How far has the protection of the right to nationality under international human rights law progressed from 1923 until the present day?

An analysis of this progress against the backdrop of the 5 elements of article 20 of the American Convention on Human Rights.

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Abbreviations

AAC (African Children's Charter)

ACHR (American Convention on Human Rights, 1969)

ACHPR (African Charter on Human and People's Rights, 1981)

ACERWC (African Committee of Experts on the Rights and Welfare of the Child)

ASEAN (Association of Southeast Asian Nations)

ASEAN DHR (ASEAN Declaration on Human rights)

CoE (Council of Europe)

ECHR (European Convention on Human Rights, 1950)

ECN (European Convention on Nationality, 1997)

ECrtHR (European Court of Human Rights)

HRC (Human Rights Committee)

IACrtHR (Inter-American Court of Human Rights)

ICCPR (International Covenant on Civil and Political Rights, 1966)

ICJ (International Court of Justice)

ILC (International Law Commission)

OAS (Organization of American States)

PCIJ (Permanent Court of International Justice)

UDHR (Universal Declaration of Human Rights, 1948)

UNHCR (United Nations High Commissioner for Refugees)

"In the past, nationality was viewed as a privilege of somewhat rigid and almost mystical character, conferred by the state. It is now increasingly regarded as an instrument for securing the rights of the individual in the national and international spheres"[1]

– Sir Hersch Lauterpacht

1. Introduction

During the first decades of the 20th century, there was consensus that the authority to "confer and withhold nationality"[2] still fell completely within the state's jurisdiction. In a landmark ruling, this view was cemented by the Permanent Court of International Justice (PCIJ)'s decision in the *Tunis and Morocco Nationality Laws Decree Case* of 1923. In the aforementioned ruling, the PCIJ stated that

> *The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends on the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle, within this reserved domain… it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.*[3]

The PCIJ undoubtedly echoed the practice of the time period when the ruling was issued by making it clear that nationality matters fell within the state's sovereign domain, however, the court left a small opening, allowing for future developments to change this view. In its view that whether nationality matters[4] fall *solely* under the state's jurisdiction is a matter of the development of international relations, the PCIJ acknowledged the relative nature of this issue. The judgment "highlights 3 points"[5]: the state's competence in regulating its own nationality law can be regulated by international law; the limitations "on state competence in matters of nationality"[6] are not

[1] Foreword to the First Edition. In Weis, Paul. *Nationality and statelessness in international law*. Vol. 28. Brill, 1979.
[2] Evans, Malcolm D. *International Law*. Oxford: Oxford UP, 2010. Print. Pg. 222
[3] *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco, 4,* Permanent Court of International Justice, 7 February 1923
[4] This phrase is borrowed from the title of Laura Van Waas' book *Nationality matters: statelessness under international law*, published by Intersentia in 2008.
[5] Chan, Johannes M. M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14.
[6] Ibid.

permanent and they can change overtime[7]; and finally, while in 1923 nationality fell exclusively within the state's jurisdiction, whether that is still the case in the present day depends on the current international relations.[8] The essence of the case is that if the international legal system would develop in such a way that nationality would acquire an international character, then "nationality matters would no longer fall *exclusively* under the state's *domaine reserve.*"[9] This thesis sets out to determine whether the developments regarding nationality matters that have taken place from the time the PCIJ issued its advisory opinion in 1923 until the present day can be said to constitute the shift in international relations that the PCIJ referred to. This shift could signal what Spiro has so eloquently phrased: it would mean the colonization of "the last bastion of sovereign discretion."[10]

It is essential to first establish what would constitute developments in international relations regarding nationality. At the time of the PCIJ's ruling, international law—particularly human rights law—was still in its early stages; at that time, international law focused *solely* on relations between states. Only 7 years after the 1923 advisory opinion, the 1930 Hague Codification Conference took place. According to van Panhuys, this conference contributed to changes in "conceptions about nationality."[11] The *1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Law*[12] is perhaps one of the first documents that set any limits to the state's discretion on nationality matters,[13] while at the same time acknowledging the state's authority in determining who its nationals are. According to Weis, the 1930 Hague Convention recognizes that "while questions of nationality are normally determined by municipal law, this

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[7] Chan, Johannes M. M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14.
[8] Ibid.
[9] Paul Weis, Nationality and Statelessness in International Law, Kluwer Academic Publishers Group, Dordrecht: 1979, page 66 as cited in Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 37
[10] Spiro, Peter J. "A new international law of citizenship." *American Journal of International Law* 105.4 (2011): 694-746.
[11] Van Panhuys, Haro Frederik. *The Role of Nationality in International Law.* The Netherlands, Leyden, A.W. Sijthoff, 1959. Pg. 15.
[12] Article 1 of the convention states that:
It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.
League of Nations, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137
[13] Brownlie, Ian. "The Relations of Nationality in Public International Law." *Brit. YB Int'l L.* 39 (1963): 284.

legislative competence does not amount to omnipotence."[14] Even though the codification conference did not manage to achieve concrete results, [15] it laid the foundation for constraints on nationality matters[16] for the first time in a convention. International relations were beginning to develop towards the slow detachment of nationality from under the state's full grasp.

Only a few years later, WWII broke out and the international community was shaken by a devastating war that had impacts at a global level. Perhaps one of the biggest changes in the post-WWII era is the emergence of human rights, after the proclamation of the Universal Declaration of Human Rights in 1948. This created a major shift in the state of international law and of international relations. From 1948 until the present day, there has been a "rapidly growing body of human rights law in the international arena,"[17] and the focus has shifted to their protection. Indeed, human rights occupy a "central position in the international agenda of the twenty-first century."[18] After the adoption of the UDHR, it became "necessary to spell out the general standards of the UDHR in legally binding instruments…covering the whole range of human rights"[19] at both universal and regional levels. Thus at the universal level the International Covenant on Civil and Political rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted in 1966. Various specialized treaties, such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) among others, were adopted. At the regional level, the European Convention on Human Rights (ECHR) was adopted in 1950, the American Convention on Human Rights (ACHR) in 1969, the African Charter on Human and People's Rights (ACHPR) in 1981, in 1994 the council of the Arab League approved the Arab Charter on Human Rights although it entered into force only after modification in 2004.[20] According to Judge Trindade Cançado, there is "complementarity" between universal and regional human rights documents, since the regional

[14] Paul Weis, Nationality and Statelessness in International Law, Kluwer Academic Publishers Group, Dordrecht: 1979, page 241. As cited in Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 38
[15] Chan, Johannes M. M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14.
[16] Spiro, Peter J. "A new international law of citizenship." *American Journal of International Law* 105.4 (2011): 694-746.
[17] Chan, Johannes M. M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14.
[18] Trindade Cançado, Antônio Augusto. "Universal Declaration of Human Rights." (2008).
[19] Cassese, Antonio. *International Law*. Oxford: Oxford UP, 2005. Print. Pg. 381
[20] Ibid. Pg. 381

systems "operate within the framework of the universality of human rights."[21] A great number of these documents contain provisions on nationality, or the regional system that these documents are found in have other documents including provisions on nationality or have case law issued by the regional competent bodies.

Of the various rights to a nationality found in the various regional and universal instruments, "the most *far-reaching* right to a nationality in a *legally binding human rights document* to date"[22] is article 20[23] of the ACHR. For this reason, article 20 ACHR was chosen as the article against which other provisions in other instruments will be compared. This article contains 5 elements: 1) the acknowledgement of a general right to a nationality 2) a provision that requires the state to grant nationality to a child born on its territory—by virtue of *jus soli*—who would otherwise be stateless 3) the prohibition of arbitrary deprivation of nationality, which contains 4) the prohibition of discriminatory practices in nationality matters, and 5) the right to change one's nationality. Case law by the IACrtHR has shown that despite the fact that article 20.3 ACHR does not *explicitly* prohibit discriminatory practices in nationality matters, in reality, the prohibition of arbitrary deprivation of nationality is broader than how it is framed in article 20.3 ACHR. This provision *implicitly* includes the prohibition of discriminatory practices in nationality matters. The combination of these elements results in a very comprehensive article that contains solid protections for the individual's right to nationality, and for this reason the provisions on nationality found across regional and universal instruments will be compared against these 5 elements.

