing the scope and content of that right under the respective legal source. Overall, the UN human rights framework provides a solid basis for the right to nationality as an internationally recognized human right.

1.2 The Statelessness Conventions and the Refugee Convention
The previous section looked at the codification of the right to nationality in the core UN human rights treaties. Hence, it has shown that the right to nationality is firmly anchored in the international human rights protection regime. This section shall analyze the two Statelessness Conventions and the Refugee Convention and discuss in how far they contribute to the protection of the right to nationality at the universal level, which developed as a parallel protection regime for stateless persons and refugees.

1.2.1 *The Convention Relating to the Status of Stateless Persons*
The Convention relating to the Status of Stateless Persons of 1954 was negotiated in parallel to the 1951 Refugee Convention with the aim of adopting one

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246 See also Kraus (n 30) 215 f.
single instrument to protect both refugees and stateless persons.\textsuperscript{248} Ultimately, however, the CSS was adopted as a self-standing instrument.\textsuperscript{249} Nevertheless, the CSS follows the model of the Refugee Convention.\textsuperscript{250} By and large the articles in the CSS mirror the guarantees enshrined in the Refugee Convention, even though they fall below the standards for refugees in some respects.\textsuperscript{251} While the Refugee Convention quickly became the central instrument for the protection of refugees and was ratified by a majority of states, the number of ratifications of the 1954 Convention remained much lower.\textsuperscript{252} Moreover, 35 states currently still have a reservation to the Convention.\textsuperscript{253} Only since the 1990s has there been a renewed interest in the CSS and an increase of ratifications.\textsuperscript{254}

Article 1(1) CSS defines a stateless person as "a person who is not considered as a national by any State under the operation of its law". This definition is recognized as customary international law.\textsuperscript{255} The subsequent provisions list the rights of persons who are stateless, prohibit discrimination and establish


\footnotesize{249} Robinson (n 248) 3 ff; Weis, 'Statelessness Convention' (n 248) 256.

\footnotesize{250} See Bianchini (n 248) 78; Laura van Waas, 'The UN Statelessness Conventions' in Alice Edwards and Laura van Waas (eds), \textit{Nationality and Statelessness under International Law} (Cambridge University Press 2014) 68; Weis, 'Statelessness Convention' (n 248) 256.

\footnotesize{251} Goodwin-Gill (n 248) 4. See also Robinson (n 248) 1; Weis, 'Statelessness Convention' (n 248) 259.

\footnotesize{252} Today, the CSR has 146 state parties, the CSS 91. The CRS has been ratified by 73 states. Van Waas interprets this as a consequence of the perception of nationality as a sovereign, internal and highly political matter, see van Waas, \textit{Nationality Matters} (n 115) 17.

\footnotesize{253} See the list of declarations and reservations, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&temp=mtdsg2&clang=_en>. The 1954 Convention only allows reservations to certain provisions, and not to the most important guarantees in Articles 1, 3, 4, 16(1) and 33–42 (Article 38(1) CSS). See also van Waas, \textit{Nationality Matters} (n 115) 232.

\footnotesize{254} Roughly a third of the state parties to the CSS only ratified the Convention in the last decade.

minimum standards of treatment for stateless persons. As Batchelor points out, the CSS:

Attempts to resolve the legal void in which the stateless person often exists, by identifying the problem of statelessness, promoting the acquisition of a legal identity, and providing for a legal status which will serve as a basis for access to basic social and economic rights.\textsuperscript{256}

The 1954 Convention tries to mitigate the most severe consequences of statelessness and grant stateless persons a number of essential rights.\textsuperscript{257} However, though the acquisition of a nationality provides the only sustainable legal solution for stateless persons, the CSS does not directly codify a right to nationality.\textsuperscript{258} Instead, it merely calls upon states to facilitate naturalization for stateless persons. Article 32 provides that states shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.\textsuperscript{259}

The provision applies to all persons recognized as stateless in the sense of Article 1 of the Convention and does not require lawful status or even habitual residence.\textsuperscript{260} It is disputed whether Article 32 grants stateless persons a right to be naturalized in the state of protection. Often the provision is interpreted as not imposing a strict obligation on states to facilitate the naturalization of stateless persons, or as granting individuals an enforceable right to naturalization.\textsuperscript{261} It is argued that the provision merely recommends to facilitate, to the extent possible, the naturalization of stateless persons and leaves states a wide

\begin{footnotesize}

\textsuperscript{257} See also Adjami and Harrington (n 37) 97.

\textsuperscript{258} Bianchini (n 248) 106.

\textsuperscript{259} Article 32 CSS corresponds to Article 34 Refugee Convention. See on the discussion regarding the direct applicability of the parallel provision in the Refugee Convention below Chapter 4, 11.1.2.3.

\textsuperscript{260} Bianchini (n 248) 107; van Waas, Nationality Matters (n 115) 366.

\textsuperscript{261} In Germany, for example, the Federal Administrative Court has interpreted Article 32 CSS as merely a requirement of benevolence, a ‘Wohlwollensgebot’, see Hailbronner and others (n 69) 106.
\end{footnotesize}
discretion. Adjami and Harrington, therefore, criticize that the CSS fails to acknowledge the right to nationality. Van Waas argues that:

From the phraseology chosen for this article it is immediately clear that it is not a right to (be considered for) naturalisation that is envisaged for the stateless but, at most, an opportunity to enjoy facilitated naturalisation. Stateless persons cannot demand access to a naturalisation procedure or even insist upon the lowering of the requisite conditions in their favour. (original emphasis)

Moreover, as pointed out by Katia Bianchini, the provision “does not mention other ways to acquire a nationality, such as automatically by operation of law or through simple procedures of registration, declaration or option” that would facilitate the procedures compared to a naturalization. The wording of Article 32 makes it difficult to find a directly applicable right for stateless persons to be granted citizenship of a particular state. Calling upon states (‘shall’) to facilitate naturalization does not amount to an individual right to nationality or an obligation to grant nationality to stateless persons within its jurisdiction for the state concerned. The addition ‘as far as possible’, moreover, leaves states a wide discretion. Nevertheless, Article 32 CSS obliges states to provide stateless persons, at a minimum, an opportunity to naturalize and to ensure that such naturalization procedures are less burdensome compared to ordinary naturalization. Hence, Article 32 according to van Waas at least provides for the “crucial right of solution by considering access to citizenship” — and thus is perhaps the most important provision of the Convention.

Similarly, Batchelor finds that while states are under no absolute obligation to naturalize

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262 Robinson (n 248) 64, referring to the first sentence of Article 32 as a recommendation or general moral obligation. See also Bianchini (n 248) 106; van Waas, ‘Statelessness Conventions’ (n 253) 73. ibid 73.

263 Adjami and Harrington (n 37) 97.

264 van Waas, Nationality Matters (n 115) 365.

265 Bianchini (n 248) 106.

266 Bianchini argues that not allowing the possibility of acquiring citizenship without a good faith explanation would breach Article 32, see ibid 107. Regulations such as one currently discussed in Germany according to which naturalization is excluded if the identity and nationality of a person is not established are highly problematic against that background since they risk disadvantaging stateless persons disproportionately, see Deutsche Welle, ‘Bundesregierung verschärft Einbürgerungsregeln’ DW.COM (17 April 2020) <https://www.dw.com/de/bundesregierung-versch%C3%A4rf-einb%C3%BCrgerungsregeln/a-53161205>.

267 van Waas, Nationality Matters (n 115) 364.
based on Article 32, they are obliged to facilitate the naturalization in order to provide for a truly effective national protection and durable solution to statelessness through the acquisition of nationality.\footnote{Carol A Batchelor, ‘The International Legal Framework Concerning Statelessness and Access for Stateless Persons, Contribution to the European Union Seminar on the Content and Scope of International Protection’ (UNHCR 2002) para 16.}

In addition, the second sentence of Article 32 entails a more specific obligation by specifying that naturalization should be facilitated.\footnote{See also Robinson (n 248) 64.} Such facilitation can occur by means of procedural facilitations, such as reduced fees or expedited or simplified procedures, and through substantive facilitations, such as reduced naturalization requirements.

To sum up, the css protects the fundamental human rights of stateless persons and, importantly, enshrines the legal definition of statelessness. With the growing number of ratifications, the importance of the Convention is increasing. While an actual right to a nationality is not protected by the Convention, Article 32 css obliges states to grant stateless persons access to a naturalization procedure and to facilitate such naturalization.

\subsection{The Convention on the Reduction of Statelessness}

The 1954 Convention is complemented by the Convention on the Reduction of Statelessness, adopted in 1961.\footnote{See on the drafting history generally Guy Goodwin-Gill, Introduction to the 1961 Convention on the Reduction of Statelessness, from the United Nations Audiovisual Library of International Law (2011) <https://legal.un.org/avl/ha/crs/crs.html>; Weis, ‘Convention on the Reduction of Statelessness’ (n 53).} Similar to the css, the number of ratifications was initially low, but has doubled over the last decade.\footnote{Today the 1961 Convention has 73 state parties, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5. See also van Waas, Nationality Matters (n 115) 42.} While the css intends to secure the most basic rights of stateless persons, the crs aims at preventing and eradicating statelessness. The crs is “the leading international instrument that sets rules for the conferral and non-withdrawal of citizenship to prevent cases of statelessness from arising.”\footnote{UNHCR, ‘Introductory Note to the Convention on the Reduction of Statelessness’ (UNHCR 2014) <https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness ENG.pdf>.} In order to achieve the aim of reducing and preventing statelessness the Convention obliges states to grant nationality under certain circumstances to stateless persons.\footnote{Donner (n 14) 194.}
Convention is thus sometimes described as the instrument that realizes the promise of Article 15 UDHR.274

The 1961 Convention addresses situations in which statelessness275 can occur — at birth, due to loss, deprivation or voluntary renunciation of nationality and in the context of state succession276 — and obliges states to eliminate and prevent statelessness in their national legislation.277 The central provisions of the Convention for the elimination of statelessness are Articles 1 and 4 on the acquisition of nationality based on birth in the territory and descent.278 Article 1 maintains that “a contracting state shall grant its nationality to a person born in its territory who would otherwise be stateless”. Such nationality can be granted automatically at birth, by operation of law or upon application.279 However, state parties may impose additional conditions for the acquisition of nationality by application based on the length of residence, national security, good character or the reason for statelessness.280 In practice, this amounts to a contingent right to nationality based on ties implicitly held with the state in which one is born or the state of which a parent was a national at the time of birth, provided a person would otherwise be stateless.281 De Groot argues that:

the exhaustive character of the list [in Article 1(2)] implies that the state does not have any discretionary power to deny nationality if the conditions mentioned under domestic law in conformity with Article 1(2) are met. To provide for a discretionary naturalization procedure for otherwise stateless children is thus not in conformity with the 1961 Convention.282

(emphasis added)

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274 *Ibid.* See also Chan (n 52) 4; Goodwin-Gill (n 270) 6; Smith (n 8). Molnár argues that the avoidance of statelessness has acquired the status of a general principle of international law, Molnár (n 148) 80.
275 The notion of statelessness in the 1961 Convention is based on the definition in Article 1 CSS.
276 See van Waas, 'Statelessness Conventions' (n 250) 74 f. Bloom, by contrast, identifies four contexts, namely not obtaining citizenship, voluntarily renouncing one’s citizenship, having one’s citizenship removed and extinction of a state, see Tendayi Bloom, ‘Problematising the Conventions on Statelessness’ (United Nations University Institute on Globalization, Culture and Mobility (UNU — GCM) 2013) Policy Report No. 02/01 <http://collections.unu.edu/eserv/UNU:1969/pdf0201BLOOM.pdf>.
277 Adjami and Harrington (n 37) 96 f.
278 See also Weis, ‘Convention on the Reduction of Statelessness’ (n 53) 1083.
279 Article 1(1)(a) and (b) CRS.
280 Article 1(1)(b) in conjunction with 1(2) 1961 Convention.
282 de Groot, ‘Children’s Right to Nationality’ (n 108) 149.
In principle, Article 1 CRS thus reflects the idea of a right to acquire a nationality by virtue of being born in the territory. Nevertheless, the possibility for states to impose certain conditions upon that acquisition of nationality leaves children, at least for a certain period, at risk of statelessness. Therefore, the provision still seems to fall short of the protection required by the child’s right to a nationality as protected by Article 24(3) ICCPR and Article 7 CRC.

Article 4 adds that states shall grant their nationality to a person who was not born on their territory if she would otherwise be stateless and if one of the parents had that state’s nationality at the time of birth. Such attribution of nationality based on descent again can be granted automatically at birth or upon application. According to Article 4(2), states may foresee several conditions for such application. In combination the two provisions aim to ensure that otherwise stateless persons have access to a nationality and are not left statelessness. Weis notes that

a balance has been struck between the obligations to be undertaken by jus soli and jus sanguinis countries: original statelessness is to be remedied by the subsidiary application of jus soli in jus sanguinis countries and, where this does not lead to acquisition of nationality, by the application of jus sanguinis by jus soli countries. (original emphasis)

The remaining substantive provisions of the 1961 Convention aim at ensuring that state parties grant citizenship to persons fulfilling the criteria for acquisition and limiting the possibilities of loss of citizenship that could render an individual stateless. An important provision is Article 8, which prohibits deprivation of nationality if such deprivation would render the person concerned stateless. Exceptions to that principle are possible — if nationality was obtained by misrepresentation or fraud, or if domestic legislation provides for deprivation of nationality for breach of loyalty or allegiance and the state party made a declaration to retain such right at the time of signature, ratification or accession to the Convention. Hence, Article 8 does not prohibit the deprivation of nationality resulting in statelessness per se. However, Article 9

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283 Weis, ‘Convention on the Reduction of Statelessness’ (n 53) 1079.
284 See van Waas, ‘Statelessness Conventions’ (n 250) 84. Less critical Goodwin-Gill (n 270) 6.
286 Articles 2 ff. See also van Waas, ‘Statelessness Conventions’ (n 250) 75.
287 Schram finds it to be the key article of the Convention, Schram (n 10) 234.
288 Article 8(2) and (3) CRS.
CRS absolutely prohibits deprivation of citizenship on the grounds of race, ethnicity, religion or politics.\textsuperscript{289}

The 1961 Convention provides a solid framework to avoid future statelessness and reducing statelessness that currently exists. As such it is the most elaborated and detailed instrument at universal level on the avoidance of statelessness.\textsuperscript{290} It imposes a positive obligation on states to attribute nationality in certain situations and prohibits its withdrawal in certain situation. While it does not directly guarantee a general right to nationality, the Convention indirectly protects the right to nationality and is one of the few instruments that specifies which state has an obligation to grant nationality.\textsuperscript{291} Thereby, the CRS thereby fills to a certain extent the gap left open by Article 15 UDHR. As Chan claims, it provides “the right to have a nationality with a substantive content, and is indicative of the extent of obligations of, or the international expectation on, the states in the elimination and reduction of statelessness”.\textsuperscript{292} Moreover, it identifies the factors of birth and descent as connections that “are sufficient to establish a link between the individual and the State, a foundation upon which it is legally sound to grant nationality, in particular, to a person who has received none”.\textsuperscript{293} This recognition of the importance of an “individual’s genuine and effective existing connection” (original emphasis) with a state adds new contours to the right to nationality.\textsuperscript{294} Nevertheless, the Convention neither obliges states to unconditionally grant access to nationality if a person is otherwise stateless, nor does it absolutely prohibit the withdrawal of nationality resulting in statelessness. As the title of the Convention indicates, the main focus is on the reduction of statelessness, and not on its complete eradication, nor generally the protection of the right to nationality as such.\textsuperscript{295}

1.2.3 The Convention Relating to the Status of Refugees

The Convention relating to the Status of Refugees and its Protocol\textsuperscript{296} address the situation and rights of refugees in the state of asylum.\textsuperscript{297} As elaborated
above, the provisions of the 1951 Refugee Convention and the 1954 Convention are to a large extent congruent. The Refugee Convention protects the rights of those individuals who are seeking protection from a well-founded fear of persecution in a state of which they are not a national of, whereas the 1954 Convention guarantees the rights of stateless persons.

For the discussion on the legal foundations of the right to nationality in international law the 1951 Refugee Convention is relevant because it entails a provision on naturalization for refugees within the definition of Article 1. Just as Article 32, Article 34 of the 1951 Refugee Convention states that:

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Article 34 Refugee Convention envisages naturalization (and assimilation) as one of the durable solutions for refugees foreseen in the Convention, or even more so, as an end to refugee status. James Hathaway even refers to it as a “true solution”.

Just as Article 32 1954 Convention, Article 34 is mostly interpreted as a recommendation for states, rather than an individual right for refugees to be

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298 See above Chapter 4, II.1.2.1.
299 Even though one could thus just refer to the interpretation of Article 32, a short discussion of Article 34 CSR seems opportune as there is much more literature as well as case law on the provision for refugees than for the provision for stateless persons.
301 Article 1(C)(3) 1951 CSR which maintains that the Convention ceases to apply to persons who have acquired a new nationality and enjoy the protection of the country of that nationality. See also Atle Grahl-Madsen, Commentary of the Refugee Convention 1951 (UNHCR 1997), Article 34 N 1; James C Hathaway, The Rights of Refugees Under International Law (2nd ed, Cambridge University Press 2021) 1210. One example where refugees were actually granted the option of naturalization as a form of durable solution is Tanzania, which granted citizenship to more than 150,000 Burundian refugees as part of a strategy to find durable solutions for the refugee community present in the country since the 1970s, see Amelia Kuch, ‘Naturalization of Burundian Refugees in Tanzania: The Debates on Local Integration and the Meaning of Citizenship Revisited’ (2017) 30 Journal of Refugee Studies 468.
302 Hathaway (n 301) 1209.
granted the nationality of their state of asylum.\textsuperscript{303} It is said to merely promote access to naturalization rather than establishing an entitlement to naturalization for persons with refugee status. Hathaway, for example, argues that Article 34 “sets an obligation only to ‘facilitate’ naturalization, not an obligation of result”.\textsuperscript{304} The duty to facilitate naturalization neither entails a strict obligation to waive or reduce naturalization requirements. Rather, it is understood as a general recommendation to put mechanisms in place that allow refugees to acquire citizenship with as little difficulty as possible. Ruvi Ziegler refers to Article 34 as a “soft” obligation to facilitate naturalization.\textsuperscript{305} Reinhard Marx notes with regard to the drafting history that naturalization as such, was considered “a matter of such a delicate nature that in every case the final decision must rest with the organs of the State concerned”.\textsuperscript{306} Thus, he argues, naturalization is not more than an option that should, in principle, be made available to refugees.\textsuperscript{307} Atle Grahl-Madsen, by contrast, writes that “the word ‘shall’ makes it clear that Article 34 imposes a duty on the Contracting States, not only a recommendation”.\textsuperscript{308} In that sense it imposes a “qualified duty” as it does not oblige states to naturalize refugees, but instead creates a duty to facilitate it as far as possible.\textsuperscript{309} Today, Article 34 is increasingly interpreted as obliging states to provide for refugees the possibility of naturalization and to facilitate such naturalization.\textsuperscript{310} At a very least, Article 34 prohibits to generally exclude refugees from access to citizenship without justification.\textsuperscript{311} The arbitrary denial of nationality to refugees would therefore violate Article 34.\textsuperscript{312}

The second sentence of Article 34 lists possible ways to facilitate naturalization: through reduced fees and expedited procedures. Other facilitation measures could consist of support for the integration process, leeway in the

\begin{thebibliography}{99}
\item \textsuperscript{303} See Marx (n 300) 1451, para 43.
\item \textsuperscript{304} Hathaway (n 301) 1218.
\item \textsuperscript{305} Ziegler (n 297) 205. The Swiss Federal Court, for example, has found Article 34 to be legally binding. Nevertheless, it argued that the provision does not grant individual refugees an entitlement to acquire the nationality of the state of protection. The wording of the provision, so the Court, clearly demonstrates states’ wide discretion how to facilitate naturalization, see iD_3/2014, Urteil vom n März 2015 [2015] BGer 1D_3/2014 para 4.2.
\item \textsuperscript{306} Marx (n 300) 1443.
\item \textsuperscript{307} \textit{ibid} 1451.
\item \textsuperscript{308} Grahl-Madsen (n 301), Article 34 N 2.
\item \textsuperscript{309} \textit{ibid}, Article 34 N 2.
\item \textsuperscript{310} \textit{ibid} N 2; Marx (n 300) 1451; Ziegler (n 297) 205.
\item \textsuperscript{311} Hathaway (n 301) 1219. See also Grahl-Madsen (n 301), Article 34 N 2.
\item \textsuperscript{312} Hathaway (n 301) 1219 f.
\end{thebibliography}
assessment of criteria relating to language skills or labor market participation, or the acceptance of dual or multiple citizenship.\footnote{313}

The discussion in this section has shown that two Statelessness Conventions and the Refugee Convention do not directly guarantee a general right to nationality. Nevertheless, in particular the 1961 Convention establishes important limitations upon state sovereignty: by defining certain circumstances under which a person should be able to acquire nationality if she would otherwise be stateless and by limiting the competence to deprive an individual of citizenship. Thus, the 1961 Convention thus indirectly gives the right to nationality substantive content. Article 32 of the 1954 Convention and Article 34 Refugee Convention suggest that states should facilitate the naturalization of stateless persons and refugees as far as possible. Overall, the three instruments reinforce the impression that nationality can no longer be described as a domaine réservé and provide guidelines for the identification of the scope and content of the right to nationality.

1.3 Soft Law Instruments at Universal Level

In addition to treaty law, soft law instruments play an important role for the development of the right to nationality at the international level.\footnote{314} These instruments reinforce and complement existing standards and support the creation of customary international law, as well as the codification of new binding legal instruments.\footnote{315} Nationality is a good example to illustrate how soft law can play an important role in domains where states are reluctant to adopt binding norms but, at the same time, agree on the need for international cooperation or even regulation.\footnote{316} The following section looks at the

\begin{footnotesize}
\footnote{313}{See similarly also Grahl-Madsen (n 301), Article 34 N 4.}
\footnote{314}{Soft law instruments are legally non-binding instruments, principles, rules or standards such as resolutions, recommendations, declarations or decisions created by subjects of international law, mostly international organizations, see Daniel Thürer, ‘Soft Law’ in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (Oxford University Press 2009) para 8 <http://opil.oup.com/view/10.1093/law:epil/9780199231690-e1469>. See also Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone, ‘Introduction: Tracing the Roles of Soft Law in Human Rights’ in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), Tracing the Roles of Soft Law in Human Rights (Oxford University Press 2016) 5.}
\footnote{315}{Lagoutte et al distinguish a norm-filling and a norm-creating function of soft law, Lagoutte, Gammeltoft-Hansen and Cerone (n 314) 6 ff. See also Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Reports 1996, p. 226 para 70.}
\footnote{316}{See also Thomas Gammeltoft-Hansen, ‘The Normative Impact of the Global Compact on Refugees’ (2019) 30 International Journal of Refugee Law 605, 607; Hobe (n 62) 231; Thürer (n 314) para 6. For the role of soft law in the development of international migration law

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most important soft law instruments dealing with the right to nationality at international level. It focuses on instruments adopted at the UN level — the UN General Assembly and the UN Human Rights Council (HRC), as well as instruments of the International Law Commission in particular.

1.3.1 Resolutions by UN Bodies

1.3.1.1 The UN General Assembly

The Third Committee of the UN General Assembly has on several occasions dealt with questions relating to nationality. Most of these resolutions concern the mandate of the UNHCR to address the situation of stateless persons. These resolutions express concern about the situation of stateless persons, highlight the connection between statelessness and displacement, call upon states to reduce statelessness and reinforce the mandate of UNHCR to support and assist stateless persons. Implicitly, all these resolutions recognize the right to nationality. Nevertheless, the UNGA remains careful to acknowledge states’ domestic jurisdiction in nationality matters. Resolution 50/152, for example, calls upon states to adopt nationality legislation to reduce statelessness and to prevent arbitrary deprivation of nationality, while acknowledging “the right of States to establish laws governing the acquisition, renunciation or loss of nationality”. Other resolutions address the issue of state succession,
and call upon states to take into account the standards elaborated by the ILC and implement them.\textsuperscript{320}

Overall, the UN General Assembly has shied away from recognizing the right to nationality as a human right that imposes duties on states and grants individuals enforceable legal claims. It has mostly addressed questions relating to nationality in the context of statelessness and reaffirmed states’ discretion in nationality matters. While statelessness is addressed, directly or indirectly, in many of the major initiatives at UN level — such as for example the Sustainable Development Goals\textsuperscript{321} or the Global Compacts on Migration and Refugees\textsuperscript{322} — the UN General Assembly has been reluctant to take on a leading role in strengthening the right to nationality as an individual human right.

1.3.1.2 The UN Human Rights Council

The UN Human Rights Council and its predecessor, the UN Commission on Human Rights, have repeatedly dealt with nationality issues. The resolutions of the Human Rights Council and the Commission address the right to nationality directly — namely regarding arbitrary deprivation of nationality, the principle of non-discrimination and birth registration.\textsuperscript{323}

\textsuperscript{320} UN General Assembly, ‘Resolution 54/112’ (UN General Assembly 1999) UN Doc. A/RES/54/112; UN General Assembly, ‘Resolution 59/34’ (UN General Assembly 2004) UN Doc. A/RES/59/34. On the work of the ILC see below Chapter 4, 1.1.3.1.3.

\textsuperscript{321} The Sustainable Development Goals (SDG) do not explicitly refer to statelessness or the right to nationality. However, considerations relating to statelessness and access to a nationality are raised under SDG Target 5.1 which relates to the elimination of gender discrimination and SDG Target 16.9 which calls for legal identity for all, including birth registration, see UN General Assembly, ‘Transforming Our World: The 2030 Agenda for Sustainable Development, Resolution 70/1’ (UN General Assembly 2015) UN Doc. A/RES/70/1.

\textsuperscript{322} See below Chapter 4, 1.1.3.1.3.

Several resolutions of the HRC deal with *arbitrary deprivation of nationality*.324 These resolutions stress that state sovereignty in nationality matters is limited by international law and “reaffirm the right to a nationality of every human person as a *fundamental human right*” (emphasis added).325 Arbitrary deprivation of nationality is criticized as a violation of human rights and fundamental freedoms, especially when it occurs on discriminatory grounds.326 Deprivation of nationality shall not impede the full enjoyment of all human rights and fundamental freedoms and expose the persons concerned to poverty, social exclusion and legal incapacity.327 The Human Rights Council also repeatedly confirmed the right of the child to acquire a nationality and derives a special need of children for protection against arbitrary deprivation of nationality.328

Resolution 20/4, adopted in 2012, addresses the right to a nationality with a focus on women and children.329 The Resolution reaffirms “that the right to a nationality is a universal human right enshrined in the Universal Declaration of Human Rights, and that every man, woman and child has the

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325 Human Rights Council, ‘Resolution 7/10’ (n 324) para 1.

326 *ibid* 2.


329 Human Rights Council, ‘Resolution 20/4’ (n 324).
While it is up to each state to determine by law who its nationals are, such determination has to be consistent with obligations under international law. The Resolution also reinforces the right of the child to a nationality at birth, the prohibition of discrimination in the application of nationality laws and spells out procedural obligations for all decisions concerning acquisition, deprivation, loss or change of nationality, including the right to effective and timely judicial review of such decisions and to effective and appropriate remedies.

Thus, the Human Rights Council resolutions on nationality consistently recognize the right to nationality as a fundamental universal human right. They provide important guidance for the obligations that can be derived from the different legal sources at the international level that guarantee a right to nationality.

1.3.1.3 The Global Compacts on Migration and Refugees

The youngest initiative at the UN level was the adoption of the New York Declaration for Refugees and Migrants on 19 September 2016. The Declaration resulted in the Global Compact on Migration — the Global Compact for Safe, Orderly and Regular Migration (GCM) — and the Global Compact on Refugees. The New York Declaration recognizes statelessness as a cause and consequence of forced migration and calls for its reduction. On that basis, both the Compacts address statelessness and nationality.

The Global Compact for Safe, Orderly and Regular Migration calls in Objective 4 to “ensure that all migrants have proof of legal identity and adequate documentation”. States should be committed to “fulfil[ling] the right to a nationality”.

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330 ibid 1.
331 ibid 2.
332 ibid 4 ff.
335 Global Compact on Refugees, adopted on 19 December 2018, see UNHCR, ‘Official Record of the 73rd Session: Global Compact on Refugees’ (UNHCR 2018) UN Doc. A/73/12 (Part II).
336 For an analysis of the legal status of the Compacts, see Gammeltoft-Hansen (n 334).
337 UN General Assembly, ‘New York Declaration’ (n 333) para 72.
339 UN General Assembly, ‘Global Compact on Migration’ (n 334), Objective 4, para 20.
to all individuals to a legal identity by providing all nationals with proof of nationality and relevant documentation” and to

strengthen measures to reduce statelessness, including by registering migrants’ births, ensuring that women and men equally confer their nationality on their children, and providing nationality to children born in another State’s territory, especially in situations where a child would otherwise be stateless, fully respecting the human right to a nationality and in accordance with national legislation [and to] review and revise requirements to prove nationality at service delivery centres to ensure that migrants without proof of nationality or legal identity are not precluded from accessing basic services nor denied their human rights.340

Moreover, the Compact calls upon states to issue registration cards to all persons living in a municipality, including migrants, to realize this commitment.341 Objective 4, thereby implicitly recognizes the right to nationality. However, the GCM also reiterates that nationality matters are a matter for domestic legislation, especially that of the country of origin, and fails to reinforce any specific obligation to prevent statelessness or to grant nationality.342 In the GCM, statelessness and nationality are closely linked to questions of documentation and legal identity and, in turn, to questions of migration control, ensuring effective migration procedures, preventing irregular migration and facilitating return procedures, thereby failing to take a comprehensive rights-approach to nationality in the migration context.343

The Global Compact on Refugees recognizes that statelessness may be a cause and a consequence of refugee movements.344 It calls upon states, the UNHCR and other actors to support the sharing of good practices for the prevention and reduction of statelessness and the development of instruments on national, regional and international levels to end statelessness.345 It further encourages states to ratify the 1954 and the 1961 Conventions.346

340 ibid, Objective 4, para 20, let. e and f.
341 ibid, Objective 4, para 20.
343 See UN General Assembly, ‘Global Compact on Migration’ (n 334), Objective 4, para 20.
344 UNHCR, ‘Official Record of the 73rd Session’ (n 335) para 83.
345 ibid.
346 ibid.
Moreover, the Refugee Compact suggests improving civil and birth registration, _inter alia_ to help establish legal identity and prevent the risk of statelessness.\(^{347}\) It also points at the need for identification and referral mechanisms, including statelessness determination procedures, for stateless persons and those at risk of statelessness to address their specific needs.\(^{348}\) Interestingly, however, the Refugee Compact does not promote integration and naturalization in host states as foreseen by Article 34 Refugee Convention, but instead promotes the objectives of easing pressure on host countries and supporting return.\(^{349}\)

The fact that statelessness and access to citizenship are addressed in the two Global Compacts in the first place shows that statelessness is recognized as an issue that is inherently linked to migration, especially forced migration. It also acknowledges the obligation to prevent and reduce statelessness where possible. This is not obvious.\(^{350}\) Nevertheless, the Compacts fail to establish mechanisms for the protection of individual rights and to recognize effective obligations for states relating to statelessness and nationality. Thereby, the Global Compacts are very much in line with the traditional doctrine of nationality as a matter of domestic legislation and take a cautious approach to recognizing nationality and statelessness as human rights issues.\(^{351}\) Neither the Global Compact on Migration nor the Compact on Refugees take an ambitious approach to reinforcing the right to nationality as an effective, enforceable human right.

### 1.3.2 Draft Articles of the International Law Commission

A third set of soft law instruments dealing with the right to nationality have been adopted under the auspices of the International Law Commission. From its establishment in 1947, the ILC has regularly dealt with nationality matters. As Weis wrote already in 1979:

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\(^{347}\) _ibid_ 82.

\(^{348}\) _ibid_ 60. Critically, especially when compared to the wording of the Zero Draft of the GCMM, also de Chickera (n 342).


\(^{350}\) See also Bloom, ‘Global Compacts’ (n 338).

\(^{351}\) This is probably not surprising as the Compacts avoid adopting a clear human rights perspective and instead primarily focus on migration and refugee flow management, see Chimni (n 349); Elspeth Guild, ‘The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?’ (2018) 30 International Journal of Refugee Law.
From the aspect of the role of nationality in international law the proceedings of the International Law Commission are of particular importance. The views on the subject of nationality expounded by the members of the International Law Commission (...) are significant, not only as opinions of international law; they can also be regarded (...) as indications of the tendencies of its development.\footnote{Paul Weis, \textit{Nationality and Statelessness in International Law} (2nd ed, Sijthoff & Noordhoff 1979) 29.}


The Draft Articles reinforce existing international legal standards and provide authoritative guidance for the interpretation of the right to nationality in the context of state succession. They build on the assumption that nationality is essentially governed by domestic law but — being of direct concern to the international order — is not without the limitations imposed by international
Of particular importance are the limitations imposed by human rights law, especially the right to nationality. The right to nationality, according to the Commission, is “a central element of a conceptual approach to the topic, which (...) should aim at the protection of the individual against any detrimental effects resulting from State succession.” While the ILC admits that the right to nationality as a concept does not “belong to the realm of lex lata” (original emphasis), the Draft Articles are generally seen to provide, at least, moral guidance for states in situations of state succession. They represent a certain consensus about the rights of individuals in nationality matters in situations of state succession and, ultimately, the right to nationality.

The ILC Draft Articles on Nationality have taken the most comprehensive and nuanced approach, so far, to identifying criteria that allow for the attribution of nationality in situations of state succession while, at the same time, respecting the right to nationality and preventing the creation of statelessness. Bronwen Manby argues that the ILC Draft Articles:

remain the most powerful and detailed statement of the principles that should apply, and, in particular, are the strongest global level statement on the obligation of a state to grant its nationality to a person with the strongest links to that state or on the basis of option.

Article 1 of the Draft Articles codifies a general right to a nationality:

Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of

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357 See Mikulka, ‘First Report’ (n 355) para 57 ff.
360 See also van Waas, Nationality Matters (n 115) 136; Blackman (n 359) 1144.
361 Ziemele, ‘State Succession’ (n 356) 245. See also Preamble to the International Law Commission, Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, 3 April 1999, Supplement No. 10, UN Doc. A/54/10 (‘ILC Draft Articles on Nationality’), Recitals 3, 4 and 5.
acquisition of that nationality, *has the right to the nationality* of at least one of the States concerned, in accordance with the present draft articles. (emphasis added)

Article 1 is a "key provision, the very foundation of the present draft articles".\(^{364}\) It aims at applying the general principle of Article 15 UDHR to the specific context of state succession.\(^{365}\) Jeffrey Blackman even argues that this provision is the most significant general elaboration of the right to nationality since its introduction in Article 15 UDHR.\(^{366}\) Thus, the right to nationality is the main principle on which all other provisions in the Draft Articles are based.\(^{367}\) The right to a nationality under Article 1 ILC Draft Articles aims to guarantee the continuing enjoyment of a nationality despite a change in territorial sovereignty.\(^{368}\) Every person whose nationality might be affected by a state succession has the right to the nationality of at least one of the states involved in the succession.\(^{369}\) Importantly, the right to nationality under Article 1 is not limited to stateless persons.\(^{370}\)

The approach to safeguarding the right to a nationality and preventing statelessness foreseen in Article 1 of the ILC Draft Articles addresses one of the main flaws of Article 15 UDHR: the lack of an addressee. Article 1 determines which state has a positive obligation to fulfill the right to a nationality and defines the scope of the right to nationality.\(^{371}\) The ILC Draft Articles oblige the successor state, or one of the successor states, to grant its nationality to the individual affected by the succession, and the predecessor state not to deprive an individual of nationality as a consequence of the succession.\(^{372}\) The state that is obliged to attribute its nationality is then identified based on the type of

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364 International Law Commission, 'Commentary Draft Articles on Nationality' (n 356) 25, para 1.
365 ibid, para 1.
366 Blackman (n 359) 1173.
367 International Law Commission, 'Commentary Draft Articles on Nationality' (n 356) 25, para 1. See also van Waas, *Nationality Matters* (n 115) 137.
368 See also van Waas, *Nationality Matters* (n 115) 137.
370 See Matias (n 39) 63.
372 International Law Commission, 'Commentary Draft Articles on Nationality' (n 356) 25, para 2; Mikulka, 'Third Report' (n 369) 36.
succession that is taking place and the links the person concerned has to the states involved in the succession.\textsuperscript{373}

Article 1 is complemented by Article 4 on the prevention of statelessness.\textsuperscript{374} This provision reflects the negative duty of states to avoid statelessness. It calls upon states to take all appropriate measures to prevent persons from becoming stateless as a result of the succession. The states involved in the succession do not have to attribute their nationality to all affected individuals (all persons having an appropriate connection to a state\textsuperscript{375}), but instead must take all appropriate measures within their competence to prevent individuals from becoming stateless as a consequence of the state succession.\textsuperscript{376}

Another interesting provision is Article 11 of the ILC Draft Articles which deals with the will of persons concerned.\textsuperscript{377} Article 11(1) calls upon states to consider the will of persons concerned whenever they can choose which nationality to acquire. Paragraph 2 grants individuals involved in the succession a right to opt for the nationality of a particular state if they have an appropriate connection to that state and would otherwise become stateless. This right to opt aims at “eliminating the risk of statelessness in situations of succession of states” by having the right to ask for the nationality of a state to which an appropriate connection exists.\textsuperscript{378} According to the Commentary to the Draft Articles the right to opt provided for by Article 11 is not limited to a choice between different nationalities, but refers more broadly to a right to opt-in, that means to voluntarily acquire a particular nationality by declaration, or to opt-out, ie to be free to renounce a nationality acquired \textit{ex lege}.\textsuperscript{379} This respect for the will of the individual concerned is an expression of the

\textsuperscript{373} International Law Commission, ‘Commentary Draft Articles on Nationality’ (n 356) 25, para 4. See also Blackman (n 359) 1174. See on this idea of nationality reflecting the actual ties Chapter 6, 11.1. See also International Law Commission, ‘Commentary Draft Articles on Nationality’ (n 356) 29, para 4.

\textsuperscript{374} International Law Commission, ‘Commentary Draft Articles on Nationality’ (n 356) 27, para 1.

\textsuperscript{375} \textit{ibid} 28, para 3.

\textsuperscript{376} \textit{ibid} 28, para 6.

\textsuperscript{377} The Commentary notes that the consideration for the will of individuals in matters of acquisition and loss of nationality in cases of succession of states is an issue of debate among scholars, see \textit{ibid} 33, para 5.

\textsuperscript{378} \textit{ibid} 34, para 9. The notion of ‘appropriate connection’ in that context is to be understood broader than the term ‘genuine link’ covering different \textit{nexi}, such as habitual residence, birth in the territory, but also being descendant of a national or former residence; see also \textit{ibid}, para 10.

\textsuperscript{379} International Law Commission, ‘Commentary Draft Articles on Nationality’ (n 356) 34, para 7.
recognition of nationality as an individual human right touching upon fundamental aspects of a person’s identity.\textsuperscript{380}

To sum up, the ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States of 1999 codify progressive international standards on nationality. Even if their scope is limited to the situation of state succession and they are not being formally binding, they are indicative of the developments in international law over the last few decades.\textsuperscript{381} The ILC Draft Articles enshrine a right to nationality for individuals involved in a state succession. States involved in a succession have the positive obligation to grant their nationality to individuals who have effective links to their territory, or to not deprive them of their nationality in the course of the succession.\textsuperscript{382} As Matias maintains:

There is an emerging right to an effective nationality in the State with which an individual possesses genuine and effective links, at least in the context of state successions. It is also clear that these principles are inquiringly general and indistinguishable. They are not exclusive to State successions but increasingly applicable in general international citizenship law.\textsuperscript{383}

Thus, the ILC Draft Articles provide interesting guidance as to how the right to nationality could be interpreted in order to identify more specific rights and obligations. In particular, the approach that the right to nationality applies \textit{vis-à-vis} the state to which an individual has the closest connection provides an interesting model of how the right to nationality could be re-interpreted which shall be discussed in more detail in Chapter 6.

2 The Right to Nationality at Regional Level

The previous section has analyzed the codification of the right to nationality in legal instruments at the universal level. In addition, the right to nationality is also addressed in regional human rights treaties. Some of these regional instruments offer important additional layers of protection for the right to nationality.\textsuperscript{384} The following section discusses these regional protection frameworks in more detail, starting with the Americas (11.2.1), then turning to Europe.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{380} \textit{Ibid}, para 6. See also Ziemelis, ‘State Succession’ (n 356) 230.
\item \textsuperscript{381} Blackman argued in 1998 that the Draft Articles illustrate the rapid development of international law in the area of nationality, Blackman (n 359) 1170.
\item \textsuperscript{382} \textit{Ibid} 1191 f.
\item \textsuperscript{383} See Matias (n 39) 63. See also Bialosky (n 4) 154.
\item \textsuperscript{384} See generally Bialosky (n 4).
\end{enumerate}
\end{footnotesize}
(II.2.2) and the African continent (II.2.3), before looking at the regulations in the Middle East and Northern Africa (II.2.4), as well as the Asian and Pacific region (II.2.5).

2.1 The Americas
The most elaborated framework for the protection of the right to nationality is found on the American continent — more precisely within the framework of the Organization of American States (OAS).\(^{385}\) Already, the *American Declaration on the Rights and Duties of Man* of 1948\(^{386}\) — adopted six months before the Universal Declaration of Human Rights — included a right to nationality. Article XIX of the non-binding Declaration, however, limited the right to nationality to those who already had an entitlement to nationality based on domestic law. This left the decision on the attribution of nationality entirely within the competence of states.

The guarantees of the American Declaration were reaffirmed in the *American Convention on Human Rights*, adopted by the member states of the OAS on 22 November 1969.\(^{387}\) The limitations of Article XIX of the American Declaration were not reproduced in the ACHR. In fact, the ACHR is the only binding international legal instrument that actually grants a general right to the nationality of a particular state.\(^{388}\) Article 20 ACHR, currently, is the most far-reaching guarantee of the right to nationality in a binding human rights instrument.\(^{389}\) It provides that:

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.