The analysis will not focus on the wording in each article, but on the general content of the article; not all instruments have the same wording on similar provisions, which is why for the purposes of this paper it is important to analyze the *general content* of the provision rather than its specific wording. A premise for this paper will be that a comprehensive article effectively restricts the state's discretion over nationality matters, while a less comprehensive article is less

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[21] Trindade Cançado, Antônio Augusto. "Universal Declaration of Human Rights." (2008).
[22] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 60
[23] *Article 20- Right to a Nationality*
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.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.
Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969

restrictive of a state's discretion. Conversely, the less discretion the state enjoys, the more the individual's rights are protected. The same could be said about an instrument: the more protections an instrument contains, the less discretion the state enjoys. Additionally, the system in which these specific articles contained will also be taken into consideration for the analysis, since articles are not detached norms; they are found within instruments which are often found within systems. System-wise, the focus will be on the Inter-American, European and African systems, since these systems also have relevant case law which will be analyzed. The overall analysis will seek to determine the extent of the progress regarding the framework for the protection of the right to nationality under international human rights law which has taken place from 1923 until the present day. An underlying question this paper will address is whether this progress can constitute the shift the PCIJ mentioned in its ruling in 1923. The existence of this shift would serve as a confirmation that nationality no longer falls within the state's absolute sovereignty.

For the purposes of this paper, some points should be kept in mind. International law in the present day continues to respect the "principles of sovereignty and equality of states."[24] This means that a state can never be compelled to undertake obligations under international law without having given its "consent to be bound."[25] Therefore, any constraints on a state's discretion over nationality matters have been the results of the willingness of states to be bound by international legal instruments that contain provisions that have resulted in said constraints. The adoption of the various human rights instruments has had "such an impact on the international community that no state currently challenges the concept that human rights must be respected everywhere in the world."[26] It is interesting to note that according to Cassese, "a general principle has gradually emerged prohibiting gross and large-scale violations of basic human rights and fundamental freedoms,"[27] making massive human rights violations reprehensible.[28] Based on this premise, isn't the existence of approximately 10 million stateless persons in the planet a massive human rights violation? International human rights law affirms that human rights apply to every human being simply by virtue of being human. In practice, however, the existence of a legal bond

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[24] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 36
[25] ibid. Pg. 36
[26] Cassese, Antonio. *International Law*. Oxford: Oxford UP, 2005. Print. Pg. 59
[27] ibid. Pg. 59
[28] ibid. 59

of nationality between an individual and a state continues to be a prerequisite to "the effective enjoyment of the full range of human rights."[29] In the planet, there are approximately 10 million persons who cannot enjoy their full range of human rights since they have no nationality tying them to any state. If having a nationality is a human right, and this right is the portal to an individual's other rights, then statelessness—the lack of a nationality—is a human rights violation[30] with deep repercussions.

2. Background theory

2.a. Statelessness

Statelessness is the embodiment of the violation of an individual's right to avail him/herself of protection by his/her state.[31] Ironically, stateless persons are forced to live in a system made up of states.[32] A stateless person, by definition, is a person who, according to Article 1(1) of the 1954 Convention on the Status of Stateless persons, "is not considered as a national by any State under the operation of its law."[33] Based on this definition, in order to be recognized as a stateless person, the individual must be able to prove a negative: that he/she has no legal bond with any state.[34] This form of statelessness is known as *de jure* statelessness, or statelessness by law, since it is a legal issue[35]: there is a lack of the legal bond of nationality between state and individual. Interestingly, one of the norms that "constrain state power in regulating citizenship"[36] is the duty to avoid statelessness.

[29] Adjami, Mirna, and Julia Harrington. "The Scope and Content of Article 15 of the Universal Declaration of Human Rights." *Refugee Survey Quarterly* 27.3 (2008): 93-109.
[30] Adjami, Mirna, and Julia Harrington. "The Scope and Content of Article 15 of the Universal Declaration of Human Rights." *Refugee Survey Quarterly* 27.3 (2008): 93-109.
[31] Gibney, Matthew J. "Statelessness and Citizenship." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 57
[32] ibid. 57
[33] Article 1(1). UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117
[34] Batchelor, Carol A., Philippe Leclerc, and Marilyn Achiron. *Nationality and statelessness: A handbook for Parliamentarians*. Inter-Parliamentary Union, 2005.
[35] Donnelly, Jack. *Universal Human Rights in Theory & Practice*. (2d ed. 2003). As cited in Weissbrodt, David S., and Clay Collins. "The human rights of stateless persons." *Human Rights Quarterly* 28.1 (2006): 245-276.
[36] "Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to Be Free from Arbitrary Deprivation of Nationality, and Combating Statelessness." *Submission of the Open Society Justice Initiative to the United Nations Office of the High Commissioner for Human Rights for Consideration by the UN Commission on Human Rights at Its Sixty-Second Session*. Rep. N.p.: Open Society Justice Initiative, 2005. Print. Pg. 3

Statelessness poses a major challenge to the legitimacy of the international system of states because if this system is meant to be effective then it should be able to "accommodate all of the world's citizens."[37] Additionally, according to Spiro, statelessness "challenged the international legal system by creating a class of individuals for whose conduct no state would stand responsible, thereby presenting, in theory at least, a gap in the enforceability of international law."[38] UN High Commissioner for Refugees, Mr. António Guterres stated that they "live in a nightmarish legal limbo," and this status as legal ghosts "…makes them some of the most excluded people in the world." [39] Stateless persons are the "international outcasts"[40] of our planet.

2.b. Nationality & Citizenship

It is essential to first set the use of the terms nationality and citizenship, since the two terms are frequently used interchangeably under international law.[41] However, they can also be used as two different and separate—although related—concepts. For example, a person can be the national of a state without being a citizen.[42] In some countries, a person becomes a citizen only upon turning 18 years of age, when one is considered an adult and has access to civil and political rights such as voting. A minor is still the national of the state, despite not being considered a citizen yet. However, for the purposes of this paper, the terms will be used interchangeably.

There is no *exact* legal, unanimously-accepted definition of nationality.[43] Under international law, the *Nottebohm* case before the International Court of Justice (ICJ) provides us

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[37] Gibney, Matthew J. "Statelessness and Citizenship." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 57
[38] Spiro, Peter J. "A new international law of citizenship." *American Journal of International Law* 105.4 (2011): 694-746.
[39] Guterres, António, High Commissioner for Refugees. As cited in *Media Backgrounder: Millions Are Stateless, Living in Legal Limbo*. Rep. N.p.: United Nations High Commissioner for Human Rights (UNHCR), 2011.
[40] McDougal, Myres S., Harold D. Lasswell, and Lung-chu Chen. "Nationality and Human Rights: The Protection of the Individual in External Arenas." *Yale Law Journal* (1974): 900-998.
[41] Faulks, Keith. *Citizenship*. London: Routledge, 2000. Print. Pg. 7
[42] Hudson, Manley O. [Special Rapporteur appointed by the International Law Commission]. *Report on Nationality, including Statelessness*, A/CN.4/50 (1952)
[43] For example, according to the Oxford Dictionary, nationality is "the status of belonging to a particular nation," which is similar to the concept of nationality from a sociological perspective, which views nationality as "the link an individual has with his/her country."[M.J.R.V] as cited in Peixoto, Raquel Salinas. "Los apátridas, la lucha contra la apatridia y la experiencia latinoamericana." *Ita ius esto* 2 (2012): 45-60. While for example the definition of nationality provided by article I in the Draft Convention of the Harvard Research in International Law, states that *"nationality is the status of a natural person who is attached to a State by the tie of allegiance."* As cited in Hudson, Manley O. [Special Rapporteur appointed by the International Law Commission]. *Report on Nationality, including Statelessness*, A/CN.4/50 (1952)

with a definition of nationality. The ICJ defined nationality as "a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[44] Nationality has also been defined by the Inter-American Court of Human Rights (IACrtHR) in the *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica,* as:

> *The political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state.*[45]

Both definitions of nationality found in the *Nottebohm* case and the IACrtHR's *Advisory Opinion* define nationality as the legal link between an individual and a state, a link which results in reciprocal rights and duties. Among these duties there is the duty of being loyal to one's state, while the state must reciprocate by protecting its nationals, for example.

According to Edwards, "the "substantive" content of nationality can be explored from two perspectives:"[46] that of the state, the international law perspective, and that of the individual, the individual human rights perspective.[47] As individual human beings, our individual legal identity derives largely from our legal bond with one (or more) states,[48] expressed through our nationality. Nationality is a key component of our individual legal identity in a world made up of states. In this sense, nationality also gives the state the *locus standi* to protect its own interests at the international level,[49] since the interests of its nationals are its own interests. Nationality not only acts as the expression of the genuine link between individual and state but also connects the individual with international law; the bond we have with our state is our connection to international law.[50] We become subjects[51] of international law through this connection.