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386 American Declaration on the Rights and Duties of Man, 2 May 1948, OAS Res. XXX ('American Declaration').
387 See also Dembour, *When Humans Become Migrants* (n 43) 56. Even though the ACHR largely supersedes the American Declaration, the Declaration remains in force and is applied by the IACHR and the IACtHR with regard to those states who have not ratified the ACHR, namely Cuba, the US and Canada.
388 See Chan (n 52) 5.
389 van Waas, *Nationality Matters* (n 115) 60. It is noteworthy that none of the member states of the ACHR has lodged a reservation against Article 20 ACHR.
3 No one shall be arbitrarily deprived of his nationality or the right to change it.

The personal scope of Article 20 ACHR covers every person irrespective of age, nationality (or dual/multiple nationalities) or statelessness. The content of Article 20 is built around the obligation of states to avoid statelessness and on the prohibition of discrimination. Article 20(1) maintains generally that everyone has the right to a nationality. Article 20(2) adds a specific right to acquire nationality *jure soli* in case a person would otherwise be stateless. Article 20(3) prohibits any arbitrary deprivation of nationality and denial of the right to change one’s nationality. According to the case law of the IACtHR, Article 20 guarantees two main aspects: on the one hand, the right to nationality as protection of the individual through the link of nationality and, on the other, protection against arbitrary deprivation of that nationality. As the IACtHR held in its *Advisory Opinion 4/84 on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Article 20 ACHR represents first:

[A] minimal measure of legal protection in international relations through the link [one’s] nationality establishes between him and the state in question; and, second the protection therein accorded the individual against the arbitrary deprivation of his nationality, without which he would be deprived for all practical purposes of all of his political rights as well as of those civil rights that are tied to the nationality of the individual.

Thus, Article 20 establishes a right to nationality that protects the individual and all her political and civil rights tied to the status of nationality. It is a “basic right that is closely allied to other fundamental liberties”. It not only obliges states to refrain from interferences with the right to nationality, but also imposes positive obligations to actively guarantee the rights it secures.

390 As Chan points out, Article 20(2) fails to protect stateless persons of unknown place of birth as the state bearing the duty to fulfill under Article 20(2) cannot be identified in such a situation, Chan (n 52) 5.
391 Torres (n 385) para 22.17.
392 See also ibid 22.05.
393 *Advisory Opinion OC-4/84* (n 1) para 34.
394 Bialosky (n 4) 166.
Comparing Article 20 ACHR to Article 15 UDHR, one notes that the provision in Article 20(2) goes beyond the latter: it guarantees a right to acquire the nationality of the state on whose territory a person is born, provided the person concerned does not have the right to another nationality. This amounts to a right to nationality for persons born on the territory of a member state if they would otherwise be stateless. By virtue of this identification mechanism based on a person’s place of birth, Article 20 ACHR becomes the only provision in a binding international instrument — so far — to grant an enforceable right to the nationality of a specific state. Hall describes this default *jus soli*-mechanism as the “law of last resort”, which is the only reliable way to, ultimately, eliminate statelessness: “everyone has a place of birth, but not everyone has parents who possessed a nationality.” As de Groot and Vonk suggest “this clear choice for a default *ius soli* rule can be explained by the strong preference for *ius soli* for the acquisition of nationality at birth in the Americas” (original emphasis).

Interpreting Article 20 ACHR, the IACtHR and the Inter-American Commission on Human Rights have developed a rich and nuanced case law on the right to nationality. Already in its first advisory opinion on Article 20 ACHR, the Advisory Opinion 4/84 on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica of 1984, the IACtHR has taken a rights-based approach to the right to nationality. The Court was asked to interpret an amendment of the provisions on nationality in the Costa Rican Constitution aimed at restricting the conditions for acquiring Costa Rican nationality.

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396 See also Bialosky (n 4) 160; See Matias (n 39) 64.
397 Dembour, *When Humans Become Migrants* (n 43) 136.
399 de Groot and Vonk (n 74) 237. See already Chan (n 52) n 44.
400 Bialosky (n 4) 160; Torres (n 385) 570 f. Within the Inter-American system individuals can only lodge a petition with the Commission (Article 44 ACHR). If the settlement procedure before the Commission fails, it can refer the case to the Court. States can refer cases directly to the Court (Article 61 ACHR). Moreover, the Court has jurisdiction to deliver advisory opinions (Article 64 ACHR). The IACmHR has mainly focused on cases concerning arbitrary deprivation of nationality, see Bialosky (n 4) 167.
401 Advisory Opinion OC-4/84 (n 1). See also Bialosky (n 4) 168. See on the IACtHR’s *pro homine* approach André de Carvalho Ramos, ‘Immigration and Human Rights: The Impact of the Inter-American Court of Human Rights Precedents (Towards a “Latin American Migration Policy”?)’ (2018) 56 Archiv des Völkerrechts 155, 165; Dembour, *When Humans Become Migrants* (n 43) 7 f. See also Advisory Opinion on Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection [2014] IACtHR OC-21/14 para 53 f.
IACtHR found the new provisions to be compatible with Article 20, since they do not exclude the possibility of naturalization as such, nor withdraw nationality from current citizens or deny the right to change nationality. Nevertheless, the Opinion is remarkable. The Court noted at the outset:

> It 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.

The landmark case relating to Article 20 of the American Convention is the case of the *Girls Yean and Bosico v Dominican Republic* of 2005. The case concerned the situation of two girls, Dilcia Oliven Yean and Violeta Bosico Cofi, who were born in the Dominican Republic to persons of Haitian descent and left stateless; extremely burdensome birth registration procedures prevented them from obtaining birth certificates. The lack of a birth certificate prevented the girls from attending public schools, accessing healthcare or social assistance and also from acquiring Dominican nationality and identity documents. Assessing whether the Dominican Republic violated Article 20 of the Charter, the IACtHR first reiterated that nationality is a non-derogable, fundamental human right. Therefore, states’ sovereignty:

> at the current stage of the development of international human rights law, [...] is limited, on the one hand, by their obligation to provide individuals with the equal and effective protection of the law and, on the other hand, by their obligation to prevent, avoid and reduce statelessness.

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402 See Matias (n 39) 64. More critical, however, is Dembour who fears that the IACtHR’s affirmation of nationality as a human right is far from uncontroversial and criticizes that “declaring the right to nationality to be ‘generally accepted today’ as a human right is simply unconvincing”, Dembour, *When Humans Become Migrants* (n 43) 136.

403 *Advisory Opinion OC-4/84* (n 1) para 32.

404 *Yean and Bosico* (n 395).

405 Both girls had a mother of Dominican nationality and a father of Haitian nationality, ibid 109(6) and (7).

406 This is a widespread practice as the Court notes in its judgment, *ibid* 109(11).

407 *ibid*.

408 *ibid* 136.

409 *ibid* 140.
Based on these two obligations, states must abstain from producing regulations on nationality matters that are discriminatory or have discriminatory effects, and prevent the creation of statelessness.\footnote{ibid 141 and 142.} The IACtHR then applied these general considerations to the specific case of Yean and Bosico and scrutinized the rule in the Dominican constitution that excluded children born to “foreigners in transit” from acquiring nationality \textit{jure soli}.\footnote{On the policy to declare persons of Haitian origin as ‘foreigners in transit’ to exclude them from \textit{jus soli} see in more detail Inter-American Commission of Human Rights, ‘Report on the Situation of Human Rights in the Dominican Republic’ <http://www.oas.org/en/iachr/reports/pdfs/DominicanRepublic-2015.pdf>.} It concluded with regard to the right to nationality that:

\begin{itemize}
\item[(a)] The migratory status of a person cannot be a condition for the State to grant nationality, because migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights.
\item[(b)] The migratory status of a person is not transmitted to the children, and
\item[(c)] The fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born.\footnote{Yean and Bosico (n 395) para 156.}
\end{itemize}

\textit{In casu}, the exclusion of the two girls from Dominican nationality, according to the IACtHR, was not justified as the parents of the girls were not just passing through the Dominican Republic but lived there permanently.\footnote{ibid 156 and 157.} The state applied the criteria for obtaining nationality in an arbitrary manner, without using reasonable and objective criteria and with disregard to the best interests of the child in a discriminatory way. The children were deliberately left outside the juridical system and placed in a situation of extreme vulnerability.\footnote{ibid 166.} This lay contrary to the obligation the Dominican Republic would have had under Article 20 ACHR to grant nationality to those born on its territory and to guarantee access to birth registration on an equal and non-discriminatory basis without unreasonable evidentiary requirements.\footnote{ibid 171.} Thus, the Dominican Republic:
failed to comply with its obligation to guarantee the rights embodied in the American Convention, which implies not only that the State shall respect them (negative obligation), but also that it must adopt all appropriate measures to guarantee them (positive obligation), owing to the situation of extreme vulnerability in which the State placed the Yean and Bosico children [...].

This failure amounted to an arbitrary deprivation of nationality in violation of Article 20 and other Convention rights.

The judgment of the IACtHR in *Yean and Bosico Case* is dense and gives a lot of content and weight to the right to nationality under Article 20 ACHR. According to a separate opinion of Judge A.A. Cançado Trinidade, the judgment is to be understood as a warning for states “that discriminatory administrative practices and legislative measures on nationality are prohibited (starting with its attribution and acquisition).” The judgment clarifies that the migratory status of a person cannot be a condition for the possibility to acquire a nationality. Moreover, it reaffirms that in cases of persons who cannot acquire a nationality based on any other link than the place of birth, the only fact that needs to be established in order to claim the right to nationality under Article 20 ACHR is the fact that the person is actually born on the territory of a member state. It is also interesting that the Court found a violation of the prohibition of arbitrary deprivation of nationality even though the girls never acquired a nationality in the first place. The Court assumed that an arbitrary denial of the acquisition of nationality amounts to an arbitrary deprivation of nationality. Finally, the judgment illustrates how closely the right to nationality

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416 ibid 173.
417 ibid 174. The Court also found a violation of Article 24 in relation to Article 19 and 1(1), Articles 3 and 18, in relation to Article 19 and 1(1) with regard to the children, and with regard to the mothers a violation of Article 5 in relation to Article 1(1).
418 Bialosky (n 4) 173.
420 Yean and Bosico (n 395) para 156. See also Dembour, *When Humans Become Migrants* (n 43) 327.
421 See also Carvalho Ramos (n 401) 167; Dembour, *When Humans Become Migrants* (n 43) 327.
422 See also Jorunn Brandvoll, ‘Deprivation of Nationality’ in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 203. Similarly also the case law of the ECtHR, see below Chapter 4, 11.2.2.1.2
is connected to the enjoyment of other rights, namely those relating to equal treatment, to one's legal identity and to social rights.\textsuperscript{423}

The situation of persons of Haitian descent in the Dominican Republic was again the subject of a contentious procedure in the case of \textit{Expelled Dominicans and Haitians v Dominican Republic}.\textsuperscript{424} Assessing a possible violation of Article 20 ACHR, the Court noted that:

Nationality, as it is mostly accepted, should be considered a natural condition of the human being. This condition is not only the very basis of his political status but also part of his civil status.\textsuperscript{425}

The IACtHR found that “the moment at which the State’s obligation to respect the right to nationality and to prevent statelessness can be required [...] is at the time of an individual’s birth”.\textsuperscript{426} Thus, Article 20(2) ACHR must be interpreted as obliging states to ensure that every child born on its territory may effectively acquire the nationality of the state of birth or another state immediately after birth.\textsuperscript{427} If the state is not sure, it has “the obligation to grant it nationality (\textit{ex lege}, automatically), to avoid a situation of statelessness at birth pursuant to Article 20(2) of the American Convention” (original emphasis).\textsuperscript{428} This obligation — so the Court stated — also applies if parents are, for factual reasons, not able to register their children in their state of nationality.

Another case that concerned the right to nationality is the case of \textit{Baruch Ivcher Bronstein v Peru} of 2001.\textsuperscript{429} Mr. Ivcher Bronstein acquired Peruvian nationality in 1984. In 1997 Peru decided to annul the naturalization in order to prevent Bronstein from criticizing the government through his media companies.\textsuperscript{430} While the case primarily concerned the lawfulness of political retaliation measures, the Court also found a violation of Article 20 ACHR.\textsuperscript{431} According to Torres, it was the first judgment “which really afforded protection

\textsuperscript{423} See also Yean and Bosico, \textit{Separate Opinion} (n 419) para 14.
\textsuperscript{424} \textit{Case of Expelled Dominicans and Haitians v Dominican Republic} [2014] IACtHR Series C No. 282.
\textsuperscript{425} \textit{Ibid} 255. The Courts presents this as a citation of para 32 of \textit{Advisory Opinion OC-4/84}, even though the wording of that passage is slightly different.
\textsuperscript{426} \textit{Ibid} 258.
\textsuperscript{427} \textit{Ibid} 259.
\textsuperscript{428} \textit{Ibid} 260.
\textsuperscript{429} \textit{Baruch Ivcher Bronstein v Peru} [2001] IACtHR Series C No. 74.
\textsuperscript{430} \textit{Ibid} 3. See also Bialosky (n 4) 168 f.
\textsuperscript{431} Dembour, \textit{When Humans Become Migrants} (n 43) 148.
under Article 20.\textsuperscript{432} The IACtHR pointed out that both the ACHR and Peru’s domestic legislation recognize a right to nationality and do not allow for a distinction based on how nationality was acquired (by birth, by naturalization or by any other way foreseen by domestic law).\textsuperscript{433} Declaring Bronstein’s Peruvian nationality to be annulled by way of a “directorial resolution” amounted to an arbitrary deprivation of nationality, as it did not comply with the requirements for annulment under Peruvian law and because the authorities ordering the annulment had no competence to do so.\textsuperscript{434} Hence, the order violated Article 20(1) and 20(3) ACHR.\textsuperscript{435} This judgment makes clear that a deprivation of nationality that contradicts domestic law is \textit{per se} arbitrary and violates Article 20 ACHR.\textsuperscript{436}

The jurisprudence of the IACtHR on Article 20 ACHR is consistent. Whether it found a violation\textsuperscript{437} or not,\textsuperscript{438} it builds on a human rights’ approach, prioritizes the needs of the individual and interprets states’ discretion in nationality matters in a limited manner. Moreover, it consistently stresses the importance of nationality not only as the basis for one’s political status but also the full enjoyment and exercise of all other rights — as well as its close link to the principle of non-discrimination. With that approach the case law of the Inter-American Court has proven to be extremely important for the development of a rights-based approach to nationality that is unique compared to other regions.\textsuperscript{439} Thus, in the Americas, Article 20 ACHR and the jurisprudence of the IACtHR provide for a strong protection of the right to nationality. In the

\textsuperscript{432} Torres (n 385) para 22.16.
\textsuperscript{433} Ivcher Bronstein (n 429) para 90.
\textsuperscript{434} \textit{ibid} 95 and 96.
\textsuperscript{435} \textit{ibid} 97. The Court, however, primarily reasoned the violation of Article 20(3) ACHR and did not motivate further why it concluded that Paragraph 1 was also violated.
\textsuperscript{436} The Court, however, did not assess if it was relevant for the case whether Bronstein was rendered stateless and whether deprivation of nationality as retaliation for political activities is as such arbitrary, see also Bialosky (n 4) 169.
\textsuperscript{437} Interesting is also the case of \textit{Gelman v Uruguay} which concerned an enforced disappearance of a pregnant woman. The IACtHR found that the abduction and transfer of the mother to another state \textit{inter alia} violated the child’s right to nationality because it prevented the birth of the child in the mother’s country of origin and, thereby — as it is a \textit{jus soli} country — the acquisition of the nationality of that country. This arbitrary obstruction of the acquisition of nationality amounted to an arbitrary deprivation of nationality as guaranteed by Article 20(3) ACHR, \textit{Gelman v Uruguay} [2011] IACtHR Series C No. 221 para 128. See also Bialosky (n 4) 174 f.
\textsuperscript{438} In the case of \textit{Castillo Petruzzi et al v Peru}, for example, the Court denied a violation of Article 20 ACHR considering that the right was never questioned or impugned, see \textit{Castillo Petruzzi et al v Peru} [1999] IACtHR Series C No. 52.
\textsuperscript{439} Bialosky (n 4) 161. See also Torres (n 385) 578 f.
states that have ratified the ACHR, individuals, in principle, have an effective and enforceable right to nationality.\textsuperscript{440}

2.2 Europe

Compared to the Americas, Europe lags behind when it comes to recognizing and safeguarding the right to nationality. The most important regional instrument, the European Convention on Human Rights, does not include a right to nationality at all. The reasons why, as well as the timid attempts of the ECtHR to introduce a right to nationality through the back door, shall be discussed below (II.2.2.1.2). First, however, a closer look shall be had at the European Convention on Nationality, the most specific instrument on nationality in the European context (II.2.2.1.1). A third subsection discusses other instruments within the framework of the Council of Europe (II.2.2.1.3). Going beyond the framework of the Council of Europe, a brief look shall then be held at standards developed by the Organization for Security and Co-Operation in Europe (OSCE) (II.2.2.2) and at citizenship in the European Union (II.2.2.3).\textsuperscript{441}

2.2.1 Council of Europe

2.2.1.1 European Convention on Nationality

The central instrument concerning nationality in the European context is the European Convention on Nationality, adopted under the auspices of the Council of Europe on 6 November 1997.\textsuperscript{442} It was drafted after the collapse of the Soviet Union and the dissolution of the former Yugoslavia with the aim of creating a comprehensive and contemporary instrument on nationality matters for Europe.\textsuperscript{443} The idea was “to promote the progressive development of
legal principles concerning nationality.”. However, its impact is limited by the relatively low number of ratifications. Moreover, many state parties to the Convention have deposited reservations limiting the application of the ECN in their jurisdiction. Nevertheless, the ECN increasingly gains traction. The ECtHR regularly refers to the Convention and the principles it sets out. Internationally, the ECN seems to increasingly influence other instruments on nationality. This is reinforced by the fact that the ECN is also open to ratification by non-Council of Europe states and hence has a potentially universal scope of application.

Today, the European Convention on Nationality is the most comprehensive treaty specifically on nationality. It codifies all major aspects relating to nationality and, according to Article 1, “establishes principles and rules relating to the nationality of natural persons”. As noted on the occasion of the 1st European Conference on Nationality in 2000:

[I]ts purpose is to make acquisition of a new nationality and recovery of a former one easier, to ensure that nationality is lost only for good reason and that it cannot be arbitrarily withdrawn, and to guarantee that the

444 Ramadan v Malta [2016] ECtHR Application No. 76136/12 para 41.
445 The ECN is currently ratified by 21 states. The number of ratifications has increased in the last few years. While the ECN would be open for signature by non-member states it has not been ratified by any so far, see <https://www.coe.int/de/web/conventions/full-list/-/conventions/treaty/166/signatures?p_auth=tAScI31>.
446 Overall, there are 10 reservations and 17 declarations limiting the scope of the ECN. Reservations must be compatible with the object and purpose of the Convention and may not concern the provisions contained in Chapters I, II and V of the Convention, ie also not Article 4 (Article 29(1) ECN). Critical with regard to the lawfulness of the reservations deposited de Groot, ‘The European Convention on Nationality’ (n 443) 121; Lisa Pilgram, ‘International Law and European Nationality Laws’ [2011] Eudo Citizenship Observatory 11 <http://cadmus.eui.eu/handle/1814/19455>.
447 See eg Rienerv Bulgaria [2006] ECtHR Application No. 46343/99 para 89; Tănase v Moldova [2010] ECtHR Application No. 7/08 para 47; Kurić and Others v Slovenia (Chamber) [2010] ECtHR Application No. 26828/06 para 260; Fehér and Dolník v Slovakia [2013] ECtHR Application No. 14927/12 para 36; Petropavlovskis v Latvia [2015] ECtHR Application No. 44230/06 para 39 ff and 83; Ramadan v Malta (n 444) para 41; Biao v Denmark (Grand Chamber) [2016] ECtHR Application No. 38590/10 para 47 f.
448 de Groot and Vonk (n 74) 262 referring to the AU Draft Protocol, see below Chapter 4, II.2.3.1.3.
449 Hall (n 398) 600.
451 Knocke (n 443) 40.
procedures governing applications for nationality are just, fair and open to appeal.\textsuperscript{452}

Despite these ambitious goals, the baseline for the Convention codified in Article 3 remains the sovereign competence of states to determine under their own law the rules for acquisition and loss of nationality, as long as these rules are consistent with international law and principles.