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[44] *Nottebohm Case (Liechtenstein v. Guatemala); Second Phase*, International Court of Justice (ICJ), 6 April 1955.

[45] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica,* OC-4/84, Inter-American Court of Human Rights (IACrtHR), 19 January 1984. Paragraph 35

[46] Edwards, Alice. "The Meaning of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 30

[47] Ibid. Pg. 30

[48] Batchelor, Carol A. "Transforming international legal principles into national law: the right to a nationality and the avoidance of statelessness." *Refugee survey quarterly* 25.3 (2006): 8-25.

[49] Chan, Johannes M.M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14.

[50] Bauböck, Ersboll, Groenendijk and Waldrauch (eds), *Acquisition and Loss of Natioanlity.* As cited in Edwards, Alice. "The Meaning of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 24

[51] Traditionally, it was only states that could be subjects of international law. However, that has changed; nowadays, there are more subjects of international law beyond the nation-states. The subjects of international law are: States, International Organizations, Non-State Actors, Special-Case Entities, and individuals. The inclusion of the individual

Every state needs a defined population in order to be a state. This means that nationality has an undeniable international legal aspect.[52] Furthermore, it is the state that has the authority to clarify the issue of "*which* persons have a legal bond with the state under the operation[53] of its law."[54] Thus, for states, the ability to confer or withdraw nationality is a *key* element of their sovereignty, since it is an expression of their supremacy in making decisions affecting them internally.[55] Consequently, nationality is a sensitive issue for states, since it is the "manifestation of a country's sovereignty and identity."[56] Furthermore, the population provides a *raison d'etre* for the state and its government.[57] The purpose of the state itself is the "promotion of the prosperity and happiness of the populace."[58] Without a population to protect, there is no reason for the state to exist. Due to nationality's entwinement with sovereignty, the state's own identity and its existential purpose, it is a very sensitive subject for states.[59] While all states carefully guard this last bastion of their sovereignty, some states are less willing to relinquish part of their sovereignty over nationality matters than others.[60]

Nationality has been deemed as "the right to have rights,"[61] which gives it the attribute of being far more than a sentiment of identity and belonging, more than a social fact of attachment. Nationality is a right that acts as a path towards the enjoyment of some of the most fundamental

among the subjects of international law can be greatly attributed to the development of international human rights law and the rise of individual criminal responsibility for grave breaches of international humanitarian law and for crimes under international criminal law. "3. Subjects of International Law - Dr. Walid Abdulrahim Professor of Law."*3. Subjects of International Law - Dr. Walid Abdulrahim Professor of Law*.

[52] Brownlie, Ian. "The Relations of Nationality in Public International Law." *Brit. YB Int'l L.* 39 (1963): 284.

[53] According to Batchelor, "to be considered a national by operation of law means that an individual is automatically considered to be a citizen under the terms outlined in the State's enacted legal instruments related to nationality or that the individual has been granted nationality through a decision made by the relevant authorities" as cited in Batchelor, Carol A., Philippe Leclerc, and Marilyn Achiron. *Nationality and statelessness: A handbook for Parliamentarians*. Inter-Parliamentary Union, 2005.

[54] Batchelor, Carol A. "Transforming international legal principles into national law: the right to a nationality and the avoidance of statelessness." *Refugee survey quarterly* 25.3 (2006): 8-25.

[55] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 35

[56] Batchelor, Carol A., Philippe Leclerc, and Marilyn Achiron. *Nationality and statelessness: A handbook for Parliamentarians*. Inter-Parliamentary Union, 2005.

[57] Evans, Malcolm D. *International Law*. Oxford: Oxford UP, 2010. Print. Pg. 221

[58] ibid. Pg. 221

[59] Verena Stolcke, "The 'Nature' of nationality" in Bader (ed) Citizenship and exclusion, Macmillan Press London: 1997, page 61; UNHCR and IPU, Nationality and statelessness. A handbook for parliamentarians, 2005, page 8. As cited in Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 35

[60] In the Americas, for example, the majority of state parties to the ACHR adhere to their international legal obligations on nationality matters without problems. However, the Dominican Republic, for example, has been very unwilling to accept any limitations on its sovereignty over nationality matters imposed on it by its international obligations.

[61] US Supreme Court, Trop v. Dulles, Secretary of State et. al., 356 US 86, 1958. As cited in Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 217

human rights. Therefore, to be deprived of the right to a nationality leads to deprivation of various other rights.[62] At the time of its conception, nationality was meant to be a way of regulating the relationships between the emerging sovereign states.[63] It was only with the dawn of the era of human rights of the 20th century that the "individual dimensions" of nationality began to emerge, and have been in constant development into the present day.[64]

2.c. Nationality: Acquisition

The basis for nationality attribution is the *social fact of attachment*—the genuine link between state and individual. The genuine link is a valuable tool in determining which nationality should be ascribed to an individual,[65] since in state practice nationality is not granted indiscriminately. Certain factors must "indicate an established link between the individual and the state."[66] Various factors can be considered evidence of a genuine link between an individual and a state, such as place of birth, descent, residence, connections, language, and ethnicity, among others.[67] States take these components (or some of them) when deciding who makes up their "body of nationals."[68] The concept of the genuine and effective link, has slowly developed into a concept based on principles "embodied in State practice, treaties, case law and general principles of law."[69] This link can be proved through "various elements considered together."[70] Nationality can be acquired at birth or later on life. The factors that determine who is a national *at birth* are place of birth and descent. States tend to make a preference for either descent or birth on the territory as their *primary* principle for nationality acquisition,[71] and some jurisdictions make use of the other as the secondary, subsidiary principle. In this respect, state practice is far from homogeneous.

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[62] Faulks, Keith. *Citizenship*. London: Routledge, 2000. Print. Pg. 8
[63] Chan, Johannes M.M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14.
[64] Edwards, Alice. "The Meaning of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 29
[65] Batchelor, Carol A. "Statelessness and the problem of resolving nationality status." *Int'l J. Refugee L.* 10 (1998): 156.
[66] ibid.
[67] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. pg. 32
[68] ibid. pg. 32
[69] Batchelor, Carol A. "Statelessness and the problem of resolving nationality status." *Int'l J. Refugee L.* 10 (1998): 156.
[70] *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Frederick John Packer, Expert witness.
[71] Batchelor, Carol A. "Statelessness and the problem of resolving nationality status." *Int'l J. Refugee L.* 10 (1998): 156.

According to municipal law, the principles that guide nationality acquisition at birth[72] are *jus soli* (law of the soil) and *jus sanguinis* (law of blood)[73] or a combination of these principles.[74] There is some degree of uniformity in nationality laws, which, according to former Special Rapporteur Manley O. Hudson,[75] "seems to indicate a consensus of opinion"[76] on this matter. These principles are based on the genuine link, since they are predictors of the country where the individual will most likely[77] have his/her strongest ties.[78] Due to the absence of a widely ratified international treaty which defines the criteria for granting citizenship, the genuine link, expressed through either *jus soli* or *jus sanguinis,* has emerged as the leading "principle to guide state practice in granting citizenship."[79] Nationality has not yet determined whether one approach prevails over the other in normal situations.[80] However, when an anomaly such as statelessness arises from issues with the approaches, provisions in international law can be found addressing the issue by giving preference to the *jus soli* principle.[81] Regarding acquisition of nationality later in life, known as naturalization, states enjoy greater sovereignty in establishing the requirements for naturalization.[82]

[72] Hudson, Manley O. [Special Rapporteur appointed by the International Law Commission]. *Report on Nationality, including Statelessness*, A/CN.4/50 (1952)
[73] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. pg. 32
[74] Hudson, Manley O. [Special Rapporteur appointed by the International Law Commission]. *Report on Nationality, including Statelessness*, A/CN.4/50 (1952)
[75] Interestingly, in his view, there is not clarity as to whether "this rule merely constitutes usage or whether it imposes a duty on States under customary international law." as cited in Hudson, Manley O. [Special Rapporteur appointed by the International Law Commission]. *Report on Nationality, including Statelessness*, A/CN.4/50 (1952)
[76] Hudson, Manley O. [Special Rapporteur appointed by the International Law Commission]. *Report on Nationality, including Statelessness*, A/CN.4/50 (1952)
[77] This, however, fails to take into account the 'increased mobility in persons' that is common in our current times, as Mirna Adjami and Julia Harrington have pointed out in "The Scope and Content of Article 15 of the Universal Declaration of Human Rights." *Refugee Survey Quarterly* 27.3 (2008): 93-109.
[78] Adjami, Mirna, and Julia Harrington. "The Scope and Content of Article 15 of the Universal Declaration of Human Rights." *Refugee Survey Quarterly* 27.3 (2008): 93-109.
[79] ibid.
[80] Batchelor, Carol A. "Transforming international legal principles into national law: the right to a nationality and the avoidance of statelessness." *Refugee survey quarterly* 25.3 (2006): 8-25.
[81] For example, Article 20.2 ACHR which states that "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." Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969
[82] For example, living in X country for X amount of time, speaking the official language to a certain level, taking a test demonstrating knowledge of the local culture and history, just to name a few.

2.c.i. Nationality at birth

2.c.i.1. Jus soli

The *jus soli* principle—or the law of the soil—dictates that nationality is acquired by virtue of being born on a country's territory. This principle's roots can be traced back to feudal Europe, in Britain for example, when those born in an area owed loyalty to the sovereign who ruled that area.[83] It was later on adopted by the so-called "immigration states" of the New World (the Americas). The *jus soli* principle of nationality attribution was a way of solidifying the bond between the new arrivals—the second generation born on the state's territory—and their new homeland.[84] Additionally, as emerging states, these states had the need to create and determine their body of nationals. Due to the differences in origin among the residents of these young nations, granting nationality to those born on their territory seemed the most effective way of securing a body of nationals from a very diverse group of people, since *jus soli* makes no distinction based on the origins of each individual. These immigration states have a long history of cultural intermixing, and there is no societal need to preserve a body of nationals composed only of the descendants of the original body of nationals. This continues to the present day, with most states in the American continent adhering by the *jus soli* principle as their primary principle for nationality acquisition. Part of the reasoning behind the *jus soli* principle is that

> *it is with the territory on which he is born that any individual is the most closely connected and that, since he grows up and lives in that territory, he assimilates the customs and habits of thought of its inhabitants and gradually merges into their community.*[85]

Jus soli is a simple concept: birth on soil means nationality, regardless of race, religion, language, etc. Everyone is welcome.

2.c.i.2. Jus sanguinis

The *jus sanguinis* principle—the law of the blood—on the other hand, "recognizes descent or parentage as the indication of a genuine link."[86] Nationality is granted on the basis of being born

[83] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. pg. 32
[84] Ibid. pg. 32
[85] International Union for Child Welfare, Stateless Children - A Comparative Study of National Legislation and Suggested Solutions to the Problem of Statelessness of Children, Geneva: 1947, page 19. as cited in Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. pg. 33
[86] Ibid. pg. 33

to one or two people who are nationals of a particular state. In other words, nationality is inherited; it is passed down from one generation to the next through blood.[87] This form of nationality attribution is very common around the world, particularly in states from which nationals migrated to other countries. This was a way for the ties to the homeland of origin not to be lost, and for the descendants of the nationals that migrated to maintain a tie to their ancestral homeland. This principle is very effective in limiting who is and who isn't allowed to be a national, in contrast with *jus soli* which allows anyone to become a national as long as they were born on the territory.[88] Consequently, there are issues that arise due to the *jus sanguinis* principle. It has been noted that this principle can play a pivotal role in the perpetuation of statelessness.[89] Like nationality through blood, statelessness can also be inherited: stateless parents have no nationality to pass down to their children, and said children will inherit their parent's statelessness. This principle can also lead to new cases of statelessness,[90] as it creates room for gaps between nationality laws to leave some people completely excluded from being able to acquire any nationality.[91]

2. Americas: State Practice

In the American continent, as the table below shows, there seems to be an overall lack of preference for either one of the two principles, with some exceptions. Most countries seem to adhere to both principles on an equal basis. However, there are various countries that show a clear preference for the *jus soli* principle as the primary form of nationality attribution, while the *jus sanguinis* principle takes on a secondary role. However, there are exceptions, with the attribution of nationality based on the *jus sanguinis* principle as primary, as is the case with Haiti.

[87] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. pg. 33
[88] However, some states apply a limited form of *jus soli*, and set conditions for individuals born on the territory to obtain nationality. in other words, some states use a conditional form of *jus soli.*
[89] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 52
[9090] For example, a child born in a country that does not apply the *jus soli* principle, such as Italy to an unmarried mother of Jordanian nationality, who due to her gender is unable to pass down her nationality to her child and a Danish father who is unable to pass down his nationality to his child since he is not married to the child's mother, the child will be stateless
[91] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 52

Country [92]	Jus soli or jus sanguinis as primary (automatic)	Jus soli or jus sanguinis as secondary (optional)	Jus soli or jus sanguinis exclusively	Notes
Argentina	*jus soli*	*Jus sanguinis*	*No*	*Must opt*
Bolivia	*Equal*	*Equal*	*No*	
Brazil	*jus soli*	*jus sanguinis*	*No*	*Must opt*
Canada	*Equal*	*Equal*	*No*	
Chile	*Equal*	*Equal*	*No*	
Colombia**[93]	*conditional ∗∗*	*conditional ∗∗*	*No*	
Costa Rica	*jus soli*	*jus sanguinis*		*Must opt*
Cuba	*jus soli*	?		
Dominican Republic	*Equal*	*Equal*	*No*	*Excludes the children born to people "in transit"*
Ecuador	*Equal*	*Equal*	*No*	
El Salvador	*Equal*	*Equal*	*No*	
Guatemala	*Equal*	*Equal*	*No*	
Guyana	*Equal*	*Equal*	*No*	
Haiti	*jus sanguinis*	*No*	*jus sanguinis*	*Makes no mention of birth on the territory*
Honduras	*Equal*	*Equal*	*No*	
Mexico	*Equal*	*Equal*	*No*	
Nicaragua	*Equal*	*Equal*	*No*	
Panama	*jus soli*	*jus sanguinis*	*No*	*Conditional (permanent residence of parents in the country)*
Paraguay	*jus soli*	*jus sanguinis*	*No*	*Conditional on permanent residence of*

[92] The table does NOT contain all the member states of the Organization of American States; states were selected for inclusion on one (or more) of the following characteristics: size (population and territorial), membership of OAS, and on whether they are state parties to the ACHR. Additionally, states for which it was not possible to obtain a nationality law were not included

[93] ** Colombia's nationality law requires at least one parent to be a Colombian national for the child to obtain Colombian nationality upon birth on the country's territory. When the child is born outside of Colombian territory, at least one of the parents must be a national and in order to obtain nationality, the child must be registered either upon returning to Colombia or at a consulate abroad.

				parents in the country
Peru	*Equal*	*Equal*	*No*	
Suriname[94]	*Both*[95]	*?*		
United States	*jus soli*	*jus sanguinis*	*No*	*Various conditions*
Uruguay	*Equal*	*Equal*	*No*	
Venezuela	*Equal*	*Equal*	*No*	

2.c.ii. Nationality Later in Life

Nationality—a different one from that of origin—can also be acquired later in life through *naturalization*.[96] One of the ways in which one can naturalize is through the *jus domicilli* principle, or the "law of residence."[97] The base of this principle is similar to the one of *jus soli*[98] and it can be said that

> *It is the persons living in the State who take part in shaping its experiences, developing its economy, and fashioning its social life, and, accordingly, they are the ones who are primarily entitled to become full members of it.*[99]

Residence, which is considered perhaps the "most significant indicator of a person's factual attachment to a territorial community,"[100] is one of the main conditions[101] for naturalization.[102] It