The European Convention on Nationality does not grant individuals enforceable rights against states.\textsuperscript{453} As van Waas writes, it is rather “a consolidation of developments in municipal and international law with regard to nationality” that aims to prevent conflicts between domestic nationality legislations.\textsuperscript{454} Nevertheless, the Convention reinforces the basic human rights principles in the field of nationality and gives weight not only to the legitimate interests of states, but also to those of individuals.\textsuperscript{455}

The \textit{ecn} does not directly guarantee an individual right to nationality. As Horst Schade writes, the drafters of the Convention had two options:

\begin{quote}
[They] could opt for a concrete, individually enforceable right or [they] could hold the view that the right to a nationality is vague because it does not specify \textit{who} has the right to \textit{which} nationality. As it stands, therefore, this ‘right’ is virtually unenforceable.\textsuperscript{456} (original emphasis)
\end{quote}

Ultimately, they opted for the latter alternative and codified the right to a nationality as a general principle in Article 4(a) \textit{ecn}. Article 4(a) recognizes the right to nationality as a human right and obliges member states to realize it in their domestic legislation.\textsuperscript{457} Article 4 lists three other general principles: the obligation to avoid statelessness (let. b), the prohibition of arbitrary

\begin{thebibliography}{99}
\item[454] van Waas, \textit{Nationality Matters} (n 115) 61.
\item[455] Preamble to the \textit{ecn}, Recital 4. See also van Waas, \textit{Nationality Matters} (n 115) 61; Autem (n 453) 23 ff; Knocke (n 443) 62 ff.
\item[457] See Council of Europe, ‘Explanatory Report ECN’ (n 443) para 30 ff.
\end{thebibliography}
deprivation of nationality (let. c) and the principle of equality between women and men (let. d). Additionally, Article 5 ECN enshrines the principle of non-discrimination. As Judge Paulo Pinto de Albuquerque wrote in a dissenting opinion in the case of Ramadan v Malta, these principles are “of such importance for ensuring social interaction of human beings in a democratic society that they must be seen as well-established principles of international law”.458 They build the foundation for the substantive provisions of the ECN.459 Still, the principles enshrined in the ECN are imperative international standards, but not enforceable individual rights.460

With the reduction of the right to nationality to a general principle merely guiding the member states, the ECN falls behind the protection established under Article 20 ACHR. Nevertheless, even the codification of the right to nationality as a general principle strengthens the protection of the right to nationality as a human right and solidifies its status in international law, As Batchelor argues, the ECN “has further developed the right to a given nationality, based on the principles of genuine and effective link”.461 This, to quote Kristin Henrard, “has an undeniable signaling function”.462 Hence, the ECN strengthens the right to nationality, not only directly through the codification as a general principle, but also in the remaining substantive provisions, which all build on the right to nationality.

The substantive provisions in Articles 6 ff. ECN deal with the acquisition and the loss of nationality, procedural questions and special situations — such as multiple nationality and state succession. Article 6 addresses the acquisition of nationality. It stipulates that all member states shall provide for the ex lege acquisition of nationality for children based on descent (Paragraph 1), and foresee a mechanism for children born on the territory, who do not acquire any other nationality at birth, to acquire nationality either ex lege or upon application if they would otherwise remain stateless (Paragraph 2). The provision combines the principles of jus sanguinis and jus soli to ensure that no child born in a member state becomes stateless.463 Moreover, Article 6 ECN obliges

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458 European Court of Human Rights, ‘Dissenting Opinion of Judge Pinto de Albuquerque in Ramadan v Malta’ (European Court of Human Rights 2016) Application No. 76136/12 para 7.
459 Council of Europe, ‘Explanatory Report ECN’ (n 443) para 32.
460 Autem (n 453) 24. See also Adjami and Harrington (n 37) 100.
461 Batchelor, ‘Resolving Nationality Status’ (n 281) 164.
463 See also Hall (n 398) 595.
states to provide for the possibility of naturalization for persons lawfully and habitually resident on the territory for a maximum period of residence of ten years (Paragraph 3). This rule is extraordinary in two respects: it not only requires the availability of naturalization in states’ domestic nationality legislation, it also limits the requirements for such naturalization by restricting the residence requirement to a maximum of ten years of lawful and habitual residence.\footnote{See also Carol A Batchelor, ‘Developments in International Law: The Avoidance of Statelessness Through Positive Application of the Right to a Nationality’ in Council of Europe (ed), \textit{Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality} (Council of Europe 1999) 56 f. Ten years is the common standard in Europe where most states require between five and ten years of residence, see Council of Europe, ‘Explanatory Report ECN’ (n 443) para 51. See also Global Citizenship Observatory (GLOBALCIT), ‘Global Database on Modes of Acquisition of Citizenship, Version 1.0’ (GLOBALCIT 2017) <https://globalcit.eu/modes-acquisition-citizenship/>. Switzerland, which was the last country who required a residence period of twelve years, reduced it to ten years with a revision of the Swiss Citizenship Act in 2014, Federal Act on Swiss Citizenship, 20 June 2014, SR 141.0 (‘SCA’). Liechtenstein reduced its residence requirement from 30 to ten years after the CtteeERD declared that a residence period of 30 years was excessively lengthy, see ‘Concluding Observations on the Third Periodic Report of Liechtenstein’ (CtteeERD 2007) UN Doc. CERD/C/LIE/CO/3 para 17.}

\textit{Other conditions may be imposed as long as they are not arbitrary.\textsuperscript{465} It illustrates the particular weight the ECN gives to the requirement residence in the territory.\textsuperscript{466} As Michael Autem writes, “lawful and habitual residence is no longer considered as one of the conditions that has to be fulfilled for acquiring the nationality of a State Party, but almost as a ground for becoming entitled to the right to acquire that nationality”.\textsuperscript{467} Lawful and habitual residence, in principle, is enough to naturalize.\textsuperscript{468} Implicitly, this amounts to a right to naturalization.\textsuperscript{469} Additionally, certain categories of persons should be granted facilitated access to nationality (Paragraph 4). This includes, amongst others, spouses, children, second generation migrants, migrant children, as well as stateless persons and recognized refugees.\textsuperscript{470} Facilitated access to nationality can be granted by means of facilitated naturalization,}

\textsuperscript{464} See also Carol A Batchelor, ‘Developments in International Law: The Avoidance of Statelessness Through Positive Application of the Right to a Nationality’ in Council of Europe (ed), \textit{Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality} (Council of Europe 1999) 56 f. Ten years is the common standard in Europe where most states require between five and ten years of residence, see Council of Europe, ‘Explanatory Report ECN’ (n 443) para 51. See also Global Citizenship Observatory (GLOBALCIT), ‘Global Database on Modes of Acquisition of Citizenship, Version 1.0’ (GLOBALCIT 2017) <https://globalcit.eu/modes-acquisition-citizenship/>. Switzerland, which was the last country who required a residence period of twelve years, reduced it to ten years with a revision of the Swiss Citizenship Act in 2014, Federal Act on Swiss Citizenship, 20 June 2014, SR 141.0 (‘SCA’). Liechtenstein reduced its residence requirement from 30 to ten years after the CtteeERD declared that a residence period of 30 years was excessively lengthy, see ‘Concluding Observations on the Third Periodic Report of Liechtenstein’ (CtteeERD 2007) UN Doc. CERD/C/LIE/CO/3 para 17.

\textsuperscript{465} The Convention remains silent on these other conditions due to the complexity of possible combinations, see Autem (n 453) 28; Knocke (n 443) 289.

\textsuperscript{466} See Pilgram (n 446) 7.

\textsuperscript{467} Autem (n 453) 32. See also Batchelor, ‘Developments in International Law’ (n 464) 56; Knocke (n 443) 289; van Waas, \textit{Nationality Matters} (n 115) 367.

\textsuperscript{468} Batchelor, ‘Developments in International Law’ (n 464) 56.

\textsuperscript{469} Spiro, ‘Citizenship’ (n 56) 288.

\textsuperscript{470} See also Knocke (n 443) 291.
by ensuring favorable conditions or based on ex lege forms of acquisition or through reduced requirements.471

The ecn also limits states’ right to withdraw nationality. Article 7 lists the acceptable grounds for deprivation of nationality exhaustively.472 In addition, Article 8 ecn allows individuals to renounce their nationality, provided they do not become stateless. This implies a right to change one’s nationality even if it is not expressly provided for in the Convention.473 Articles 10–13 ecn provide an important concretization of the procedural aspect of the right to nationality.474 They proscribe that decisions concerning nationality must be processed within a reasonable time, contain reasons in writing and must be open to review by an administrative or judicial authority.475 Moreover, fees must be reasonable and may not be an obstacle for applicants.476 So far, these procedural standards are unique. No other instrument sets up rules relating to procedures in nationality matters.477 Finally, the ecn takes a neutral stance on dual and multiple citizenship.478

The analysis of the substantive provisions of the ecn shows that the Convention with its pragmatic approach to the right to nationality, in fact, contributed to its international recognition. The standards enshrined in the Convention impose concrete obligations for states to implement in their internal nationality legislation.479 One of the central deficiencies of the ecn is, however, the lack of a supervisory body that could monitor the implementation and enforcement of the Convention standards in the member states.480 The initial idea that the Committee of Experts on Nationality in charge of drafting

471 Council of Europe, ‘Explanatory Report ECN’ (n 443) para 52. The ecn itself does, however, not define the notion of ‘facilitated naturalization’.
472 Legitimate grounds for withdrawal of nationality are, amongst others, the voluntary acquisition of another nationality, fraudulent acquisition, violation of vital state interests, the lack of a genuine link due to habitual residence abroad, see Article 7(1) ecn. See also ibid 58.
474 See Autem (n 453) 26; Knocke (n 443) 453. See also van Waas, Nationality Matters (n 115) 117. See in more detail Chapter 5, iii.7.
475 Articles 10, 11, 12 ecn.
476 Article 13 ecn.
477 See, however, the Draft Protocol on Nationality of the AU, Chapter 4, II.2.3.2.
478 Article 15 ecn. See also de Groot and Vonk (n 74) 262.
479 Knocke (n 443) 551. See also Pilgram (n 446) 6.
the Convention could serve as a supervisory body, was not upheld in practice.\textsuperscript{481} Because of the lack of jurisdiction the ECtHR has to apply and interpret the Ecn directly, individuals have no independent international body to call upon in case of a violation of their rights derived from the Convention.\textsuperscript{482} An enforcement mechanism for the Convention could significantly strengthen its effective implementation on domestic level. Nevertheless, the Ecn, overall, is “a significant and welcome advance in the process of transforming the Universal Declaration’s call for a right of all persons to possess a nationality into a substantive legal norm”.\textsuperscript{483} Notably, its focus is not only on the prevention and reduction of statelessness, but also on the integration of settled migrants into the citizenry through the availability of naturalization and the stipulation of non-discretionary procedures.\textsuperscript{484}

2.2.1.2 European Convention on Human Rights

The European Convention on Human Rights\textsuperscript{485} and its Protocols do not comprise a right to nationality among its substantive provisions.\textsuperscript{486} The\textit{ travaux préparatoires} to the Convention do not elaborate why the right to nationality was not included.\textsuperscript{487} In 1988, the Committee of Experts for the Development of

\begin{itemize}
  \item \textsuperscript{481} See Autem (n 453) 33.
  \item \textsuperscript{482} See Hall (n 398) 601.
  \item \textsuperscript{483} \textit{ibid} 600.
  \item \textsuperscript{484} See also Pilgram (n 446) 7.
  \item \textsuperscript{485} Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5 (‘European Convention on Human Rights’, ‘ECHR’).
  \item \textsuperscript{486} See eg X v Austria (Decision) [1972] ECtHR Application No. 5212/71; Kafkasli v Turkey [1997] ECtHR Application No. 21063/92 para 33; Karasassv v Finland (Decision) [1999] ECtHR Application No. 3144/96; Slivenko v Latvia [2003] ECtHR Application No. 48321/99 para 77; Savoia and Bounegru v Italy [2006] ECtHR Application No. 8407/05. See also Erbsell, ‘The Right to a Nationality’ (n 480) 249; William Schabas,\textit{ The European Convention on Human Rights: A Commentary} (Oxford University Press 2015) 378.
  \item \textsuperscript{487} Even though according to Recital 5 of the preamble of the ECHR the UDHR served as a model for the new European Convention. During the negotiations for Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16 September 1963, ETS No. 046 (‘Protocol No. 4’) there were discussions whether Article 3 on the prohibition of expulsion of nationals should include a prohibition of deprivation of nationality for the purpose of expulsion. However, the experts in the drafting committee decided against it, arguing that the question of deprivation of nationality was too delicate and that such a right was difficult to implement in practice, see Council of Europe, Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Strasbourg 1963, para 23.
\end{itemize}
Human Rights of the Council of Europe considered the possibility of creating an additional protocol to the ECHR on the right to a nationality. However, this endeavor was not successful. States feared the perspective of the ECtHR having jurisdiction over a right to nationality. Instead, the Council of Europe drafted the European Convention on Nationality. Despite the absence of a Convention-based right to nationality, the ECtHR has, relatively early on, recognized that nationality matters might, under certain circumstances, raise an issue under other rights of the Convention. In other words, it can be argued that the ECtHR effectively introduced a right to nationality through the backdoor. It did based on Articles 3, 6, 8 and 14 ECHR as well as Article 4 of Protocol No. 4 to the Convention.

In particular, the case law on the right to private life under Article 8 ECHR has proven to be important for the development of a right to nationality under the Convention. The Court found that arbitrary denial of nationality and arbitrary revocation of nationality, the confiscation of passports or identity documents, the erasure of register data with the result of statelessness and the denial of a right to residence for stateless persons can give rise to an interference with Article 8 ECHR. The jurisprudence of the Court under Article 8 ECHR has been taken up by domestic courts.

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488 Erbsøll, ‘The Right to a Nationality’ (n 480) 252.
489 ibid; Andreas Zimmermann and Sarina Landefeld, ‘Europäische Menschenrechtskonvention und Staatsangehörigkeitsrecht der Konventionsstaaten’ [2014] Zeitschrift für Ausländerrecht und Ausländerpolitik 97, 98.
490 See Knocke (n 443) 538.
491 Council of Europe, ‘Explanatory Report ECN’ (n 443) para 16.
492 Karassev v Finland (n 486); Slivenko v Latvia (n 486); Ahmadov v Azerbaijan [2020] ECHR Application No. 32538/10.
493 Ramadan v Malta (n 444); K2 v The United Kingdom (Decision) [2017] ECHR Application No. 42387/13; Said Abdul Salam Mubarak v Denmark (Decision) [2019] ECHR Application No. 74411/16.
495 Slivenko v Latvia (n 486); Kurić and Others v Slovenia (Grand Chamber) [2012] ECHR Application No. 26828/06.
496 Sisojeva and others v Latvia (Chamber) [2005] ECHR Application No. 65654/00; Kurić and Others v Slovenia (cc) (n 495); Hoti v Croatia [2018] ECHR Application No. 63311/14; Sudita Keita v Hungary [2020] ECHR Application No. 42321/15.
497 See also Fripp (n 45) 276.
498 Eg the Supreme Court of the United Kingdom in R (on the application of Johnson) (Appellant) v Secretary of State for the Home Department (Respondent) [2016] UK Supreme Court [2016] UKSC 56; the Council of State of the Netherlands (Raad van State), Judgment
In the 1995 case of *Kafkasli v Turkey*, the ECtHR acknowledged that the status of statelessness can have an effect on a person’s right to private and family life.\(^{499}\) In the case of *Karassev v Finland* it stated for the first time explicitly that:

> Although right to a citizenship is not as such guaranteed by the Convention or its Protocols [...], the Court does not exclude that an arbitrary denial of a citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual [...]\(^{500}\) (emphasis added)

The Court refined this approach in a series of cases. It discussed, for example, different criteria for the acquisition of nationality and examined whether they amounted to arbitrary denial of citizenship.\(^{501}\) In the case of *Riener v Bulgaria* the ECtHR added that not only the arbitrary denial of citizenship, but also the arbitrary refusal of a request to renounce citizenship might, in certain circumstances, raise an issue under Article 8, if such refusal has an impact on the individual’s private life.\(^{502}\) As the Court denied a violation of the Convention in that case, Judge Rait Maruste argued in a dissenting opinion:

> I see nationality (citizenship) as part of someone’s identity. If Article 8 covers the right to self-determination in respect of, for example, sexual orientation and so forth, it undoubtedly also covers the right to self-determination [sic] in respect of nationality and citizenship.\(^{503}\)

Five years later, the ECtHR adopted this argument. In the case of *Genovese v Malta* it had to decide whether Maltese nationality laws, according to which children born out of wedlock were only eligible for Maltese citizenship if their mother was Maltese, violated Article 14 in conjunction with Article 8 **ECHR**.\(^{504}\) The Court found that such a rule discriminated between children born to

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\(^{499}\) It did, however, not find a violation, see *Kafkasli v Turkey* (n 486) para 33.

\(^{500}\) See eg *Savoia and Bounegru v Italy* (n 486); *Petropavlovskis v Latvia* (n 447) para 83 ff. However, it so far never found specific naturalization criteria to violate Article 8 **ECHR**.

\(^{501}\) See Judge Rait Maruste in *Riener v Bulgaria* (n 447) para 154.


\(^{503}\) *Genovese v Malta* [2011] ECHR Application No. 53124/09.
The denial of citizenship, so the Court stated, “may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person’s social identity”. Thus, the question whether the applicant could acquire the Maltese nationality from his father fell within the scope and ambit of Article 8. In combination with the prohibition of discrimination under Article 14, the Court found a violation of the Convention. The case of Genovese v Malta is the first case in which the ECtHR found that nationality is part of a person’s social identity and thus protected by the right to private life under Article 8 ECHR. It is, moreover the first time the Court found a violation of the Convention in a question directly relating to citizenship. The case of Genovese remains a landmark case for the ECtHR’s approach on the right to citizenship.

In the case of Ramadan v Malta, the Court found that not only the refusal of the acquisition of citizenship could violate the right to private life but also its revocation:

> [t]he loss of citizenship already acquired or born into can have the same (and possibly a bigger) impact on a person’s private and family life. [...] Thus, an arbitrary revocation of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of its impact on the private life of the individual. (emphasis added)

Nevertheless, the ECtHR rejected a violation of the ECHR arguing that the withdrawal of nationality due to fraudulent acquisition was not arbitrary. The fact that the applicant was possibly left stateless by the Maltese decision

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505 ibid 48. The Court did not consider it necessary to examine whether there has also been a discrimination on the basis of the parent’s sex, ibid 50.

506 Genovese v Malta (n 504) para 33.

507 ibid.

508 ibid 49.

509 See also Gerard-René de Groot and Olivier Vonk, ‘Nationality, Statelessness and ECHR’s Article 8: Comments on Genovese v Malta’ (2012) 14 European Journal of Migration and Law 317, 317; Zimmermann and Landefeld (n 489) 99.

510 Ramadan v Malta (n 444).

511 ibid 85.

512 ibid 86. The outcome of the ruling has, however, been criticized. See Marie-Bénédicte Dembour, ‘Ramadan v Malta: When Will the Strasbourg Court Understand That Nationality Is a Core Human Rights Issue?’ (Strasbourg Observers, 22 July 2016) <http://blogs.brighton.ac.uk/humanrights/2016/07/22/ramadan-v-malta-when-will-the-strasbourg-court-understand-that-nationality-is-a-core-human-rights-issue/>.
did not change that outcome.\textsuperscript{513} Similarly, in the case of \textit{Fehér and Dolník v Slovakia} it found that:

\[\text{Since the Convention guarantees no right to nationality, the question}
\text{whether a person was denied a State's nationality arbitrarily in a way sus-
\text{ceptible of raising an issue under the Convention is to be determined}
\text{with reference to the terms of the domestic law.}\textsuperscript{514}\]

In the case of \textit{Usmanov v Russia}, the Court consolidated its line of case on
revocation of nationality.\textsuperscript{515} The case concerned a man whose Russian citizen-
ship was annulled ten years after his naturalization, as he had not informed
the authorities about his siblings when applying for citizenship. The applicant
argued that the annulment of his Russian citizenship and his removal from
Russian territory violated Article 8 \textit{ECHR}.\textsuperscript{516} In its judgment, the ECtHR reiter-
ated the criteria for revocation of nationality and clarified that it applies a two-
step test to determine whether there has been a breach of the Convention: first
it looks at the consequences for the individual concerned to establish whether
there has been an interference with the right to private life, in a second step
it assesses whether the revocation has been arbitrary.\textsuperscript{517} In order to deter-
mine arbitrariness, the Court examines whether the measure in question
was in accordance with the law, accompanied by procedural safeguards, sub-
ject to judicial review and whether the authorities had acted diligently and
swiftly.\textsuperscript{518} Applying this two-step test to the case at hand the Court found that
the annulment of his Russian citizenship indeed amounted to an interference
with Article 8 \textit{ECHR}, given it deprived him of any legal status in Russia, left
him without valid identity documents and ultimately led to his removal from
Russia and that it was arbitrary as the legal framework was excessively formal-
istic and failed to give the individual adequate protection against arbitrary
interference.\textsuperscript{519} Hence, the annulment of citizenship in the case of \textit{Usmanov v
Russia} amounted to a violation of Article 8 \textit{ECHR}.\textsuperscript{520}

\begin{thebibliography}{99}
\bibitem{513} Ramadan \textit{v Malta} (n 444) para 92.
\bibitem{514} Fehér and Dolník \textit{v Slovakia} (n 447) para 36.
\bibitem{515} Usmanov \textit{v Russia} [2020] ECtHR Application No. 43936/18.
\bibitem{516} \textit{ibid} 43.
\bibitem{517} \textit{ibid} 53.
\bibitem{518} \textit{ibid} 54.
\bibitem{519} \textit{ibid} 59 ff.
\bibitem{520} \textit{ibid} 71.
\end{thebibliography}
In principle, these criteria apply to all cases of deprivation of citizenship. However, in cases concerning deprivation of nationality in the context of national security, the ECtHR has so far granted the states a very wide margin of discretion.\footnote{See on the reception of this practice in the Member States eg Swiss Federal Administrative Court, F-70/3/2017, (n 498); Swiss Federal Court, 1C_457/2021, Urteil vom 25. März 2022 [2022]; Council of State of the Netherlands (Raad van State), Judgment of 30 December 2020, ECLI:NL:RVS:2020:3045 [2022]; Supreme Court of the United Kingdom, R (on the application of Begum) (Appellant) v Special Immigration Appeals Commission (Respondent), R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant), Begum (Respondent) v Secretary of State for the Home Department (Appellant), [2022] UK Supreme Court [2021] UKSC 7 para 64. See also Louise Reyntjens, ‘Citizenship Deprivation under the European Convention-System: A Case Study of Belgium’ (2019) 1 Statelessness and Citizenship Review 263.} In most of these cases the Court denied a violation of the Convention, arguing that the deprivation of nationality was not arbitrary given the severity of the (terrorist) acts committed, the respect for procedural guarantees, the fact that the deprivation order was not automatically followed by a removal order and that it did not result in statelessness.\footnote{522} Highly problematic in that respect seems in particular the reasoning of the Court in the case of \textit{Ghoumid and others v France} where it argued that “terrorist violence is in itself a grave threat to human rights” and thereby seemed to imply that this results in a lower threshold of arbitrariness and diminishes the importance of citizenship as part of a person’s social identity.\footnote{Ghoumid v France (n 522) para 50. See also Johansen v Denmark (n 522) para 70.}

Moreover, methodologically, the reasoning of the Court in cases concerning the right to citizenship under Article 8 ECHR and its focus on arbitrariness is somewhat inconsistent and does not follow the usual approach of the Court to cases concerning a violation of the right to private or family life.\footnote{524} The Court...
thereby creates a lower standard for cases concerning citizenship under Article 8 ECHR where the threshold for a violation is arbitrariness and not, as implied by Article 8, an interference which is not in accordance with the law and not necessary in a democratic society. The current approach of the ECtHR to cases concerning nationality — especially in a counter-terrorism context — therefore questions the Courts actual willingness to recognize nationality as a core human rights issue. Marie-Bénédicte Dembour, for example, is not convinced that the Court really changed its viewpoint that nationality matters generally fall outside its radar. Equally critical of the Court’s timid approach to nationality matters is Judge Pinto de Albuquerque. In a dissenting opinion to the judgment in *Ramadan v Malta*, he criticized that the Court failed to revisit its own insufficient case-law on the right to citizenship. He argued that:

> In sum, the now well-established prohibition of arbitrary denial or revocation of citizenship in the Court’s case-law presupposes, by logical implication, the existence of a right to citizenship under Article 8 of the Convention, read in conjunction with Article 3 of Protocol No. 4. Furthermore, a systemic interpretation of both provisions in line with the Council of Europe standards on statelessness warrants the conclusion that State citizenship belongs to the core of an individual identity. [...] taking into account the Convention’s Article 8 right to an identity and to State citizenship [...] States parties to the Convention have a negative obligation not to decide on the loss of citizenship if the person would thereby become stateless and a positive obligation to provide its citizenship for stateless persons, at least when they were born — or found in the case of a foundling — in their respective territories, or when one of their parents is a citizen.