[94] "A gap in the previous nationality law meant that children born within marriage but outside Suriname were unable to acquire its nationality from their mothers. Children born abroad to Surinamese mothers, who could not acquire nationality from their foreign fathers, would therefore be left stateless." This law has been amended. As cited in "UNHCR Applauds Suriname for Ensuring Gender Equality in Nationality Laws." *UNHCR News*. N.p., n.d. Web. 03 Sept. 2014.
[95] The child has to be born in Suriname and at least one of the parents must be a national for the child to be Surinamese
[96] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. pg. 33
[97] ibid. pg. 33
[98] ibid. pg. 33
[99] Yaffa Zilberschats, "Chapter 3 - The Horizontal Aspect of Citizenship" in The Human Right to Citizenship, Transnational Publishers, Ardsley, NY: 2002, page 94. As cited in Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. pg. 34
[100] McDougal, Myres S., Harold D. Lasswell, and Lung-chu Chen. "Nationality and Human Rights: The Protection of the Individual in External Arenas." *Yale Law Journal* (1974): 900-998.
[101] Naturalization requirements can also include taking a language test demonstrating sufficient knowledge of the official language of the country; a test that measures the person's knowledge of the country's culture and history which is meant to be a reflection of the person's integration into the country's society; an oath of allegiance to the new homeland; renunciation of any previous nationality in some cases; and depending on the country, other requirements as well.
[102] However, the required period of residence varies: in some countries, it is only 5 years or even less, in others, it can be 10 or even more; it varies per country. There are some countries that contain provisions in their naturalization laws that make exceptions for stateless persons: the required period of residence for obtaining nationality in some cases is as short as 1 or 2 years of consecutive residence.

is also possible to naturalize through other links, such as the bond of marriage. Many countries have special rules for spouses of their nationals to obtain the nationality of their spouse. The requisites for naturalization are set by the state but must, like the requisites for acquisition of nationality at birth, be in line with the state's international legal obligations.

2.d. Nationality: Relevant Concepts

Nationality can be obtained at birth or later in life. In this same manner, one can be barred from obtaining nationality at birth, or one can lose one's nationality later in life. Therefore, nationality is neither a *permanent* nor an *automatic* characteristic of human beings. The following section will address some concepts relevant to nationality.

2.d.i On *renunciation*, *loss*, *deprivation* and *denial* of nationality

Highly relevant for the concept of nationality are the principles of *renunciation*, *loss, deprivation* and *denial*. Renunciation of nationality refers to the *voluntary* severing of the link of nationality by the individual. Renouncing one's nationality of origin is often a precondition for obtaining a nationality other than one's nationality of origin. The key characteristic of this mode of nationality loss is its *voluntariness*. Nationality can also be lost, which means nationality is forfeited through the operation of law.[103] For example, various countries[104] provide in their law that if an individual does not live a certain amount of time on national territory, they automatically lose their nationality. Additionally, nationality can also be automatically lost upon acquisition of another state's nationality. Furthermore, the 1961 statelessness convention provides that one can lose one's nationality when "the law entails loss of nationality as a consequence of a change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or

[103] Edwards, Alice. "The Meaning of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 21

[104] Denmark, for example, provides for that a Danish national who is born abroad *"and has never lived in this country nor stayed here under conditions indicating an interdependence with Denmark shall lose his Danish citizenship on attaining the age of twenty-two years. The Minister for the Interior or anyone so authorized by him may, however, by petition submitted before this time, permit that the citizenship be retained."* Statutory Notice of Act on the Acquisition of Danish Citizenship

adoption."[105] The convention requires that any loss is "conditional upon possession or acquisition of another nationality."[106]

Nationality can also be forfeited through "an administrative act,"[107] known as deprivation. Under the 1961 statelessness convention, deprivation of nationality is permissible *only* in situations where for example nationality was obtained through fraud, even if this deprivation[108] would result in statelessness.[109] However, there is a form of deprivation of nationality that is never permissible under any circumstance: deprivation of nationality resulting from *discrimination* against the individual, or in some cases, group. According to van Waas, this refers to "situations where a state withholds or withdraws the nationality of an individual on the basis of a distinction that is deemed unreasonable and untenable."[110] It should be noted that *every* discriminatory practice resulting in deprivation of nationality *is arbitrary*, but not every arbitrary practice resulting in loss of nationality is discriminatory.[111] Another key concept to keep in mind is that of denial of nationality. According to van Waas, denial of nationality "has become the popular term used in describing situations of discriminatory deprivation of nationality."[112] Denial of nationality can be defined as "unequal access to nationality and the lack of justification for said bias."[113] Based on this definition, it is implied that discrimination plays a key role in denial of nationality. This statement can be supported by van Waas' assertion that "denial of citizenship *is* the discriminatory deprivation of nationality."[114] Groups are often victims of denial of nationality, for example the Dominicans of Haitian origin in the Dominican Republic of the Rohingya in Myanmar.

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[105] 1961 convention on the reduction of statelessness. As cited in Edwards, Alice. "The Meaning of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 22
[106] ibid. Pg. 22
[107] Edwards, Alice. "The Meaning of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 22
[108] An example of this would be the Rottman v. Freistaat Bayern case, in which the ECJ established that it is essential that "the decision to withdraw [nationality] observes the principle of proportionality"
[109] Edwards, Alice. "The Meaning of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 22
[110] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. pg. 95
[111] The *Ivcher Bronstein v. Peru* case, analyzed in section 3.d, is a prime example of this; in this case, Mr. Bronstein was deprived of his Peruvian nationality, but this deprivation had not resulted from discrimination, it resulted from Peru's decision to revoke his nationality
[112] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. pg. 96
[113] ibid. pg. 97
[114] ibid. pg. 98

A distinction should be made between the concepts of arbitrary deprivation of nationality and arbitrary denial[115] to nationality. While both acts are arbitrary, deprivation refers to the revocation of an individual's nationality on arbitrary grounds. On the other hand, arbitrary denial of nationality would refer to arbitrary policies, for example, precluding an individual from having access to a nationality. If the departure point is the premise that every human being has the right to a nationality, then denial of nationality based on discriminatory practices is undoubtedly *arbitrary deprivation* of nationality, since the individual is being *arbitrarily deprived* of this essential right through the discriminatory practices that deny him/her a nationality.[11] Finally, deprivation of nationality, even if not arbitrarily, may result in statelessness and thus in an effective denial of the right to a nationality.[116]

Under international law, it is well established that states enjoy sovereignty in the determination of its body of nationals; however, this sovereignty is limited by the state's international legal obligations. According to Edwards, there are certain obligations that strictly limit the state's discretion, which includes "the prohibition of the arbitrary deprivation of nationality, and non-discrimination in nationality matters,"[117] which will be analyzed in the following section.

2.d.ii. On *unlawfulness*, *arbitrariness* and *discrimination* in nationality practices

The concepts explored in this section, while closely interrelated, have distinct characteristics. Arbitrary deprivation of nationality can refer to deprivation itself or denial, both having taken place through *unlawful*, or *illegal*, means.[118] In other words, any deprivation of nationality is impermissible, *unless* the law provides for it. The Human Rights Committee (HRC) has found that any acts by the state must always have a legal basis for them not to be unlawful[119] (see section 5.d.iii). However, as van Waas has suggested, the "scope of arbitrariness is clearly

[115] Spiro has suggested that "The emergence of an international law of citizenship is also suggested by an emerging discourse that frames the 'denial of citizenship' as violating a right of 'access to citizenship.'" In Spiro, Peter J. "A new international law of citizenship." *American Journal of International Law* 105.4 (2011): 694-746.
[116] Robinson, Nehemiah. *The Universal Declaration of Human Rights. Its Origin Significance, Application and Interpretation. By Nehemiah Robinson. (Second Edition.)*. New York: Institute of Jewish Affairs, 1958.
[117] Edwards, Alice. "The Meaning of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 25
[118] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 94
[119] A prime example is the *Ivcher Bronstein* case, in which Peru unlawfully and arbitrarily deprived Mr. Bronstein of his nationality. See section 3.d.iii.

broader than illegal, suggesting rather an abuse of power that is either outside the law of achieved through [an arbitrary] law."[120] An unlawful deprivation or denial of nationality is always arbitrary, but there are times when the law itself is arbitrary. Therefore, when an arbitrary law permits deprivation of nationality, said deprivation would be *lawful* but *arbitrary* and thus unacceptable.

For analyzing the concept of *arbitrariness* in the context of nationality, it is interesting to take into account the discussions that took place during the drafting of the UDHR. There was widespread disagreement on the inclusion of the prohibition of arbitrary deprivation of nationality, due to different views on the meaning of the term arbitrary. Mr. Jiménez de Aréchaga stated that

> *The more exact meaning of arbitrary was anything done in contravention of a known standard of principles. An arbitrary act was usually an act committed against law, but it could be a just act if it contravened an unjust law. There should be a higher standard of justice to which the laws on deprivation of nationality should conform*[121]

The HRC defined arbitrariness in the *van Alphen v. the Netherlands* communication, stating that it should not be equated with unlawfulness, but should be "interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability."[122] Arbitrariness does not have a legitimate aim, it is not proportional and is always "incompatible with international law."[123] Additionally, according to the Open Society Justice Initiative, under international law, "it is possible to derive guiding principles behind the prohibition against arbitrary deprivation of nationality."[124] One of these principles is the compulsory application of "procedural fairness and due process,"[125] which results in a constraint in the ability of states to avoid accountability.[126] However, it should be kept in mind that arbitrariness goes beyond "procedural fairness."[127]

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[120] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 94
[121] United Nations General Assembly, 3rd Session, 3rd Committee, 123rd Meeting, held on Friday, 5 November 1948: 01/01/1948, A/C.3/SR.123
[122] *van Alphen v. the Netherlands (Communication No. 305/1988)*, CCPR/C/39/D/305/1988, UN Human Rights Committee (HRC), 23 July 1990. Paragraph 5.8
[123] As cited in Edwards, Alice. "The Meaning of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 26
[124] "Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to Be Free from Arbitrary Deprivation of Nationality, and Combating Statelessness." *Submission of the Open Society Justice Initiative to the United Nations Office of the High Commissioner for Human Rights for Consideration by the UN Commission on Human Rights at Its Sixty-Second Session*. Rep. N.p.: Open Society Justice Initiative, 2005. Print
[125] Ibid.
[126] Ibid.
[127] Ibid.

Finally, according to Brandvoll, it has been argued that *any* deprivation of nationality is arbitrary if it results in statelessness,[128] which includes *denial* of nationality as well.[129]

Discrimination plays a central role in deprivation and denial of nationality; it is an element of arbitrariness. If an act is based on discriminatory grounds, it will *always* be arbitrary. It should be first and foremost be pointed out that the prohibition of discrimination has attained the status of a *jus cogens* norm[130] under international law.[131] Therefore, *jus cogens* prohibitions on discriminatory practices[132] constrain the state's discretion over nationality matters. According to article 53 of the Vienna Convention on the Law of Treaties (VCLT), this means that this norm is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[133] The IACrtHR, in its *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants* determined that

> *The international community is unanimous in considering that the* prohibition *of racial discrimination and of practices directly associated with it is an obligation* erga omnes*. The* jus cogens *nature of the principle of non-discrimination implies that, owing to their peremptory nature, all States must observe these fundamental rules, whether or not they have ratified the conventions establishing them*[134]

Furthermore, according to Brandvoll, "the principle of non-discrimination forms a central part of the aims and objectives of all universal human rights treaties,"[135] and any deprivation or denial of

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[128] Brandvoll, Jorunn. "Deprivation of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 197

[129] See *Yean and Bosico v. Dominican Republic* case

[130] The IACrtHR, in *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants* stated that *'there is no finite list of* jus cogens *norms, because, there appear to be no criteria that allow them to be identified. It is the courts that determine whether a norm can be considered* jus cogens*…'*
Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants, OC-18/03, Inter-American Court of Human Rights (IACrtHR), 17 September 2003

[131] Edwards, Alice. "The Meaning of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 26

[132] The IACrtHR, in its *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants* stated that *'Owing to their transcendence, human rights norms are norms of* jus cogens *and, consequently, a source of the legitimacy of the international legal system. All human rights must be respected equally, because they are rooted in human dignity; therefore, they must be recognized and protected based on the prohibition of discrimination and the need for equality before the law'*
Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants, OC-18/03, Inter-American Court of Human Rights (IACrtHR), 17 September 2003

[133] Article 53. United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

[134] *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants,* OC-18/03, Inter-American Court of Human Rights (IACrtHR), 17 September 2003

[135] Brandvoll, Jorunn. "Deprivation of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 196

nationality based on any of the elements in the "list of discriminatory grounds"[136] is arbitrary and forbidden under international law.[137] The CERD committee has considered the issue of discrimination in relation to nationality. In its general recommendation no. 30, the committee established that state parties have the obligation to "ensure nondiscriminatory enjoyment of the right to nationality."[138] Therefore, nationality laws should *never* contain any discriminatory elements.

2.e. Section 2: Conclusions

Several conclusions can be derived from section 2. It has become apparent that statelessness is a problem affecting a large number of people worldwide, with impacts that go beyond the lack of nationality. Statelessness can result in the violation of several other fundamental rights of the individual, and for this reason, it is an issue that must be addressed in order to ensure equal enjoyment of rights for all mankind. This section also delved into the forms of acquisition of nationality, and it can be concluded that practice is far from homogeneous. For this reason, it is necessary for international human rights law to regulate nationality matters, in order to ensure that no person falls between the cracks of nationality laws. This section explored a wide range of concepts that while related are distinct from one another. It was established that renunciation of nationality contains a voluntary aspect, while loss of nationality results from a condition provided in the law, deprivation means nationality is forfeited through an administrative act, and finally, denial means an individual is barred from having access to a country's nationality.

The concepts of unlawfulness, arbitrariness and discrimination within the context of nationality practices were also explored. It was established that unlawfulness is related to deprivation of nationality, and it means nationality was lost contrary to what the law provides. Regarding arbitrariness, it can be concluded that there is an inextricable link between these two

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[136] This list includes discrimination based on: race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. As cited in Brandvoll, Jorunn. "Deprivation of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 196

[137] Brandvoll, Jorunn. "Deprivation of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 196

[138] UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXX on Discrimination Against Non-Citizens*, 1 October 2000. Paragraph 14

concepts, however, they are distinct. It can be concluded that any deprivation or denial of nationality based on discriminatory grounds will *always* be arbitrary,[139] but not every deprivation or denial will be discriminatory. Finally, as the Human Rights Council, in its resolution of June 2012[140] established, "arbitrary deprivation of nationality, especially on discriminatory grounds…is a violation of human rights…"[141] without exceptions.

3. The Inter-American Human Rights system: how did the right to a nationality evolve in the Inter-American system?

The Inter-American human rights system has made "substantial progress" in effectively protecting civil and political rights in the region,[142] particularly the right to a nationality. This section will explore the development of the right to a nationality as a human right in the Inter-American system of human rights. First, this section will explore the birth of the two core human rights documents in the region: the American declaration and the American Convention on Human Rights. This section will explore the birth of each document, its scope and content focusing on their respective provision on the right to a nationality, and will look at the preparatory works of the ACHR. This section will also explore the two main human rights enforcement organisms of the region: the Inter-American Commission and the Inter-American Court of Human Rights (IACrtHR). These two entities have "different but complementary functions and powers in promoting state observance and ensuring human rights in the Americas."[143] Part of their role is to process individual complaints from individuals against states which allege that an American state is liable for violating[144] the individual's rights. Finally, the jurisprudence of the IACrtHR dealing with

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[139] "Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to Be Free from Arbitrary Deprivation of Nationality, and Combating Statelessness." *Submission of the Open Society Justice Initiative to the United Nations Office of the High Commissioner for Human Rights for Consideration by the UN Commission on Human Rights at Its Sixty-Second Session*. Rep. N.p.: Open Society Justice Initiative, 2005. Print

[140] This resolution also "*Calls upon* all States to refrain from taking discriminatory measures and from enacting or maintaining legislation that would arbitrarily deprive persons of their nationality on [discriminatory] grounds…especially if such measures and legislation render a person stateless." Human Rights Council. *Human rights and arbitrary deprivation of nationality*. Resolution adopted at the 20th session of the Human Rights Council: Resolutions and President's statement. A/HRC/20/L.9 28 June 2012. Para. 4

[141] Human Rights Council. *Human rights and arbitrary deprivation of nationality*. Resolution adopted at the 20th session of the Human Rights Council: Resolutions and President's statement. A/HRC/20/L.9 28 June 2012. Para. 2

[142] Pasqualucci, Jo. "The Americas". In Moeckli, Daniel, Sangeeta Shah, Sandesh Sivakumaran, and D. J. Harris. *International Human Rights Law*. Oxford: Oxford UP, 2014. Print. Pg. 398

[143] ibid. Pg. 399

[144] ibid. Pg. 399

violations of the right to a nationality will be analyzed, divided in the 5 elements of article 20 ACHR, as it was established in section 1.