Nevertheless, overall, the case law of the Court on citizenship, as part of a person’s social identity and thus of a person’s private life, in the meantime is quite well-established. It also expanded the scope of the citizenship-dimension under the right to private life, from only covering arbitrary denial of citizenship

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525 Dembour, *When Humans Become Migrants* (n 43) 145 f. See also Dembour, ‘Ramadan v Malta’ (n 512).

526 European Court of Human Rights, ‘Dissenting Opinion Ramadan v Malta’ (n 458) para 1.

527 ibid.

to including also the arbitrary refusal of a request to renounce citizenship — and thus to change citizenship — loss of citizenship, denial of citizenship that is not arbitrary and any discrimination in citizenship matters. Thus, while the ECHR thus does not guarantee a right to nationality as such, the ECtHR has over the years effectively recognized the human rights dimension of citizenship as part of the right to private life. It remains to be seen how this jurisprudence will evolve in the future.

2.2.1.3 Other Council of Europe Instruments

A Convention on the Reduction of Cases of Multiple Nationality

The Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality of 1963 was the first instrument on nationality adopted within the framework of the Council of Europe. It aimed at avoiding conflicts between nationality regimes and preventing multiple nationality. It does not have a special focus on individual rights. In order to prevent multiple nationality it states that individuals shall lose their former nationality if they acquire the new one. Implicitly the Convention, thereby, acknowledges that individuals must be able to change their nationality and states have an obligation to allow for the renunciation of nationality and recognition of the new nationality.

The Second Protocol amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality further loosened the strict approach of the 1963 Convention. It allows the retention of the nationality of origin and permits dual citizenship in cases of second-generation migrants, binational marriages if one spouse acquires the nationality of the other and children of binational couples. This amendment indirectly amounts to the recognition of dual nationality. However, the Second Protocol does not grant an enforceable individual right to

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529 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, 6 May 1963, ETS No. 43 (‘Convention on the Reduction of Multiple Nationality’, ‘1963 Convention’).


531 Article 1(1).

532 Article 2.


534 The provisions only apply to situations where the nationalities of two or more contracting states are at stake.

535 de Groot and Vonk (n 74) 220.
dual nationality, but merely allows state parties to permit dual nationality.\textsuperscript{536} To sum up, the 1963 Convention and its Protocols have limited significance for the protection of the right to nationality.

\textbf{B  Convention on the Avoidance of Statelessness in Relation to State Succession}

The youngest instrument adopted within the framework of the Council of Europe is the Convention on the Avoidance of Statelessness in Relation to State Succession of 2006.\textsuperscript{537} Building on the ECN, the Convention aims at preventing, or at least reducing statelessness by setting up more detailed rules for the acquisition of nationality in the context of state succession.\textsuperscript{538} Its substantive scope is limited to the context of state succession.\textsuperscript{539} As Roland Schärer notes, this limitation upon the scope of the instrument had the advantage of facilitating a consensus between the state parties, despite the relatively clearly defined obligations for the member states set out in the Convention.\textsuperscript{540}

The basic provision of the 2006 Convention is Article 2 stating that:

\begin{quote}
Everyone who, at the time of the State succession, had the nationality of the predecessor State and who has or would become stateless as a result of the State succession has the right to the nationality of a State concerned, in accordance with the following articles.
\end{quote}

According to Article 5, the right to nationality applies to everyone who, at the time of the succession, had both the nationality of a predecessor state and was a habitual resident or had another appropriate connecting factor to the territory of the successor state.\textsuperscript{541} The main connecting factor for acquiring

\textsuperscript{536} Moreover, the Protocol was only ratified by three states, one of which denounced its membership later on, see the list of signatures and ratifications, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/149/signatures?p_auth=Wvb26RGY>.

\textsuperscript{537} The Convention has so far only been ratified by seven states, see the list of signatures and ratifications, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/200/signatures?p_auth=Xr4U7QYH>.


\textsuperscript{539} See also de Groot and Vonk (n 74) 333.

\textsuperscript{540} Schärer (n 538) 34.

\textsuperscript{541} Article 5. Other appropriate connections include nationality of a predecessor state, birth on the territory or last habitual residence.
nationality under the Convention is habitual residence. In principle, according to the general presumption of international law, the population of a territory shall thus follow the change of sovereignty over the territory.542 The predecessor state shall not withdraw nationality from its nationals during the succession if they would otherwise become stateless.543 Together, the right to acquire the nationality of the successor state for habitual residence for those who would otherwise be stateless and the prohibition of withdrawal of nationality in cases of statelessness, contribute to the prevention of statelessness.544

Overall, the Council of Europe Convention on the Avoidance of Statelessness is of limited relevance to the protection and enforcement of the right to nationality. While it does stipulate the right to nationality, its scope remains limited to the prevention of statelessness occurring in the context of state succession. Thus, the 2006 Convention also falls below the standards proposed in the ILC Draft Articles on Nationality of 1999, which stipulate a right to nationality in the context of state succession irrespective of the risk of statelessness.545

C  Resolutions and Recommendations of Council of Europe Bodies
The bodies of the Council of Europe — namely the Committee of Ministers and the Parliamentary Assembly (PACE) — have repeatedly dealt with nationality matters. The PACE adopted several recommendations dealing with statelessness. In particular, the prevention of childhood statelessness, the equality of women in nationality matters and the avoidance of multiple nationality.546 In Recommendation 696 (1973) the PACE recalled the right to nationality as protected by the UDHR and emphasized the importance of an effective nationality for the individual’s protection and for the exercise of her personal rights and freedoms.547 In Recommendation 1981 (1988) it noted “that the nationality of a

543 Article 6.
544 See for a more thorough discussion Schärer (n 538) 35 f.
545 See on the ILC Draft Articles on Nationality (n 362) Chapter 4, II.1.3.2.
547 PACE, ‘Recommendation 696 (1973)’ (n 546).
person is not only an administrative matter, but also an important element of the dignity and of the cultural identity of human beings. Recommendation 564 (1969) links the issues of forced migration and refugee integration with nationality matters and invites member states to facilitate naturalization of refugees and stateless persons. In particular, states should take a liberal approach to the integration of refugees in the host country and make:

> every effort to remove, or at least reduce, legal obstacles to naturalisation, such as the minimum period of residence when it exceeds five years, the cost of naturalisation fees when it exceeds the financial possibilities of the majority of refugees, the length of time elapsing between the receipt of applications for naturalisation and their consideration and the requirement that refugees should prove loss of their former nationality.

Moreover, states should enable refugee children to acquire nationality at birth and refugee youth to obtain the nationality of their country of residence at their request by age of majority, at the latest. Thus, from an early stage, the PACE thus from an early stage linked access to citizenship to questions of refugee and migrant integration. This was, clearly, a different approach to other organizations, which first and foremost saw nationality matters in the context of statelessness.

In 2014, the PACE adopted Resolution 1989 (2014), which was concerned with access to nationality and the effective implementation of the European
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The Parliamentary Assembly notes the close link between nationality and human rights and the rule of law and recalls nationality as the right to have rights. It calls upon states to take measures to prevent and eliminate statelessness, including ensuring the automatic acquisition of nationality for children born on the territory who would otherwise be stateless. Moreover, it recommends facilitating access to nationality (naturalization) for long-term residents and ensuring that naturalization requirements are not excessive or discriminatory.

Most recently, the Parliamentary Assembly adopted Resolution 2263 (2019) on the withdrawal of nationality as a measure to combat terrorism. The

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555 Ibid., para 5.2. The eradication of childhood statelessness is also the subject of Resolution 2099 (2016) which calls upon states to ensure that children born on the territory who would otherwise be stateless are granted nationality and that stateless persons have the possibility of facilitated naturalization, see Parliamentary Assembly of the Council of Europe, ‘Resolution 2099 (2016) on the Need to Eradicate Statelessness of Children’ (PACE 2016) para 12.2.2. and 12.2.3.


560 Parliamentary Assembly of the Council of Europe, ‘Resolution 2263 (2019) on Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach?’ (PACE 2019). The Resolution is complemented by Recommendation 2145 (2019) which recommends the Committee of Ministers to prepare a study on national legislation allowing for the deprivation of nationality and to set up draft guidelines on the criteria for the deprivation of nationality and other counter-terrorism measures, see Parliamentary Assembly of the Council of Europe, ‘Recommendation 2145 (2019) Withdrawing Nationality as a
Assembly expressed its concern that some states consider nationality as a privilege and not a right.\textsuperscript{561} The Resolution calls upon states to refrain from any deprivation of nationality that could be arbitrary or discriminatory.\textsuperscript{562} It stresses that:

\begin{quote}
[t]he use of nationality deprivation must in any case be applied in compliance with the standards stemming from the European Convention on Human Rights and other relevant international legal instruments. Any deprivation of nationality for terrorist activities shall be decided or reviewed by a criminal court, with full respect for all procedural guarantees, shall not be discriminatory and shall not lead to statelessness; it shall have suspensive effect and shall be proportionate to the pursued objective and applied only if other measures foreseen in domestic law are not efficient.\textsuperscript{563}
\end{quote}

The Committee of Ministers, for its part, dealt with similar issues. The main topics were the nationality of spouses of binational marriages and their children,\textsuperscript{564} the acquisition of nationality for refugees and migrants,\textsuperscript{565} and the avoidance of statelessness.\textsuperscript{566} Recommendation No. R (83) 1 of 1983 addresses the situation of stateless nomads and nomads of undetermined nationality in Europe.\textsuperscript{567} The Recommendation notes that many nomads in Europe experience difficulties regarding their legal status because they lack a sufficient link

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{561}Pace, ‘Resolution 2263 (2019)’ (n 560), para 5.
\item \textsuperscript{562}Ibid., para 9.
\item \textsuperscript{563}Ibid., para 7.
\item \textsuperscript{564}Council of Europe, Committee of Ministers, ‘Resolution (77) 12 on the Nationality of Spouses of Different Nationalities’ (Committee of Ministers 1977); Committee of Ministers, ‘Resolution (77) 13 on the Nationality of Children Born in Wedlock’ (Committee of Ministers 1977).
\item \textsuperscript{565}Council of Europe, Committee of Ministers, ‘Resolution (70) 2’ (n 549); Committee of Ministers, ‘Recommendation No. R (84) 9’ (n 552); Committee of Ministers, ‘Recommendation No. R (84) 21’ (n 549).
\item \textsuperscript{566}Council of Europe, Committee of Ministers, ‘Recommendation No. R (99) 18 on the Avoidance and the Reduction of Statelessness’ (Committee of Ministers 1999).
\item \textsuperscript{567}Council of Europe, Committee of Ministers, ‘Recommendation No. R (83) 1 on Stateless Nomads and Nomads of Undetermined Nationality’, 22 February 1983.
\end{enumerate}
\end{footnotesize}
of nationality or residence to a state.\textsuperscript{568} It calls upon states to facilitate the establishment of a link with a state for stateless nomads or nomads of undetermined nationality based on the place of birth, the origin of the immediate family, habitual residence, frequent periods of residence or the lawful presence of immediate family or nationality of family members.\textsuperscript{569}

The Committee of Ministers also adopted a recommendation to promote the new European Convention on Nationality.\textsuperscript{570} The Recommendation, \textit{inter alia}, calls upon states to apply the principles of the ECN, including the principle that access to the nationality of a state should be possible whenever a person has a genuine and effective link with that state, that nationality should not be arbitrarily deprived and that deprivation should not result in statelessness.\textsuperscript{571} Moreover, it recommends that states take the genuine and effective link of a person to a state and the gravity of the facts into account when considering the deprivation of nationality due to fraudulent conduct, false information or concealment of relevant facts.\textsuperscript{572}

The Committee of Ministers reaffirmed these principles ten years later in its Recommendation (2009)13 on the nationality of children.\textsuperscript{573} The appendix to the Recommendation lists principles concerning the nationality of children that should be implemented in order to reduce childhood statelessness and improve children's access to the nationality of their parents, their country of birth and residence.\textsuperscript{574} It calls upon states to provide for the acquisition of nationality either \textit{jure sanguinis} or \textit{jure soli} if a child would otherwise be stateless.\textsuperscript{575} States should provide that children who are nevertheless stateless have the right to apply for their nationality after lawful and habitual residence after a maximum of five years.\textsuperscript{576} Moreover, states should ensure that children who are born on member state' territory to a foreign parent with lawful and habitual residence have facilitated access to nationality.\textsuperscript{577} In cases of second and

\textsuperscript{568} \textit{Ibid.}, preamble.
\textsuperscript{569} \textit{Ibid.}, para 2. See also Article 8 of the AU Draft Protocol on Nationality, below Chapter 4, II.2.3.2.
\textsuperscript{570} Council of Europe, Committee of Ministers, ‘Recommendation No. R (99) 18’ (n 566).
\textsuperscript{571} \textit{Ibid.}, para 1.4, i., b., c. and d.
\textsuperscript{572} \textit{Ibid.}, para 1.4, ii., c.
\textsuperscript{574} Council of Europe, Committee of Ministers, ‘Recommendation (2009)13’ (n 573) para 3.
\textsuperscript{575} \textit{Ibid.}, Appendix, para 1 and 2.
\textsuperscript{576} \textit{Ibid.}, Appendix, para 5.
\textsuperscript{577} \textit{Ibid.}, Appendix, para 17.
third generation migrants, the acquisition of nationality should be more facil
itated, as second and third generation migrants are, as the Recommendation
points out, *per se* integrated in the host society, which itself justifies facilitation
of access to nationality.\footnote{Ibid.}

Thus, both the PACE and the Committee of Ministers recognize the right
to nationality as a human right. In their resolutions and recommendations,
they developed the specific obligations under the right to nationality. They rely
on the ECN, but also on the case law of the ECtHR and universal standards.
The rights and duties proposed by PACE and by the Committee of Ministers,
however, are often aspirational and go beyond the current practice of Council
of Europe member states. The CoE organs, thereby, make an important con
tribution to the codification of the right to nationality at European level. All
in all, the legal framework on the right to nationality under the auspices of
the Council of Europe is well developed. The right to nationality is protected
directly or indirectly in binding treaties and reaffirmed in soft law instruments,
as well as the case law of the ECtHR. While the CoE might be the most import
ant actor for the protection of the right to nationality in Europe, it is not the
only one. The following two subsections shall look at two additional actors: the
OSCE and the European Union.

### 2.2.2 Organization for Security and Co-operation in Europe

The Organization for Security and Co-Operation in Europe (OSCE), for its part,
has also repeatedly reaffirmed the right to nationality in its instruments.\footnote{See for an overview on the work of OSCE on statelessness and nationality UNHCR and OSCE, ‘Handbook on Statelessness in the OSCE Area: International Standards and Good Practices’ (UNHCR 2017) <https://www.osce.org/handbook/statelessness-in-the-OSCE-area>.}
that no one should be deprived of his or her nationality arbitrarily. In the Ljubljana Guidelines on Integration of Diverse Societies of 2012, the OSCE
confirms the commitment for the protection of the right to nationality.\footnote{Organization for Security and Co-operation in Europe, ‘The Ljubljana Guidelines on Integration of Diverse Societies’ (OSCE 2012) <https://www.osce.org/hcnm/ljubljana-guidelines>. The Guidelines are not binding but they illustrate the commitment within the framework of the OSCE to protect the rights of minorities. See on the
Guidelines reaffirm that the right to citizenship from the moment of birth is part of international human rights law and that “everyone has the right to a citizenship”. States should avoid statelessness and “consider granting citizenship to persons who have been de jure or de facto stateless for a considerable amount of time, even when other objective grounds may not be present” (original emphasis). Additionally, the Guidelines link the right to citizenship to integration of non-citizens and social cohesion in migration societies:

The long-term presence of a significant number of persons without citizenship in a State runs counter to the integration of society and potentially poses risks to cohesion and social stability. It is therefore in the interest of the Stat to provide persons habitually residing on its territory over a prolonged period of time with the opportunity to naturalize without undue obstacles and to actively promote their naturalization.

Interestingly, the Guidelines also call upon states to respect the principles of friendly, good neighborly relations and territorial sovereignty when granting access to citizenship based on cultural, historical or familial ties. Against that background, it is also not surprising that the Guidelines take a positive stance on multiple citizenship, particularly when acquired at birth.

While not being as prominent as instruments adopted under the auspices of the CoE, the instruments adopted within the framework of the OSCE add a dimension of security to the discussion about the right to nationality. The recognition of the right to nationality in OSCE instruments highlights how important a rights-based regulation of citizenship is to secure stable and democratic societies and achieve social cohesion.

\footnotesize{importance of the OSCE as an extra-conventional human rights organ also Kälin and Künzli, Menschenrechtsschutz (n 88) 309.}
\footnotesize{Organization for Security and Co-operation in Europe, ‘Ljubljana Guidelines’ (n 582) para 34.}
\footnotesize{ibid 35.}
\footnotesize{ibid.}
\footnotesize{ibid 36. This point was already raised in the Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations of 2008, which call upon states to ensure that the conferral of citizenship respects the principles of friendly, including good neighbourly, relations and territorial sovereignty, and to refrain from conferring citizenship en masse. See Organization for Security and Co-operation in Europe, ‘The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations’ (OSCE 2008) 7 <https://www.osce.org/hcnm/bolzano-bozen-recommendations>.}
\footnotesize{Organization for Security and Co-operation in Europe, ‘Ljubljana Guidelines’ (n 582) para 37.}
2.2.3 European Union

Any discussion about nationality in a European context must also have a look at European Union (EU) and the regulation of citizenship in EU law. In EU law, nationality matters are primarily assessed in relation to EU citizenship. The legal status of EU citizenship and its relationship with national citizenship is complex and multifaceted, as is often discussed in the literature. EU citizenship, introduced by the Treaty of Maastricht in 1992, is a unique form of membership to a supranational, sui generis legal order. According to the CJEU, EU citizenship is “the fundamental status of nationals of the Member States”. As enshrined in Article 20(1) of the Treaty on the Functioning of the European Union:

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588 It is telling that the EU Charter of Fundamental Rights does not address citizenship, see Charter of Fundamental Rights of the European Union, 26 October 2012, OJ C 326/391 (‘EUCFR’).


Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Even though EU citizenship, according to Article 20(2) TFEU, creates independent rights and duties, it is dependent on the possession of and thus additional to national citizenship. As the Advocate General Maduro held in its Opinion to the Rottman case, “there is no autonomous way of acquiring and losing Union citizenship.”592 This being said, there is also no autonomous right to EU citizenship independent of national citizenship.593 The question whether an individual possesses national citizenship, however, is determined by domestic law of member states.594 Even though the CJEU has developed certain criteria and principles that have to be observed in the regulation of acquisition and loss of citizenship, member states still have the exclusive competence to determine the conditions.595 The obligation to observe


595 AG Opinion Rottman (n 592) para 17; JY v Wiener Landesregierung (n 590) para 54. See also Kruma (n 589) 133. EU member states’ competence in citizenship matters is well illustrated by the controversy around the investment citizenship regimes in Bulgaria, Cyprus and Malta under which foreign investors can acquire national citizenship upon a certain investment while regular naturalization requirements are waived or softened. With national citizenship the investor automatically acquires EU citizenship. This practice ultimately results in EU citizenship being for sale for foreign investors. The EU Commission has reacted critically, arguing that these schemes undermine the very concept of EU citizenship and raising specific concerns relating to security, money laundering, tax evasion and transparency, see European Commission, ‘Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Investor Citizenship and Residence Schemes in the European Union’ (European Commission 2019) COM(2019) 12 final <https://ec.europa.eu/info/sites/info/files/com_2019_12_final_report.pdf>. In 2020 the EU Commission moreover opened infringement procedures based on Article 258 TFEU against Malta and Cyprus for its investor citizenship schemes.
EU law includes an obligation to adhere to international (human rights) law.\textsuperscript{596}

In the case of \textit{Tjebbes and others v The Netherlands} the CJEU was called to examine the lawfulness of a provision that foresaw that dual nationals would automatically lose their Dutch nationality, and with it Union citizenship, if they reside outside the Netherlands and the EU for an uninterrupted period of more than ten years.\textsuperscript{597} The Court confirmed that it is legitimate for member states “to take the view that nationality is the expression of a genuine link between it and its nationals, and therefore to prescribe that the absence, or the loss, of any such genuine link entails the loss of nationality”.\textsuperscript{598} Considering that the Dutch rule does not apply if the person concerned would become stateless and that there is the possibility to retain nationality by declaration, the CJEU concluded that EU law does not preclude such automatic loss of national citizenship even if it entails the loss of EU citizenship.\textsuperscript{599} However, national authorities must have due regard to the principle of proportionality concerning the consequences of the loss for the person concerned and her family.\textsuperscript{600} “The loss of nationality of a Member State by operation of law”, so the Court stated, “would be inconsistent with the principle of proportionality if the relevant national rules did not permit at any time an individual examination of the consequences of that loss for the persons concerned from the point of view of EU law”.\textsuperscript{601} The CJEU’s ruling in \textit{Tjebbes} is largely in line with the previous case law of the court on the relationship between EU and national citizenship.\textsuperscript{602} What is interesting about the case, however, is the proportionality assessment, which adds a rights perspective.\textsuperscript{603} Even though it is legitimate for the state to foresee the loss of nationality, such a rule is an interference with individual rights and must be carefully weighed and justified. The proportionality requirement in citizenship cases was further strengthened by the CJEU in the case of \textit{JY v Wiener Landesregierung}.\textsuperscript{604} The case raised questions regarding the relationship between naturalisation procedures and EU citizenship. The

\begin{itemize}
\item \textsuperscript{596} See Rottman (n 590) para 53. See on the limitations on EU member states’ sovereignty in nationality matters derived from the ECN also Hall (n 398) 598.
\item \textsuperscript{597} Tjebbes (n 593). See also Caia Vlieks, ‘Tjebbes and Others v Minister van Buitenlandse Zaken: A Next Step in European Union Case Law on Nationality Matters?’ (2019) 24 Tilburg Law Review 142.
\item \textsuperscript{598} Tjebbes (n 590) para 35.
\item \textsuperscript{599} ibid 39.
\item \textsuperscript{600} ibid 40.
\item \textsuperscript{601} ibid 41.
\item \textsuperscript{602} Vlieks (n 597) 146.
\item \textsuperscript{603} See also Chapter 5, iii.7.
\item \textsuperscript{604} JY v Wiener Landesregierung (n 590).
\end{itemize}
woman concerned, an Estonian national living in Austria, had her Estonian citizenship revoked in view of acquiring Austrian nationality by naturalization. Even though the Austrian authorities had already assured that she would be naturalized, she was ultimately rejected Austrian nationality for committing traffic offences — a decision which deprived her of her Union citizenship and left her stateless.\textsuperscript{605} The CJEU ruled that the Austrian authorities failed to have due regard to the principle of proportionality. The consequences of the refusal to grant JY Austrian nationality were so significant for her, the normal development of her family and professional life and had the effect of making her lose the status of Union citizen that they did not appear to be proportionate to the gravity of the offences committed.\textsuperscript{606}

De Groot and Vonk identify four additional limitations of member states’ autonomy in nationality matters based on the case law of the CJEU:

1. The nationality of a Member State cannot be lost for the sole reason of using the free movement rights that follow from one’s European citizenship;
2. In order to comply with Article 4(2) TEU [Treaty on European Union]\textsuperscript{607}, nationality cannot be accorded to large numbers of non-Member State citizens without consultation of the EU;
3. EU law is violated if a Member State’s provisions on the acquisition and loss of its nationality are contrary to international law. The different Member States cannot, for example, accept the loss of Member State nationality on grounds which violate international law if this loss entails that someone ceases to be a European citizen;
4. Lack of coordination of the nationality laws of the Member States may lead to a violation of EU law. This ground for violation of EU law may be illustrated by way of the CJEU’s Rottmann [sic] ruling.\textsuperscript{608}

It would go beyond the scope of this study to discuss EU citizenship and its relationship to national citizenship in more detail. Regarding the question at hand, the right to nationality in international law, this short side note nevertheless allows for the conclusion that EU law does not, as such, guarantee a right to citizenship — neither to EU citizenship nor to national citizenship of an EU member state. The obligation to respect EU law and international law does, however,
indirectly reinforce the general obligation to respect international human rights law, including the right to nationality and the principle of proportionality. Thus, while EU law does not directly protect the right to nationality, it recognizes the human rights dimension of citizenship, and with EU citizenship — as a unique form of supranational citizenship — it has significantly contributed to a novel, more individual rights oriented understanding of citizenship.

To sum up, there are a number of instruments at the European level that codify the right to nationality — some of them directly, such as those within the framework of the Council of Europe, and some indirectly, by recognizing the rights-dimension of nationality matters. In particular, the ECN’s comprehensive codification of relevant standards relating to acquisition and loss nationality and the innovative provisions on naturalization and nationality procedures serve as an important model for the regulation of nationality internationally. Nevertheless, the European system falls below the benchmark set by Article 20 ACHR. What is absent in the framework of the Council of Europe is an enforceable, general right to nationality. This lacunae is not closed by the ECHR, which does not include a right to nationality. However, the Convention system, at least, offers indirect protection of the right to nationality through the case law established by the ECtHR under the right to private life, as according to Article 8 ECHR. EU citizenship, finally, has a special position as a status sui generis within the EU system of free movement and is only indirectly relevant for the discussion on the right to nationality.

2.3 Africa
At first glance, the system of protection of the right to nationality within the African human rights framework seems relatively weak. The main regional human rights instruments do not enshrine a right to nationality. However, several initiatives deserve further attention. The developments within the African Union are indicative of a progressive and innovative interpretation of nationality and nationality rights. The developments must be seen in the particular historical context of the African continent, where “the initial establishment of borders by colonial powers, has given questions of nationality and statelessness particular characteristics” and where matters of citizenship and belonging have contributed to many conflicts.

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610 African Union, Draft Protocol to the African Charter on Human and Peoples’ Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in
The following section will first discuss the right to nationality within the framework of the African Charter on Human and Peoples’ Rights (ACHPR) (11.2.3.1), then examine the draft for a Protocol on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness, which is currently being negotiated (11.2.3.2) and finally turn to the framework of the African Charter on the Rights and Welfare of the Child, which entails a specific right to nationality for children (11.2.3.3). The analysis reveals an innovative approach to the protection of the right to nationality, which has been strongly influenced by the case law of the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights (ACTHPR).

### 2.3.1 African Charter on Human and Peoples’ Rights

The main human rights instrument on the African continent is the African Charter on Human and Peoples’ Rights. Among its broad catalogue of civil, political, economic, social, cultural and collective rights the ACHPR does

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The section will not discuss the sub-regional level, namely the initiatives within the Economic Community of West African States (ECOWAS) and the Abidjan Declaration and the Banjul Plan of Action, which both address statelessness. See also ECOWAS, ‘Nationality and Statelessness in West Africa — Background Note’ (ECOWAS 2017) 5 <https://www.unhcr.org/protect/statelessness/591205ac7/statelessness-conference-2017-background-note-english.html>.

The ACmHPR and the ACTHPR form the institutional framework for individual complaints under the ACTHPR. While the ACmHPR can only make recommendations, the Court has the competence to adopt binding judgments. Before the Court not only the rights enshrined in the African Charter on Human and Peoples’ Rights can be invoked, but all human rights treaties ratified by a state party. See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd ed, Oxford University Press 2019) 207.

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itself not enshrine a right to nationality. Other instruments adopted within the framework of the Charter that address nationality matters directly equally fall short of actually protecting a right to nationality. An exception, however, is Resolution No. 234, adopted by the ACmHPR in 2013, dealing with the right to nationality. Referring to the relevant international and regional legal framework the Resolution reaffirms:

the right to nationality of every human person is a fundamental human right implied within the provisions of Article 5 of the African Charter on Human and Peoples’ Rights and essential to the enjoyment of other fundamental rights and freedoms under the Charter.

The Resolution calls upon states to refrain from taking discriminatory decisions in nationality matters, to observe minimum procedural standards to avoid arbitrary decisions, to ensure judicial review, to ratify all relevant international and regional instruments, to ensure civil registration and to prevent and reduce statelessness. It recalls that all children have a right to the nationality of the state in which they were born if they would otherwise be stateless and urges states to prohibit arbitrary denial or deprivation of nationality. The Resolution is not legally binding. However, it mandated

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615 Article 12 ACHPR enshrines different rights relating to migration, namely the right to leave any country and to return, the right to seek asylum and limitations upon expulsion measures as well as a prohibition of mass expulsions, but does not explicitly refer to nationality. See also Darren Ekema Ewumbue Monono, ‘People’s Right to a Nationality and the Eradication of Statelessness in Africa’ (2021) 3 Statelessness and Citizenship Review 33; Manby, ‘Citizenship Law in Africa’ (n 609) 10.

616 Article 6 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa of 7 November 2003 calls upon states to guarantee women the right to retain their nationality or to acquire the nationality of their husbands (let. g). Let. h grants women equal rights to transmit their nationality to their children, “except where this is contrary to a provision in national legislation or is contrary to national security interests”. Hence, the Protocol effectively fails to grant women equal rights in nationality matters, especially regarding the transmission of nationality to their children, see Manby, Citizenship in Africa (n 363) 21.


618 Resolution No. 234 (n 617), Recital 10.

619 Ibid., Recital 11 ff.

620 Ibid., Recital 13.

621 Adjolohoun (n 617) 414.
the African Commission’s Special Rapporteur on Refugees, Asylum Seekers, Displaces and Migrants in Africa to carry out a study on the right to nationality in Africa. Concluding that the African region lacks an effective instrument safeguarding the right to a nationality, the study suggested the adoption of a new Protocol to the ACHPR on that matter.

In the absence of a specific provision on the right to nationality in the ACHPR, the ACmHPR and the ACtHPR have stepped in and regularly address nationality matters indirectly based on other provisions in the Charter. By doing so, the Commission and the Court have made a significant contribution to the development of the right to nationality under the Charter. Many of the cases concerning nationality before the Commission and the Court were complaints against expulsions under Article 12 ACHPR. But other provisions of the Charter — namely the principles of non-discrimination and equality before the law (Articles 2 and 3), the right to human dignity and recognition of legal status (Article 5) and to a fair trial (Article 7) — have also been interpreted by the African Commission in a way that implicitly recognizes the right to nationality.

The central case on nationality before the ACmHPR is the case of John K. Modise v Botswana. The complainant, John Modise, was born in South Africa to a Botswanan father and a South African mother and grew up in Botswana. After he had started a political career in Botswana, Botswanan authorities refused to recognize him as a citizen, declared him an undesirable immigrant and deported him to South Africa, where he spent several years in homelands and in border zones between the two countries. Mr. Modise, inter alia, complained that he should have acquired Botswana nationality by

622 Resolution No. 234 (n 617), Recital 17.
624 Bialosky (n 4) 163.
627 Bialosky (n 4) 185.
628 Modise v Botswana (n 626) para 1.
629 ibid 5. In fact, he was only refused recognition as a citizen after he founded an opposition political party in 1978, see for more details Manby, Citizenship in Africa (n 363) 121.
descent and was unjustly deprived of his real nationality. The Commission concluded that the denial to grant the complainant Botswanan citizenship amounted to a violation of the right to equal protection before the law and the right to respect for human dignity and recognition of legal status under the Charter. Finding that Mr. Modise actually has Botswanan citizenship the ACmHPR then held that the repeated deportation of the complainant from Botswana to South Africa amounted to a violation of his rights. In Modise v Botswana the ACmHPR implicitly acknowledged a right to nationality. If the conditions for acquiring of nationality in domestic law were fulfilled, nationality had to be granted. A denial of nationality in such situations amounts to a violation of the ACHPR. Moreover, the judgment highlights the close link between nationality and the full and effective enjoyment of other human rights, namely also political rights.

The protection against unlawful expulsion was also at stake in the cases of Malawi African Association and Others v Mauritania and Amnesty International v Zambia. The case of Malawi African Association had arisen out of political tensions, during the course of which almost 50,000 persons were deprived of their identity documents, no longer recognized as Mauritanian citizens and expelled to Senegal and Mali. The ACmHPR found that the complainants were deprived of their Mauritanian citizenship in violation of Article 12(1) ACHPR. In addition to finding a violation of the Charter, the Commission recommended that Mauritania, as a positive measure, issued the persons concerned new identity cards to allow them to return to their country. The case of Amnesty International v Zambia concerned two politicians who were deported from Zambia after losing an election in 1991. The Zambian government refused to recognize them as citizens. The ACmHPR found a number of violations of the Charter, including a violation of the right to be heard, as the complainants were not granted access to the procedure.
relating to their citizenship, as well as a violation of Article 12(4) regarding their deportation to Malawi.\footnote{AI v Zambia (n 635) para 44.} The Commission noted that by expelling the victims from Zambia it had arbitrarily removed their citizenship which “cannot be justified”.\footnote{ibid 52.} Finally, it found that Zambia had forced the two victims to live as stateless persons under degrading conditions and without their families which amounted to a violation of their dignity as human being.\footnote{ibid 58.} The cases of \textit{Amnesty International v Zambia} and \textit{Modise v Botswana}, moreover, show how closely citizenship is tied to political rights and to the functioning of democratic structures. This is also illustrated by the case of \textit{Legal Resources Foundation v Zambia},\footnote{Legal Resources Foundation v Zambia [2001] ACmHPR Communication No. 211/98, 7 May 2001 para 3.} which deals with the question whether political rights may be tied to the mode of acquisition of citizenship. The complainant argued that an amendment to the Zambian constitution, according to which the office of president of the country can only be held by a person whose parents both are Zambian by birth or descent, violates the \textit{ACHPR}. The ACmHPR argued that the retroactive limitation of political rights to “indigenous Zambians” — ie persons who were born and whose parents were born in Zambia — is arbitrary and violates Article 13 \textit{ACHPR}.\footnote{ibid 71.} Even though the decision does not directly relate to a right to nationality, it illustrates that states may not make the exercise of passive political rights dependent on certain criteria of citizenship — \textit{in casu} a double \textit{jus soli}.\footnote{The Commission confirmed this approach in the case of \textit{Mouvement ivoirien des droits humains (MIDH) v Côte d’Ivoire} [2008] ACmHPR Communication No. 246/02, 29 July 2008.}

Another central case for the discussion of the right to nationality under the African Charter is the case of \textit{The Nubian Community in Kenya v The Republic of Kenya}.\footnote{The Nubian Community in Kenya v The Republic of Kenya [2015] ACmHPR Communication No. 317/06, 28 February 2015.} The case concerns the citizenship status of the Nubian ethnic minority in Kenya. The complainants argued that the Nubian people have been denied identity documents, which effectively deprived them of the possibility of proving their citizenship and of the benefits tied to that status and rendered them \textit{de facto} stateless.\footnote{ibid 5 f.} Examining whether the denial of identity documents amounted to a violation of human dignity, the Commission referred
to the judgment of the IACtHR in the case of *Yean and Bosico v Dominican Republic*647 and noted that:

nationality is intricately linked to an individual’s juridical personality and that denial of access to identity documents which entitles an individual to enjoy rights associated with citizenship violates an individual’s right to the recognition of his juridical personality. The Commission considers that a claim to citizenship or nationality as a legal status is protected under Article 5 of the Charter.648 (emphasis added)

The ACmHPR then recalled that while states do “enjoy a wide discretion when it comes to determining who qualifies to acquire its nationality”, this discretion is limited by the obligation to prevent statelessness and discrimination.649 Even though Kenya is not a state party to the 1954 Convention or the 1961 Convention, the Commission nevertheless referred to the two Conventions, noting that they “outline the position of international customary law on State obligations to prevent statelessness”.650 It concluded that Kenya failed to take measures preventing members of the Nubian community from becoming stateless and to put in place fair, non-discriminatory and non-arbitrary processes for acquiring identity documents, both of which violated Article 5 ACmHPR.651 The discriminatory treatment faced by members of the Nubian minority resulted in a tenuous citizenship status that left the Nubians in a precarious situation, in violation of other rights in the Charter.652

The same day, the African Commission also issued a decision for the case of *Open Society Justice Initiative v Côte d’Ivoire*.653 The case concerned the concept of ‘ivoirité’, an official policy that stipulated that Ivorian nationality could only be obtained by persons born in Côte d’Ivoire from two Ivorian parents.654 The complainants argued that this policy arbitrarily deprived the ethnic minority of Dioulas of their Ivorian nationality.655 The ACmHPR assessed the Ivorian

647 *Yean and Bosico* (n 395).
648 *The Nubian Community v Kenya* (n 645) para 140.
649 *ibid* 145.
650 *ibid* 146.
651 *ibid* 151.
652 *ibid* 167 f.
654 See *ibid* 4.
655 *ibid* 91.
nationality regime under the prohibition of torture and cruel, inhuman and degrading treatment according to Article 5 ACHPR.\footnote{ibid 95 ff.} The decision of the Commission entails an elaborate discussion of the concept of nationality in the African context and illustrates the complexity of nationality matters in the post-colonial context.\footnote{See for a discussion of the concept of nationality and citizenship in Africa in detail among many Mamdani (n 610); Said Adejumobi, ‘Citizenship, Rights, and the Problem of Conflicts and Civil Wars in Africa’ (2001) 23 Human Rights Quarterly 148; Samantha Balaton-Chrimes, *Ethnicity, Democracy and Citizenship in Africa: Political Marginalisation of Kenya’s Nubians* (Routledge 2016); Bronwen Manby, *Citizenship and Statelessness in Africa: The Law and Politics of Belonging* (Wolf Legal Publishers 2015); Manby, *Citizenship in Africa* (n 363).} The Commission elaborated that “the right to a nationality of any human person is a fundamental right derived from the terms of Article 5 of the Charter and essential for the enjoyment of other fundamental rights and freedoms guaranteed by the Charter”.\footnote{OSI v Côte d’Ivoire (n 653) para 97.} Nationality, according to the Commission, is “the primordial mode of realization of the right to the recognition of legal status”.\footnote{ibid.} Unreasonable laws on the acquisition of nationality, such as those in Côte d’Ivoire, were arbitrary and therefore not consistent with the right to nationality.\footnote{ibid 109.} The ACmHPR then examined the Ivorian nationality code in detail and concluded:

In short, on the right to nationality as a recognition of legal status, the Commission observes that the Ivorian nationality Code establishes original nationality for Ivorians and acquired nationality for foreigners, but fails to clearly define who an outright Ivorian is, who an Ivorian by origin is and who a foreigner is. This way, the Code and laws [...] have prevented access to nationality both theoretically and practically. [...] Consequently, the laws and practices of the Respondent State violate the provisions of Article 5 of the Charter with regard to all victims.\footnote{ibid 138.}

The Commission’s decision in *Open Society Justice Initiative v Côte d’Ivoire* illustrates for how it interprets the concept of nationality, links it to other international legal instruments and the relevant case law of international tribunals and derives a right to nationality directly from Article 5 ACHPR.
The ACTHPR, so far, has only decided one case that touches upon nationality issues. The case of Anudo v Tanzania of 2018 concerned the denationalization and expulsion of a Tanzanian citizen. Tanzanian authorities had confiscated Mr. Anudo’s passport, withdrawn his nationality and expelled him to Kenya, arguing that there were irregularities with his citizenship and that he obtained his passport fraudulently. In Kenya, Mr. Anudo found himself stuck in a no man’s land between the Kenyan and Tanzanian border. The Court reaffirmed states’ sovereignty in granting nationality, and that “the granting of nationality falls within the ambit of the sovereignty of states”. It acknowledged that neither the African Charter nor the ICCPR enshrine a right to nationality, but found that the UDHR guarantees a right to nationality and has been recognized as forming part of customary international law. Thus, “the power to deprive a person of his or her nationality has to be exercised in accordance with international standards, to avoid the risk of statelessness”. According to these standards, so the Court stated, loss of nationality is only permissible if it has a clear legal basis, serves a legitimate purpose under international law, is proportionate to the interest protected and respects procedural guarantees including the right to independent review. In casu, the Court was not convinced by the evidence provided by the Tanzanian government to justify the withdrawal of nationality and found the deprivation to be in violation of Article 15(2) UDHR. The Court, further, found a violation of the right not to be arbitrarily expelled as the expulsion resulted from the arbitrary deprivation of nationality, which violated the principle that a nationality may not be withdrawn for the sole purpose of expelling a person. Finally, the ACTHPR argued that international law requires that citizens, by birth, must have a

662 The case of Youssef Ababou v Morocco in which the applicant also raised complaints relating to nationality issues, including the failure to be issues identity documents, was struck out for lack of jurisdiction as Morocco is not a member state to African Union and has not signed or ratified the ACTHPR Protocol, Youssef Ababou v Kingdom of Morocco [2011] ACTHPR Application No. 007/2011 para 11 ff.
664 Anudo v Tanzania (n 71) para 4.
665 ibid 74.
666 ibid 77.
667 ibid 76.
668 ibid 78.
669 ibid 79.
670 ibid 88.
671 ibid 99 ff.
judicial remedy to challenge decisions concerning their nationality and found Tanzania fell below this standard.\textsuperscript{672} Ultimately, the AChPR not only found a violation of the rights not to be expelled arbitrarily and to be heard under the ACHPR, but also a violation of the prohibition of arbitrary deprivation of nationality under Article 15(2) UDHR and of the right to be heard under Article 14 ICCPR.\textsuperscript{673} An interesting point in the case of Anudo v Tanzania is the way the African Court accepts the right to nationality under Article 15 UDHR to be binding customary international law, and how it links the right to be heard to the withdrawal of nationality. In doing so, it defines certain minimum procedural standards that need to be fulfilled for the deprivation not to be arbitrary. In the absence of a formalized deprivation procedure, moreover, the burden of proof that the individual concerned is not a citizen lies with the state.\textsuperscript{674}

Thus, the Commission and the Court in their jurisprudence, effectively developed a right to nationality under the ACHPR without an explicit basis in the Charter. As shown by the case of Anudo v Tanzania, the right to nationality can even be directly invoked before the institutions of the African Charter on Human and Peoples’ Rights. This clearly strengthens the right to nationality in the African human rights system.