3.a. The American Declaration on the Rights and Duties of Man

3.a.i. Birth of the American Declaration

In 1948, various OAS member-states supported the approval of a legal document that would contain the full array of every human being's most fundamental human rights.[145] Initially, the idea was for this document to be a legally binding human rights instrument, but this idea fell into disfavor.[146] However, that same year—only a few months before the adoption of the UDHR by the UN General Assembly—the Organization of American States (OAS) adopted the American Declaration on the Rights and Duties of Man,[147] through Resolution XXX of the Final Act of the Conference.[148] This was, according to Pasqualucci, "the first international statement of human rights."[149] The preamble of the declaration affirmed that "fundamental human rights are not derived from being a national of a state, but are founded in the attributes of being a human being,"[150] [M.J.R.V.] and that the protection of human rights should be "the main guide of the still evolving American human rights system"[151] [M.J.R.V.]

The legal character of international legal documents cannot be changed through interpretation alone, since this would lead to insecurity for the international legal system, and particularly for states.[152] However, according to Salvioli, "modifications through interpretation can eventually grant a specific text a 'legal character' that it did not possess at the time of its

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[145] Salvioli, Fabián. "El aporte de la Declaración Americana de 1948 para la protección internacional de los derechos humanos." *Memoria del seminario sobre El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Corte Interamericana de Derechos Humanos, San José de Costa Rica* (2003).
[146] ibid.
[147] Chan, Johannes M. M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14
[148] Salvioli, Fabián. "El aporte de la Declaración Americana de 1948 para la protección internacional de los derechos humanos." *Memoria del seminario sobre El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Corte Interamericana de Derechos Humanos, San José de Costa Rica* (2003).
[149] Pasqualucci, Jo. "The Americas". In Moeckli, Daniel, Sangeeta Shah, Sandesh Sivakumaran, and D. J. Harris. *International Human Rights Law*. Oxford: Oxford UP, 2014. Print. Pg. 399
[150] Secretaria General de la Organizacion de los Estados Americanos (OEA), *Conferencia Especializada Inter-Americana Sobre Derechos Humanos*, 7-22 de Noviembre de 1969, OEA/Ser.K/XVI/1.2
[151] Ibid.
[152] Salvioli, Fabián. "El aporte de la Declaración Americana de 1948 para la protección internacional de los derechos humanos." *Memoria del seminario sobre El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Corte Interamericana de Derechos Humanos, San José de Costa Rica* (2003).

inception."[153] This is precisely what happened to the American Declaration. The document's legal weight increased through its role as the "legal and procedural base of the Inter-American commission (IACommHR)"[154] [M.J.R.V.] and through interpretation by the IACrtHR.[155] The legal character of the American Declaration shifted from being a non-legally binding document to a legally binding one. In fact, the IACommHR and the IACrtHR have examined violations of articles of the American Declaration in cases concerning both state parties to the ACHR and non-state parties. The American Declaration is said to be the regional human rights document that regulates the behavior of states that are not parties to the ACHR.

3.a.ii. On Nationality: Article XIX American Declaration

Resolution XXX, which adopted the American Declaration, reinforces the notion that human rights are inherent to human beings simply by virtue of being human beings, regardless of nationality—or lack of it—expressing that "…American States have recognized that the essential rights of man are not derived from being nationals of a state but are derived from being a human being…"[156] As it was previously mentioned, the international protection of human rights should be the guide for the evolving American human rights system. The American Declaration can be considered the base of the human rights system which American states must "uphold and protect"[157] [M.J.R.V.] and has acted as the main guide for drafting other human rights instruments, such as the ACHR.[158] A very important contribution of the American Declaration to the Inter-

[153] Salvioli, Fabián. "El aporte de la Declaración Americana de 1948 para la protección internacional de los derechos humanos." *Memoria del seminario sobre El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Corte Interamericana de Derechos Humanos, San José de Costa Rica* (2003).
[154] ibid.
[155] ibid.
[156]Declaración Americana de Derechos y Deberes del Hombre: resolución XXX, IX Conferencia Interamericana, Bogotá, Colombia, 1948. As cited in Salvioli, Fabián. "El aporte de la Declaración Americana de 1948 para la protección internacional de los derechos humanos." *Memoria del seminario sobre El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Corte Interamericana de Derechos Humanos, San José de Costa Rica* (2003).
[157] Salvioli, Fabián. "El aporte de la Declaración Americana de 1948 para la protección internacional de los derechos humanos." *Memoria del seminario sobre El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Corte Interamericana de Derechos Humanos, San José de Costa Rica* (2003).
[158] Novena Conferencia Internacional de los Estados Americanos: "Resolución XXX", párrafos tercero y cuarto, Bogotá, Colombia, Marzo 30 - mayo 2, págs. 38 y ss, Edit. UPA, 1948. As cited in Salvioli, Fabián. "El aporte de la Declaración Americana de 1948 para la protección internacional de los derechos humanos." *Memoria del seminario sobre El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Corte Interamericana de Derechos Humanos, San José de Costa Rica* (2003).

American human rights systems is that OAS member states have "signaled their agreement"[159] that the declaration "contains and defines the fundamental human rights referred to in the Charter"[160] of the organization. Therefore, when human rights are concerned, the charter can neither be interpreted nor applied without "relating its norms… to the corresponding provisions of the Declaration."[161]

The American Declaration is the first human rights document—or one of the first, along with the UDHR—in contemporary international law that contains a right to a nationality.[162] The content of the American Declaration and the UDHR is similar, because these two texts are contemporary and because at the time these two texts were adopted, international law was still considerably Eurocentric and western.[163] Additionally, due to its time-period, the thoughts behind the declaration also contributed to the "various debates for the adoption of certain norms of the UDHR"[164] [M.J.R.V.] through various delegates from American States. Similarly to the UDHR, the American Declaration contains a provision on the right to a nationality, found in article XIX of the American Declaration, which states that

> *Every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.* [165]

It is clear that the right to a nationality, as recognized in article XIX, is limited. This article initially recognizes the right to a nationality in general terms, but immediately limits the scope of the article by stating that this right is limited to the individual's "entitlement by law" to a specific nationality.

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[159] *Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights,* Inter-American Court of Human Rights (IACrtHR) (Ser. A) No. 10 (1989). OC-10/89, July 14, 1989. Paragraph 43.

[160] ibid. Paragraph 43.

[161] ibid. Paragraph 43.

[162] Salvioli, Fabián. "El aporte de la Declaración Americana de 1948 para la protección internacional de los derechos humanos." *Memoria del seminario sobre El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Corte Interamericana de Derechos Humanos, San José de Costa Rica* (2003).

[163] Salvioli, Fabián: "El desarrollo de la protección internacional de los derechos humanos, a partir de las Declaraciones Universal y Americana", en: "Relaciones Internacionales N 13", pág. 79; edit. Instituto de Relaciones Internacionales de la Universidad Nacional de La Plata, Argentina, 1997. As cited in Salvioli, Fabián. "El aporte de la Declaración Americana de 1948 para la protección internacional de los derechos humanos." *Memoria del seminario sobre El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Corte Interamericana de Derechos Humanos, San José de Costa Rica* (2003).

[164] Salvioli, Fabián. "El aporte de la Declaración Americana de 1948 para la protección internacional de los derechos humanos." *Memoria del seminario sobre El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Corte Interamericana de Derechos Humanos, San José de Costa Rica* (2003).

[165] Article XIX. Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948,

The right exists only when there is *legal correspondence*, which does not necessarily "ensure the right to a nationality to everyone and in every case."[166] [M.J.R.V.] This creates a gap that can allow for statelessness to occur, since it seems to exclude persons who, due to conflict of laws for example, are not entitled to any nationality. It is possible, however, that this article was worded in this manner due to the fact that in the Americas, most countries adhere to the *jus soli* principle. *Jus soli* does not leave much room for individuals to "fall through the cracks" of conflicting nationality laws, since by law, nationality is obtained at the time of birth by virtue of being born on the state's territory. However, for many, proving their birth on the territory of a state is challenging since they do not possess any documentation. Additionally, the *original* legal character of the document should be kept in mind; this document was not meant to be legally binding, and was meant to state general principles rather than create obligations upon OAS member states.