### 2.3.2 Draft Protocol on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa

A new development promises to significantly strengthen the right to nationality in the African human rights system. Based on a proposal by the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa, the member states of the African Union are currently negotiating a protocol to the ACHPR on the right to nationality with the aim of identifying, preventing and reducing statelessness and protecting the right to nationality.\textsuperscript{675} A first draft of this Protocol on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa was published in 2017 and a revised draft and explanatory memorandum released in June 2018.\textsuperscript{676}

\textsuperscript{672} Anudo v Tanzania (n 71).

\textsuperscript{673} ibid 132.


\textsuperscript{675} The process was initiated based on the 2013 Resolution No. 234 (n 617) and the 2015 study on the right to nationality by the Special Rapporteur and, at the time of writing was still ongoing. See also Chapter 4, ii.3.2.i.

\textsuperscript{676} See Manby, Citizenship in Africa (n 363) 22; Ewumbue (n 615) 50.
The current draft foresees 21 substantive provisions that should govern nationality matters in African states. Its purpose is to:

a. Ensure respect for the right to a nationality in Africa;

b. Establish the obligations and responsibilities of States relative to the specific aspects of the right to a nationality in Africa; and

c. Ensure that statelessness in Africa is eradicated.\(^{677}\)

The instrument aims to facilitate the inclusion of individuals in African States, to provide a legal solution for the recognition and exercise of the right to a nationality, to eradicate statelessness and to identify the principles that govern the relationship between individuals and states in nationality matters.\(^{678}\)

It draws, \textit{inter alia}, on the models of the \textsc{ecn} and the \textsc{ilc} Draft Articles on Nationality.\(^{679}\)

Article 3(2) of the Protocol declares the right to nationality to be a general principle. Not only does this right include both a general right to nationality (lit. a) and a prohibition of arbitrary deprivation or denial of recognition of nationality and the right to change one’s nationality (lit. b), it also specifies, that everyone should have the right to the nationality of at least one state to which she has an appropriate connection (lit. c).\(^{680}\) Moreover, it recognizes the principle of the best interests of the child as a primary consideration in nationality matters (lit. d). If adopted, the Draft Protocol would be the first instrument that generally ties the right to nationality to an individual’s actual connections in identifying the state that owes the obligation to grant its nationality. This is a significant change compared to existing instruments.\(^{681}\)

The right to nationality based on an appropriate connection is further developed in the substantive provisions on the acquisition of nationality. In cases, where a child would otherwise be stateless, and in those of second generation migrants, states shall always attribute nationality \textit{jure soli} (Articles 5(1)(b) and (c)).\(^{682}\) Habitual residents must have the possibility to acquire nationality.\(^{683}\) Such acquisition may be made subject to certain conditions, including

\(^{677}\) Article 2 Draft Protocol on the Right to Nationality. See also African Union, ‘Explanatory memorandum’ (n 610) para 1.

\(^{678}\) \textit{ibid.}

\(^{679}\) African Union, ‘Explanatory memorandum’ (n 610) para 9 ff.

\(^{680}\) \textit{ibid} para 19 ff.

\(^{681}\) The Explanatory Memorandum points out that the concept is derived from the \textsc{ilc} Draft Articles on Nationality which applies it in the context of state succession, see \textit{ibid} 25.

\(^{682}\) \textit{ibid} 36.

\(^{683}\) Article 6(1) Draft Protocol.
a residence requirement of a maximum of ten years.⁶⁸⁴ Certain groups shall, moreover, have the possibility of facilitated naturalization. Among these groups are people who already were habitually resident in the state as children, stateless persons and refugees.⁶⁸⁵ Article 8 addresses the specific situation of nomadic and cross-border populations.⁶⁸⁶ For these groups, the Draft Protocol suggests that an appropriate connection can be evidenced by factors such as repeated residence, presence of family members, cultivation of crops, use of water points or grazing sites, burial sites of ancestors and the testimony of members of the community, as well as the expressed will of the person herself (lit. c). This provision is unique and, as the Explanatory Memorandum points out, “recognizes the specific aspects of nationality and statelessness in an African context, where many millions of people follow a nomadic lifestyle, or live in communities divided by a colonial border”.⁶⁸⁷

As the wording of Article 3(2)(c) (“every person has the right to the nationality of at least one state […]”) indicates, the Draft Protocol allows for multiple nationality.⁶⁸⁸ In fact, it obliges states not to prohibit multiple nationality in cases where a child has been attributed multiple nationalities at birth, and in cases where someone acquires another nationality automatically through marriage (Article 11(2)). Moreover, states shall not make the renunciation of another nationality a condition for acquiring nationality if such renunciation is not possible, cannot be reasonably required or exposes the person to the risk of statelessness (Article 6(3)). The Draft Protocol, however, intends to leave states a relatively wide margin of discretion to make distinctions between the modes of acquiring of nationality and between single and dual nationals in the exercise of political rights and the deprivation of nationality (Article 4(3)). Here, the Draft Protocol seems to fall below the standards enshrined in other international instruments that establish absolute prohibitions of discrimination in nationality matters.⁶⁸⁹

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⁶⁸⁴ According to the Explanatory Memorandum most African states require five years of residence, see African Union, ‘Explanatory memorandum’ (n 610) para 49.

⁶⁸⁵ Article 6(2) Draft Protocol. Article 19 specifies that states should facilitate the recognition or acquisition of nationality for stateless persons and persons whose nationality is in doubt to offer them effective protection.

⁶⁸⁶ I e persons who follow a pastoralist or nomadic lifestyle and whose migratory routes cross borders or who live in border regions and whose place of habitual residence cannot be defined clearly, see African Union, ‘Explanatory memorandum’ (n 610) para 77.

⁶⁸⁷ ibid 63.

⁶⁸⁸ ibid 77.

⁶⁸⁹ For example, Article 5 ECN.
Regarding loss or deprivation of nationality, Article 16(1) of the Draft Protocol states that “a State Party shall not provide for the loss of its nationality”. Exceptions to this principle are possible where the recognition or acquisition of nationality has been obtained fraudulently within a maximum ten year period and provided the deprivation would not be disproportionate (Article 16(3)). Deprivation of nationality shall only be possible if nationality was acquired after birth, if it is provided for in a law of general application, and in cases where the person concerned served voluntarily in foreign military forces or was convicted of a crime that is seriously prejudicial to the vital interests of the state concerned (Article 16(4)). Moreover, deprivation of nationality shall not affect family members (Article 16(6)). Arbitrary deprivation, including deprivation on racial, ethnic, religious or political grounds, and on grounds related to the exercise of rights established in the ACHRPR, is absolutely prohibited (Article 16(5)), as is deprivation of nationality resulting in statelessness (Article 16(7)). The latter would also be a novelty compared to current international legal standards.

A number of provisions in the Draft Protocol deal with procedural questions. States shall provide for documents evidencing the entitlement to nationality, such as birth certificates, and for certificates of nationality and documents that are conclusive proof of a person’s nationality, including identity cards and passports (Articles 12 and 13). Article 21 provides that all rules governing recognition, acquisition, loss, deprivation, renunciation, certification or recovery of nationality must be set out in law, be clear and accessible. It also notes that procedures may not be arbitrary, must be processed within a reasonable time and that fees and other procedural requirements must be reasonable. This is an important protection for the principles of due process in nationality matters.690 Article 22, finally, foresees that the African Commission and the African Court will have jurisdiction to hear individual complaints once the Protocol is in force. Thus, compared to the ECtHR, the African Union Protocol would have an effective enforcement mechanism.

The Protocol has not yet been adopted. It is still being negotiated among the member states of the AU and since 2018 there have been no significant developments.691 It remains to be seen if, and if so, in which form the African Union Protocol on Nationality will be adopted.692 If it is adopted without significant

690 African Union, ‘Explanatory memorandum’ (n 610) para 113.
691 The plan to adopt it in 2019 was not realized, see https://www.unhcr.org/ibelong/event/meeting-on-the-african-union-protocol-on-the-right-to-a-nationality-and-the-eradication-of-statelessness/.
692 Manby indicated that the state representatives tried to water down the legal effect of the Protocol, see Manby, Citizenship in Africa (n 363) 22 n 69. See also Manby, ‘Restore the Factory Settings’ (n 674).
changes to the draft, it would be the most comprehensive and specific instrument on nationality besides the European Convention on Nationality.\textsuperscript{693} The Protocol would establish a novel approach to nationality matters, strengthening the right to nationality based on an individual’s connection to a state — irrespective of whether a person is stateless or not.\textsuperscript{694} As Manby writes, it would “radically strengthen rights to belong.”\textsuperscript{695}

2.3.3 African Charter on the Rights and Welfare of the Child

As long as the Protocol on Nationality and Statelessness is not yet in force, the African Charter on the Rights and Welfare of the Child (\textit{ACC})\textsuperscript{696} is the only instrument that explicitly enshrines the right to nationality in the African context.\textsuperscript{697} Article 6 \textit{ACC} guarantees the child’s right to a nationality. Article 6(3) provides that “every child has the right to acquire a nationality”. Article 6(4) specifies how states are supposed to implement this right and prevent statelessness:

State Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth he is not granted nationality by any other State in accordance with its laws.

Article 6 \textit{ACC} follows the model of Article 7 \textit{CRC}.\textsuperscript{698} It introduces a \textit{jus soli}-mechanism for children who would otherwise be stateless, similar to Article 1 1961 Convention.\textsuperscript{699} Even though the wording of Paragraph 4 is relatively vague, the African Committee of Experts on the Rights and Welfare of the Child (\textit{ACERWC}) — the monitoring body to the \textit{ACC} — has interpreted Article 6(4) as an obligation of result: “States Parties need to make sure that all necessary measures are taken to prevent the child from having no nationality.”\textsuperscript{700}

\begin{thebibliography}{99}
\bibitem{693} de Groot and Vonk (n 74) 262.
\bibitem{694} See also Manby, ‘Restore the Factory Settings’ (n 674).
\bibitem{695} Manby, \textit{Citizenship in Africa} (n 363) 317.
\bibitem{697} Manby, \textit{Citizenship in Africa} (n 363) 21.
\bibitem{698} Manby, ‘Citizenship Law in Africa’ (n 609) 10. See also Adjami and Harrington (n 37) 99.
\bibitem{699} See de Groot and Vonk (n 74) 253; Manby, \textit{Citizenship in Africa} (n 363) 21.
\end{thebibliography}
In 2014, the ACERWC adopted a General Comment on Article 6 ACC.701 The Committee notes that the right to a name, the right to birth registration and the right to a nationality guaranteed in Article 6 are interlinked.702 It stresses that the rights in Article 6 constitute the pillars of a person’s identity.703 The possession of a recognized and effective nationality, according to the Committee, is essential for the respect for and fulfillment of other human rights.704 Nationality is a necessary foundation for the exercise of political rights, the freedom of movement, participation in the formal economy and the enjoyment of diplomatic protection.705 Thus, “a State’s compliance with the obligation to prevent and reduce statelessness starts from taking all necessary measures to ensure that all children born on its territory are registered”, irrespective of whether they are eligible for citizenship or not.706 In doing so, states do not have unlimited discretion, but have to respect their international legal obligations.707 As the Committee notes, Articles 6(3) and (4) ACC oblige states to grant their nationality to children born on their territory if they would otherwise be stateless.708 It also stresses the importance of nationality as a form of “recognition as a full participant in the political and social life of the country where a person has been born and lived all his or her life”709 and encourages states to facilitate the acquisition of nationality for children who were not born in on the territory but have arrived as children and grew up there.710

The Committee’s General Comment on Article 6 drew substantively on the Committee’s own jurisprudence on the right to nationality. In its decision on Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian Decent in Kenya v Kenya711 the

702 ibid 3 and 9.
703 ibid 23.
704 ibid 83 f.
705 ibid 84.
706 ibid 23.
707 ibid 87.
708 ibid 88.
709 ibid 89.
710 ibid 92.
711 Children of Nubian Descent v Kenya (n 700).
ACERWC interpreted the child’s right to nationality under the ACC.\textsuperscript{712} The case of the \textit{Children of Nubian Descent in Kenya} was the very first decision on the merits of an individual communication before the Committee. It concerns the nationality of children of Nubian ethnicity in Kenya who were regarded as ‘aliens’ by Kenyan authorities due to their ethnic origins and continue to have an uncertain citizenship status.\textsuperscript{713} Children of Nubian descent often lack birth registration and have major difficulties to obtain identity documents to prove their nationality upon reaching adulthood.\textsuperscript{714} In its decision, the Committee found multiple violations of Articles 6(2), (3) and (4), Article 3, Article 14(2) and Article 11(3).\textsuperscript{715} It noted that children that are not registered are not issued birth certificates and because of that rendered stateless, as they cannot prove their nationality. State parties to the ACC are under the obligation to ensure that all children are effectively registered immediately after birth.\textsuperscript{716} Moreover, the Committee stressed the strong and direct link between birth registration and nationality. Even though Article 6(3) does not explicitly state that every child has the right from his birth to acquire a nationality, a purposive reading and interpretation of the provision suggests that children should have a nationality from birth.\textsuperscript{717} Therefore, the Kenyan practice of leaving Nubian children without a nationality until the age of 18 violates Article 6 ACC and the best interests of the child.\textsuperscript{718} It has an enormously negative impact on children leaving them in a legal limbo and hindering them to freely exercise their socio-economic rights. “Being stateless as a child”, so the Committee, “is generally \textit{antithesis to the best interests of children}” (emphasis added).\textsuperscript{719} Therefore, the Committee found that

although states maintain the sovereign right to regulate nationality, in the African Committee’s view, state discretion must be and is indeed

\begin{itemize}
  \item \textsuperscript{712} See also Bialosky (n 4) 163.
  \item \textsuperscript{713} See also the case on \textit{The Nubian Community in Kenya} of the ACmHPR (n 644), Chapter 4, 11.2.3.1. See on the citizenship status of Nubian Kenyans generally Balaton-Chrimes (n 657).
  \item \textsuperscript{714} The situation is comparable to that of persons of Haitian descent in the Dominican Republic as Bialosky and de Groot and Vonk point out. The Committee itself refers to the judgment of the IACtHR in the case of \textit{Yean and Bosico v Dominican Republic} in its decision, see \textit{Children of Nubian Descent v Kenya} (n 700) para 56. See also Bialosky (n 4) 187; de Groot and Vonk (n 74) 727.
  \item \textsuperscript{715} \textit{Children of Nubian Descent v Kenya} (n 700) para 69.
  \item \textsuperscript{716} ibid 40.
  \item \textsuperscript{717} ibid 42.
  \item \textsuperscript{718} ibid.
  \item \textsuperscript{719} ibid 46.
\end{itemize}
limited by international human rights standards, in this particular case the African Children’s Charter, as well as customary international law and general principles of law that protect individuals against arbitrary state actions. In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid and reduce statelessness.\(^\text{720}\)

The Committee is careful to not to suggest that the Charter would require states to introduce a *jus soli* approach. Nevertheless, in line with the principle of the best interests of the child, it notes that the intent of Article 6(4) is that a state should allow a child to acquire its nationality if it is born on its territory and is not granted nationality by another state.\(^\text{721}\) The merely theoretical possibility that a child might be entitled to acquire the nationality of another state is not enough to abrogate this obligation.\(^\text{722}\)

The conclusion that can be drawn from the foregoing analysis of the right to nationality on the African continent is not straightforward. Nevertheless, the ACmHPR, the ACtHPR and the ACERWC have developed a nuanced case law deriving a right to nationality from other human rights. The drafting of a Protocol to the Charter on Human and Peoples’ Rights on the right to nationality represents a significant step towards the recognition of nationality as a human right and offers an innovative attempt at concretizing states’ obligations under the right to nationality based on one’s appropriate connection, provided it will be adopted. Looking at these developments Africa, as Bialosky writes:

> is perhaps the region most representative of the global shift toward recognition of nationality as a fundamental human right. The attention it has given to the issue of nationality is cause for optimism that any future right to a nationality protected in Africa will be at least as strong as that which is recognized by other regional human rights bodies.\(^\text{723}\)

### 2.4 Middle East and North Africa

In the Middle East and North Africa, the protection of the right to nationality is relatively weak. As Zahra Albarazi notes, the Middle East and North African region “has always had a complicated relationship with the notion of

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\(^\text{720}\) Ibid 48.
\(^\text{721}\) Ibid 50.
\(^\text{722}\) Ibid 51.
\(^\text{723}\) Bialosky (n 4) 189.
nationality and which individuals and groups to determine as nationals. Nevertheless, both the Arab Charter on Human Rights (11.2.4.1) and the Covenant on the Rights of the Child in Islam (11.2.4.2) entail a provision dealing with the right to nationality.

2.4.1 Arab Charter on Human Rights

Article 29 of the revised version of the Arab Charter on Human Rights enshrines the right to nationality. It establishes that:

1. Every person has the right to a nationality, and no citizen shall be deprived of his nationality without a legally valid reason.
2. The State Parties shall undertake, in accordance with their legislation, all appropriate measures to allow a child to acquire the nationality of his mother with regard to the interest of the child.
3. No one shall be denied the right to acquire another nationality in accordance with the applicable legal procedures of his country.

Thus, Paragraph 1 of Article 29 ArCHR enshrines both the right to a nationality and a prohibition of deprivation of nationality without a legally valid reason. Bialosky argues that it should be interpreted synonymously with the notion of arbitrariness. Article 29(2) addresses the right of the child to a nationality. It grants the right of children to acquire the nationality from their mothers “with regard to the interest of the child”. Even though the provision seems to stipulate that women should have (equal) rights in passing on their nationality to their children, this right is limited, in practice, to cases where the father is a foreign national or is stateless. Moreover, the already vague obligation (“shall undertake all appropriate measures”) is further narrowed down

727 The notion of ‘legally valid reason’ has never been defined, due to the lack of a monitoring body or enforcement mechanism to the Charter.
728 Bialosky (n 4) 165.
by reference to domestic legislation, leaving states with wide discretion. The third paragraph of Article 29 ArCHR grants the right to “acquire another nationality”. This right to acquire another nationality implies a right to change one’s nationality, and also to possess two or more nationalities. Again, however, the right is limited by reference to the “applicable legal procedures of his country”. Thus, considering that many Arab states do not allow for dual nationality and some even prohibit the renunciation of nationality, this right seems to be of little practical relevance. Bialosky moreover criticizes that the wording of Article 29(3) “seems to allow for domestic legislation allowing states to deprive citizenship to nationals who acquire a new nationality”. Overall Article 29 ArCHR leaves ample room for state discretion in nationality matters and does not grant individuals any protection beyond the rights already granted at the domestic level.

2.4.2 **Covenant on the Rights of the Child in Islam**

Article 7 of the legally binding Covenant on the Rights of the Child in Islam (crci) enshrines the right of a child to an identity. The provision is inspired by Article 7 and 8 crc. Regarding nationality, Article 7 states the right to have his or her nationality determined (Paragraph 1) and to have safeguarded the elements of one’s identity, including nationality (Paragraph 2). Article 7(2) stipulates that “states shall make every effort to resolve the issue of statelessness for any child born on their territories or to any of their citizens outside their territory”. The provision reflects both *jus soli* and *jus sanguinis* by declaring both the state of birth, as well as the country of nationality of one of the parents responsible for granting the child a nationality. Article 7(3) concerns children of unknown decent or children who are legally assimilated to this status, and explicitly mentions the right of such children to nationality. The provision not only includes foundlings but also children whose parents may be known and are not legally recognized and cannot transmit their nationality to the child. Hence, Article 7 of the Covenant does not grant

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730 Bialosky (n 4) 165.
731 See also de Groot and Vonk (n 74) 331.
732 Albarazi (n 724) 16 f.
733 Bialosky (n 4) 165.
735 de Groot and Vonk (n 74) 332.
736 van Waas, *Nationality Matters* (n 115) 62 n 58.
737 de Groot and Vonk (n 74) 332.
a right to nationality as such, but obliges states to determine the nationality of children born on their territory or to their nationals and to protect them against statelessness.

Even though the scope of both Article 29 ArCHR and Article 7 of the CRC are limited and fall below the standards at universal level, the provisions reflect a certain acceptance of the right to nationality in a region where many people are affected by statelessness, and where discrimination in nationality matters on the basis of gender remains widespread.\textsuperscript{738} Moreover, in February 2018 the Arab League endorsed the Arab Declaration on Belonging and Identity,\textsuperscript{739} an instrument calling upon member states of the Arab League to ensure gender equality in conferring nationality to children and spouses in order to respect the right of the child to a nationality, and for women to acquire, change or retain nationality in conformity with international standards.\textsuperscript{740} It remains to be seen whether this Declaration will contribute to improving the protection of the right to nationality in the Middle Eastern and North African region in the long run.

2.5 Asia and Pacific

In the Asian and Pacific region, finally, there is no binding regional human rights treaty.\textsuperscript{741} Instead, within the framework of the Association of Southeast Asian Nations (ASEAN), the non-binding ASEAN Human Rights Declaration\textsuperscript{742} includes a provision on the right to nationality. Article 18 states:

Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.

\textsuperscript{738} Bialosky (n 4) 165.
\textsuperscript{741} Kälin and Künzli, Menschenrechtsschutz (n 88) 61. Moreover, Asian states have generally been reluctant to ratify international instruments dealing with nationality or citizenship, see Olivier Vonk, ‘Comparative Report: Citizenship in Asia’ (Global Citizenship Observatory (GLOBALCIT) 2017) <http://cadmus.eui.eu/handle/1814/50047>.
\textsuperscript{742} ASEAN Declaration of Human Rights, 18 November 2012 (‘ASEAN Declaration’).
Article 18 of the ASEAN Declaration mirrors Article 15 UDHR.\textsuperscript{743} However, Article 18 only provides that a “right to a nationality \textit{as prescribed by law}” (emphasis added). This limits the scope of the right to nationality to the protection foreseen in domestic legislation and leaves a wide margin for states’ discretion. Overall, the protection provided by Article 18 falls below other international standards.\textsuperscript{744}

\subsection*{2.6 Interim Conclusion}

Overall, this analysis of the codification of the right to nationality in international law at the universal and the regional levels, largely shows three different types of regulations. First, a growing number of instruments explicitly recognizing the right to nationality, though most of these instruments only do so as a general principle and not as an effective and enforceable individual right. This includes the ACHR, but also the ICCPR, the CRC or the ECN. A second group of instruments addressing nationality matters without explicitly guaranteeing a right to nationality. This is, for example, the case with the CSS and the CSR, but also the non-discrimination instruments CEDAW, CERD and CRPD. And a third group of instruments, that do not address nationality matters or the right to nationality explicitly, but have, nevertheless, been interpreted as indirectly protecting aspects of the right to nationality. Here, the examples would be the ECHR or the ACHPR. Apart from the ArCHR, the CRCI and the ASEAN Declaration, the instruments that do codify the right to nationality do not fall below the minimum standard established by Article 15 UDHR. The foregoing analysis evidences that the right to nationality — despite continuing affirmations of nationality as a \textit{domaine réservé} — finds a broad and growing basis in international law. As the Special Rapporteur of the African Union on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa noted:

\begin{quote}
The international community has made considerable efforts to fill the normative void in the area of nationality, although progress still remains
\end{quote}

\textsuperscript{743} Article 10 of the Declaration explicitly refers to the UDHR and the rights set out therein. See also Bialosky (n 4) 164.

\textsuperscript{744} Generally, the ASEAN Human Rights Declaration has been criticized as falling below international standards, see Kälin and Künzli, \textit{Menschenrechtsschutz} (n 88) 61. See also the statement of the UN High Commissioner for Human Rights, Navi Pillay, 19 November 2012, <https://news.un.org/en/story/2012/11/426012>.
to be achieved to effectively deal with statelessness around the world, and the right to a nationality is now virtually a universal legal given.745

Thereby, the instruments developed at the regional level — particularly Article 20 ACHR, the ECN and, if it is to be adopted, the African Union Protocol on Nationality — set the most progressive standards.746 This is reinforced by the innovative and rights-oriented jurisprudence of, particularly, the IACtHR, but also the ACmHPR and the ACTHPR, as well as to some extent the ECtHR. Soft law, moreover, plays an important role in further developing the content of and specifying the obligations under the right to nationality.

In a schematized form, the most important instruments discussed above protecting the right to nationality — at least in a limited form or based on jurisprudence (x) — can be summarized as follows in table 1 on page 204.

The vast number of international and regional treaties, declarations, resolutions or recommendations confirming the right to nationality as a human right must be interpreted as reflecting consistent state practice — a paper practice — recognizing the human rights character of nationality.747 As the different reservations and declarations to the instruments discussed show, not all states have unconditionally accepted all these provisions codifying the right to nationality and are reluctant to accept international obligations in the field of nationality.748 Notwithstanding, the analysis also shows that, over the last few years, several states have withdrawn their reservations. But not only that, the reservation of Malaysia to Article 18 CRPD has provoked the opposition of many European states that have stressed the importance of the right to nationality as a fundamental principle. This signals a new conviction that the right to nationality belongs to the core catalogue of human rights from which no derogations should be allowed. The question remains, however, whether this practice can also be qualified as state practice in the more narrow sense of

746 See also Hall (n 398) 600.
748 The starting point for any discussion about reservations is Article 19 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (‘VCLT’), according to which reservations are permissible unless the treaty itself prohibits reservations per se or only allows for specific reservations or if the reservation is incompatible with the object and purpose of the treaty.
<table>
<thead>
<tr>
<th>Legal source</th>
<th>Acknowledgement of right to nationality</th>
<th>Jus soli for otherwise stateless children</th>
<th>Facilitated acquisition for stateless persons or refugees</th>
<th>Prohibition of arbitrary deprivation</th>
<th>Right to change one’s nationality</th>
<th>Prohibition of discrimination in nationality matters</th>
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Article 38(1)(b) of the ICJ-Statute giving rise to customary international law. This is the question that shall be analyzed in the following section.

III The Right to Nationality as Customary International Law?

Customary international law includes those legal standards considered to be binding, even if they are not enshrined in a treaty to which the state parties explicitly consented.749 An international rule or instrument is recognized as customary international law if there is 1) an international general practice of states consisting of repeated similar practices by several states over a certain period of time, and 2) a corresponding *opinio juris*, a "sense among states of the existence or non-existence of an obligatory rule".750

In general, it is difficult to find customary international law on nationality.751 States usually insist on having exclusive jurisdiction in nationality matters. The reservations discussed in the previous section bear witness to this reluctance. The resistance of the Dominican Republic — or, more precisely, its constitutional court — against the ruling of the IACtHR in the case of *Yean and Bosico* is another example in that regard.752 This complicates finding the necessary *opinio juris*.753 In other words, the reluctance of states to accept treaties limiting their sovereignty in nationality matters translates to the field of customary law. Weis concluded in 1979:

> There is no basis in present customary international law for a right to a nationality; neither has the individual a right to acquire a nationality at birth, nor does international law prohibit loss of nationality after birth by


750 *ibid* 17, Observation 8. See also the leading cases of the International Court of Justice, *Lotus Case* (n 59) 18; *North Sea Continental Shelf* (n 59) para 60 ff; *Colombian-Peruvian Asylum Case* (n 59) 276 f.

751 See also Conklin (n 56) 163; Mantu (n 38) 7.

752 Alexandra Huneeus and René Urueña, ‘Treaty Exit and Latin America’s Constitutional Courts’ (2017) 111 American Journal of International Law Unbound 456, 458. Interestingly, however, the Dominican Constitutional Court has not primarily challenged the recognition of the right to nationality as a human right but argued that the accession of the Dominican Republic to the IACtHR’s jurisdiction was constitutionally invalid and hence the state was not bound by its judgments.

753 Conklin (n 56) 163.
deprivation or otherwise, with the possible exception of the prohibition of discriminatory denationalization.\textsuperscript{754}

Despite the difficulty in finding a coherent state practice, the baseline is more nuanced today. Most international legal scholars seem to agree on the existence of certain customary standards relating to nationality. First, there is a relatively broad consensus that the general principles enshrined in Chapter 1 of the 1930 Convention\textsuperscript{755} have acquired the rank of customary international law.\textsuperscript{756} This includes the right to renounce one’s nationality for dual or multiple nationals, which could be interpreted as implicitly entailing a right to change one’s nationality under certain conditions.\textsuperscript{757} Second, as discussed above, it is increasingly argued that Article 15 UHPR has become part of customary international law.\textsuperscript{758} This strengthens the position of those who argue that the right to nationality, as such, has become a customary international legal norm.\textsuperscript{759} Nevertheless, this position remains controversial, given the lack of a consistent state practice and opinion relating to the right to nationality.\textsuperscript{760}

As Chan writes:

\begin{quote}
It is probably true that there is no rule of international Law imposing a duty on States to confer their nationality. Given the wide difference in approaching the right to nationality in various human rights instruments, they can \textit{hardly reflect customary international law}. Nor could the
\end{quote}

\begin{footnotes}
\item[754] Weis, \textit{Nationality in International Law} (n 352) 248.
\item[755] Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April 1930, LNTS Vol. 179, p. 89 (‘1930 Convention’).
\item[756] Fripp (n 45) 17; de Groot and Vonk (n 74) 87; Schram (n 10) 231. See on the 1930 Convention chapter 3, III.3.
\item[757] This position is supported by Knop and Chinkin who argue that there is "some sort of customary consensus regarding the right to change one's nationality", Knop and Chinkin (n 167) 562. See also Chan (n 52) 11. More critical Anne Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction' (2010) 53 German Yearbook of International Law 662.
\item[758] See above Chapter 4, 1.3. See Hailbronner and others (n 69) 37; Kraus (n 30) 235; Schram (n 10) 241; see also \textit{Anudo v Tanzania} (n 71) para 76.
\item[759] Batchelor, 'Transforming International Legal Principles' (n 292) 10; Hailbronner and others (n 69) 37; \textit{Advisory Opinion OC-4/84} (n 1) para 34.
\item[760] See eg Serena Forlati, 'Nationality as a Human Right' in Alessandra Annoni and Serena Forlati (eds), \textit{The Changing Role of Nationality in International Law} (Routledge 2013) 27; Hannum (n 9) 346; Kraus (n 30) 265.
\end{footnotes}
widely divergent State practice in the conferment of nationality support such a claim.\textsuperscript{761} (emphasis added)

The domestic nationality regulations states recorded in the \textsc{globalcit} Database on Modes of Acquisition of Citizenship shows that in 2016, 174 out of 175 states knew a provision on the acquisition of nationality through naturalization.\textsuperscript{762} In the very large majority of states, naturalization occurs through a discretionary procedure in which the decision whether to grant citizenship ultimately remains with the state. Few jurisdictions foresee a right to nationality or a general entitlement to acquire nationality by means of naturalization or registration in domestic law.\textsuperscript{763} In most cases, the entitlement to acquire nationality through naturalization is only available for particular groups of non-citizens; namely, for persons with long periods of residence.\textsuperscript{764} Hence, Chan's objection that state practice is too divergent to support a customary right to nationality is still valid. The large acceptance of the possibility of acquiring nationality through naturalization (on a discretionary basis or based on entitlement), however, supports the conclusion that states are under a customary obligation to provide for possibility of naturalization — even if they are free to determine the mode, the procedure and the conditions for such naturalization.\textsuperscript{765} Stephan Hobe, moreover, argues that there is a customary prohibition of mass naturalization and forced or arbitrary (extraterritorial) naturalization.\textsuperscript{766} Furthermore, it is increasingly maintained that the right of the child to be granted nationality at birth if it would otherwise

\begin{thebibliography}{9}
\bibitem{761} Chan (n 52) 10. See also Oliver Dörr, ‘Nationality’ in Rüdiger Wolfrum (ed), \textit{The Max Planck Encyclopedia of Public International Law} (Oxford University Press 2006) para 7.
\bibitem{762} Global Citizenship Observatory (\textsc{globalcit}), ‘Database Acquisition of Citizenship’ (n 464).
\bibitem{763} The \textsc{globalcit} database lists 18 states that grant an entitlement to naturalization for certain non-citizen residents. Many of them at the same time have a discretionary ordinary naturalization procedure that applies to those non-citizens that do not qualify for the acquisition based on entitlement, \textit{ibid}.
\bibitem{764} Under the German Nationality Act persons with more than eight years of residence and a permanent residence permit are entitled to be naturalized if they respect constitutional values, have sufficient financial resources, language skills, civil knowledge, no criminal record and renounce their former nationality, see §10 Deutsches Staatsangehörigkeitsgesetz vom 22. Juli 1913. See also Farahat (n 747) 154 ff.
\bibitem{765} Similarly already International Law Commission, ‘Hudson Report’ (n 6) 8. See also Chapter 5, 111.3.6.
\bibitem{766} Hobe (n 62) 91. See also Donner (n 14) 148 f; Peters, ‘Extraterritorial Naturalizations’ (n 757) 678.
\end{thebibliography}
be stateless is a customary right. In an extensive empirical study, William Worster has analyzed the international legal framework and state practice relating childhood statelessness and has come to the conclusion that “it is more likely than not that there is a norm of customary international law that governs child statelessness”.\footnote{Worster, ‘The Obligation to Grant Nationality under Treaty Law’ (n 102). See also Worster, ‘Customary International Law’ (n 318).} This opinion is shared, \textit{inter alia}, by Chan and Ziemele.\footnote{Chan (n 52) 11; Ziemele, ‘State Succession’ (n 356) 243. See also Forlati (n 760) 27.}

A trend towards the recognition of the duty to prevent and reduce statelessness, or rather a customary obligation for states to prevent and reduce statelessness generally, is identified by other authors.\footnote{Chan (n 52) 11; Clerici (n 200) 845; Council of Europe, ‘Explanatory Report ECN’ (n 443) para 33; Alice Edwards, ‘The Meaning of Nationality in International Law in an Era of Human Rights, Procedural and Substantive Aspects’ in Alice Edwards and Laura van Waas (eds), \textit{Nationality and Statelessness under International Law} (Cambridge University Press 2014) 29; Kay Hailbronner, ‘Nationality in Public International Law and European Law’ in Rainer Bauböck and others (eds), \textit{Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries, Volume 1: Comparative Analyses} (Amsterdam University Press 2006) 65; Knop and Chinkin (n 167) 562; Molnár (n 148) 83; Pilgram (n 446) 2. See also the judgment by the \textit{Yean and Bosico} (n 395) para 140. Weis in 1979 was more reluctant to accept such obligation, see Weis, \textit{Nationality in International Law} (n 352) 198; similarly Ziemele, ‘State Succession’ (n 356) 243. See further Chapter 5, 111.2.3.} However, an obligation to avoid or reduce statelessness does not amount to a prohibition of statelessness. Most authors, furthermore, agree that the prohibition of racial discrimination in nationality matters is a principle of customary international law.\footnote{See for an in-depth discussion Foster and Baker (n 201) 83 ff; Clerici (n 200) 845; Forlati (n 760) 27; Pilgram (n 446); CtteeEDAW, ‘General Recommendation No. 32’ (n 168) para 59. See also Chapter 5, 111.2.1.}

Finally, a broader consensus also exists regarding the customary nature of the prohibition of arbitrary deprivation of nationality.\footnote{See eg de Groot and Vonk (n 74) 46; Molnár (n 148) 74; Pilgram (n 446) 2. See also Human Rights Council, ‘Report 13/34 of the Secretary General on Human Rights and Arbitrary Deprivation of Nationality’ (HRC 2009) UN Doc. A/HRC/13/34 para 21; UNHCR, ‘Expert Meeting — Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality (“Tunis Conclusions”)’ (UNHCR 2013) para 2 <https://www.refworld.org/docid/533a754b4.html>. More reluctant Hobe (n 62) 96; Rainer Hofmann, ‘Denaturalization and Forced Exile’ in Rüdiger Wolfrum (ed), \textit{Max Planck Encyclopedia of Public International Law} (Oxford University Press 2013) para 17.} The CJEU has recognized the prohibition of arbitrary deprivation of nationality as a general principle of international law.\footnote{Rottman (n 590) para 53.
denationalizations in recent years, states are careful to stress that deprivation measures are based in law, follow a procedure and aim to achieve a particular public interest, namely the protection of national security in the context of anti-terrorism measures. Thus, the current state practice on deprivation of nationality thus seems to respect the prohibition of arbitrariness. Together with the different legal instruments prohibiting arbitrary deprivation of nationality, this would support the conclusion that the prohibition of arbitrary deprivation of nationality has indeed acquired the rank of customary international law.\(^\text{773}\)

The prohibition is, however, limited to the arbitrary deprivation of nationality. Deprivation of nationality \textit{per se} is still possible in most jurisdictions and has re-emerged in recent years as a political instrument against unwanted citizens in the context of counter-terrorism measures.\(^\text{774}\)

To sum up, whether the right to nationality has become customary international law is disputed. State practice and the lack of consistent \textit{opinio juris} do not support such a conclusion, even though the literature and international courts, namely the IACtHR and the ACtHPR, progressively argue so. Regardless, certain elements of the right to nationality are increasingly recognized as customary international law, namely the right of the child to the nationality of the state of birth if it would otherwise be stateless, the duty to prevent and reduce statelessness, the prohibition of discrimination in nationality matters and the prohibition of arbitrary deprivation of nationality.

\section*{Conclusion: The Body of International Human Rights Law}

In this Chapter I have attempted to substantiate my claim that the traditional perception of nationality as a \textit{domaine réservé} no longer holds and that the right to nationality attracts growing international support. The in-depth analysis of the international legal framework at the universal and regional levels shows that the right to nationality is, in fact, widely regulated in contemporary international human rights law.\(^\text{775}\) The relevant legal framework is built, on the one hand, directly by provisions in treaty law that protect the right to nationality as an enforceable right or as a general principle underpinning nationality matters. On the other hand, the right to nationality is indirectly recognized as

\begin{itemize}
\item \(^{773}\) See James Crawford, \textit{Brownlie’s Principles of Public International Law} (9th ed, Oxford University Press 2019) 508.
\item \(^{774}\) See namely UNHCR, ‘Tunis Conclusions’ (n 771) para 2.
\item \(^{775}\) See also Blackman (n 359) 1191; Spiro, ‘New Citizenship Law’ (n 169) 745.
\end{itemize}
a human right in soft law instruments and the case law of international human rights tribunals on the basis of other, well established human rights norms.

Given that the right to nationality was already included in the first modern universal human rights instrument — the Universal Declaration of Human Rights — these developments are consistent. While no UN human rights treaty codifies a general right to nationality, most grant children a right to nationality or recognize the right to nationality through the principle of non-discrimination. Together, these standards protect different aspects of the right to nationality and jointly indicate the existence of a general right to nationality. The importance of right to nationality is confirmed in the practice of the UN human rights treaty bodies. Furthermore, the protection of the right to nationality is the underlying aim of the 1961 Convention and, to a more limited extent, the 1954 Convention. Moreover, the right to nationality is repeatedly recognized in resolutions of UN bodies; namely, by the Human Rights Council. The right to nationality as a general human right is reinforced by instruments at the regional level. In particular, the ACHR, the ECN and, possibly in the near future, the AU Draft Protocol on Nationality, recognize the right to nationality as a human right. Article 20 ACHR provides for the only current hard law recognition of a general right to nationality for all. The IACtHR, the ACmHPR, the ACtHPR and, to some extent, the ECtHR have contributed to the development of a coherent jurisprudence on the right to nationality. Regarding customary international legal standards, it remains doubtful whether the right to nationality, as such, has acquired the rank of customary law, particularly due to the lack of a consistent state practice and corresponding opinio juris. Nevertheless, different aspects of the right to nationality are found to be binding on a customary basis; namely, the right of the child to the nationality of the state of birth if it would otherwise be stateless, the principle of prevention and reduction of statelessness and the prohibition of arbitrary deprivation of nationality.

Overall, the international legal framework on nationality matters has fundamentally changed over the last decades. It can no longer be argued that there is no such right as a right of nationality just because there is an absence of an express recognition of a general right to nationality in a binding universal treaty. While it remains for the state to decide on acquisition and loss of nationality, this decision is subject to a broad framework of international legal sources that, overall, guarantee that everyone has a right to a nationality.

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776 Batchelor, 'Developments in International Law' (n 464) 59.
turn back to the elements for new human rights standards, as set out in UN GA Resolution 41/120, the analysis of the international legal framework in this chapter has not only provided additional support for the argument that the right to nationality attracts broad and growing international support and that it is consistent with the existing body of international human rights law.\textsuperscript{778} It has also shown that there is a functioning implementation machinery with the treaty bodies at universal level and the regional human rights courts that interpret and develop the right to nationality. This is so regardless of the remaining gaps in the direct invocation of the right to nationality before international courts. The next step is to now identify which concrete rights individuals have under the right to nationality and what corresponding obligations it bears for states. This will be the subject of Chapter 5.

\textsuperscript{778} See Chapter 2, iii.3.