3.b. American Convention on Human Rights (ACHR)

3.b.i. Birth of the ACHR

The American Convention on Human Rights was adopted in 1969 by the Organization of American States and entered into force on July 18th, 1978. This convention sets forth 23[167] *fundamental* civil and political rights that every state party has pledged to "respect and ensure"[168] in respect of every individual under their jurisdiction.[169] As it has been previously mentioned, the ACHR contains "the most far-reaching right to a nationality in a legally binding human rights document to date."[170] Article 20 recognizes that nationality is "inherent to being a human being"[171] [M.J.R.V.] and is independent of any requisites established by states.[172] Article 20 ACHR states that

1. Every person has the right to a nationality.

[166] Peixoto, Raquel Salinas. "Los apátridas, la lucha contra la apatridia y la experiencia latinoamericana." *Ita ius esto* 2 (2012): 45-60.
[167] It contains one provision which "provides for the progressive development of economic, social and cultural rights" as cited in Pasqualucci, Jo. "The Americas". In Moeckli, Daniel, Sangeeta Shah, Sandesh Sivakumaran, and D. J. Harris. *International Human Rights Law*. Oxford: Oxford UP, 2014. Print. Pg. 400
[168] Pasqualucci, Jo. "The Americas". In Moeckli, Daniel, Sangeeta Shah, Sandesh Sivakumaran, and D. J. Harris. *International Human Rights Law*. Oxford: Oxford UP, 2014. Print. Pg. 400
[169] Jurisdiction refers to every area over which the state has effective control. In Pasqualucci, Jo. "The Americas". In Moeckli, Daniel, Sangeeta Shah, Sandesh Sivakumaran, and D. J. Harris. *International Human Rights Law*. Oxford: Oxford UP, 2014. Print. Pg. 401
[170] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 60
[171] Peixoto, Raquel Salinas. "Los apátridas, la lucha contra la apatridia y la experiencia latinoamericana." *Ita ius esto* 2 (2012): 45-60.
[172] Ibid.

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.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it. [173]

It can be said that article 20 ACHR covers 4 basic provisions related to nationality. Its first provision, which states "1. Every person has the right to a nationality" contains the general right to a nationality. Its second provision creates an obligation upon state parties to protect individuals from becoming stateless through the application of the *jus soli* principle in cases where the child would be otherwise stateless. While most American states adhere to the *jus soli* principle, there are states that do not, as it can be seen in the table found in section 2.b. Therefore, the inclusion of this provision was essential for the protection of the right to a nationality in the region. The third provision "3. No one shall be arbitrarily deprived of his nationality or of the right to change it" contains two provisions, a) a protection against arbitrary deprivation of nationality, and b) the right of every person to change his/her nationality. However, inexplicitly, the third provision contains a prohibition of discriminatory practices in nationality matters, a prohibition that is reinforced by of article 1.1 ACHR (see section 3.b.ii.) Together, these provisions result in a high level of protection of the right to a nationality.

3.b.ii. ACHR: Scope, Content, and Article 20 ACHR

When the ACHR was drafted, its drafters were very careful when setting its limits,[174] one of which is the exclusion or the limitation of the "effect the American Declaration can have from a *pro homine* perspective."[175] [M.J.R.V.] This limit obeys the legally binding nature of the Declaration,[176] discussed in section 3.a. Therefore, the ACHR cannot supersede the American Declaration. It is also clear that the main limitation of the interpretation of both documents is the extent to which they can be interpreted from a *pro homine* perspective. The ACHR can never be interpreted in a way that would not be beneficial to the individual.

Article 20 ACHR contains similar provisions to article 15 UDHR: it contains a general right to a nationality, a strict prohibition or arbitrary deprivation of nationality and contains the right

[173] Article 20. Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969
[174] Salvioli, Fabián. "El aporte de la Declaración Americana de 1948 para la protección internacional de los derechos humanos." *Memoria del seminario sobre El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Corte Interamericana de Derechos Humanos, San José de Costa Rica* (2003).
[175] ibid.
[176] ibid.

to change one's nationality. However, as section 2 of article 20 ACHR shows,[177] when a conflict of laws results in statelessness at birth, the ACHR "clearly prescribes the adoption of *jus soli* to ensure that those individuals acquire a nationality."[178] In this respect, the article 20 ACHR goes further than article 15 UDHR by imposing an *obligation* upon states in order to prevent statelessness at birth. This measure can be a mere reflection of the preference among American states of the *jus soli* principle[179] as the primary principle for nationality attribution.[180]

The strictness of the regulations found in the article, and the limited character of its scope translates into the impossibility of any withdrawal from the "imperative requirements found in article 20 ACHR."[181] [M.J.R.V.] For example, *any* action that can be inferred to be under a state's own discretion—making it arbitrary—automatically constitutes a violation of article 20 ACHR. This leaves limited room for the state to maneuver, which means increased protection for the individual from a violation of his/her right to a nationality. Additionally, article 20 ACHR is included in the list—found under article 27 ACHR[182] —of articles from which derogation is *never* permissible.

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[177] *Article 20- Right to a Nationality*
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.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it. [177]
Article 20. Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969

[178] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 60

[179] It could also be attributed to the influence of the 191 Convention on the Reduction of Statelessness. Article 1.1 of the convention states that
A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted:
(a) at birth, by operation of law, or
(b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this Article, no such application may be rejected.
UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175

[180] Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status', in International Journal of Refugee Law, Vol. 10, 1998, page 170 as cited in Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 60

[181] del Rosario Rodríguez, Marcos Francisco. "El derecho a la nacionalidad." *Revista Internacional de Derechos Humanos/ISSN* 1.0 (2011): 81.

[182] *Article 27. Suspension of Guarantees*
1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

Finally, it is interesting to point out that the scope of article 20 ACHR has become broader. On its first interpretation of article 20 ACHR, the IACrtHR in its *advisory opinion on proposed amendments* stated that

> *Since the proposed amendments are designed…to impose stricter requirements for the acquisition of…nationality by naturalization, but since they do not purport to withdraw that nationality from any citizen currently holding it, nor to deny the right to change that nationality, the Court concludes that the proposals do not in any formal sense contravene Article 20 of the Convention. Although Article 20 remains to be more fully analyzed and is capable of development*…[183]

Clearly, in its first judgment on the subject, the IACrtHR set the limits of what it considered would constitute a violation of article 20 ACHR at the time: deprivation of nationality. However, the IACrtHR left the door open for this scope to expand. Recently, the IACrtHR has established that denial of nationality also constitutes a violation of article 20 ACHR, as it is a form of deprivation of the right to nationality.

It has been mentioned that, while the focus of this paper is on articles that address nationality, it is not beneficial to carry out an analysis exclusively on articles relating to nationality, but it is essential to take other articles in the same instrument into consideration.[184] Within the ACHR, there is an article of crucial importance for a comprehensive analysis of article 20 ACHR: article 1.1 ACHR, which deals with the prohibition of discrimination. It has been established that some arbitrary practices on nationality matters are discriminatory, and for this reason, article 20.3 *implicitly* contains the prohibition of discriminatory practices. Within the ACHR, article 1.1 *explicitly* prohibits any discriminatory acts.[185] Article 1.1 ACHR provides the full enjoyment of the

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2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969

[183] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84,* Inter-American Court of Human Rights (IACrtHR), 19 January 1984. Paragraph 42

[184] Due to constraints in length, this paper will only address, outside of articles dealing with nationality, articles on discrimination found in the instrument where articles on nationality are found

[185] Article 1.1.
The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth,

rights and freedoms found in the convention *without any discrimination*. Therefore, article 1.1 ACHR prohibits any form of discrimination in nationality matters, which includes the prohibition of arbitrary deprivation or denial of nationality on discriminatory grounds.

3.b.iii. Preparatory works of the American Convention on Human Rights

The preparatory works, or *travaux préparatoires*, of any international legal instrument give us insight into how said international instrument came into being. Preparatory works particularly give us an idea of what was the state of international relations at the time of the instrument's creation, and on which end of the spectrum the states participating in the discussions stood. Initially, when the ACHR was being drafted, the right to a nationality was going to be included within article 18, an article on the rights of the child, similarly to article 24 ICCPR. The proposed article[186] would read as follows:

> *Article 18*
> *Every child has the right:*
> *b) To acquire the nationality of the state in whose territory he/she was born if he/she does not have the right to any other.*

Argentina for example, stated that article 18 paragraph b) created a combination that attempted to include both *jus soli* and *jus sanguinis*; however, to avoid conflicts of law, Argentina[187] proposed the text of article 18 paragraph b) to be replaced with a text similar to article 24 paragraph 3[188] ICCPR. Other states, like the Dominican Republic, disagreed. The Dominican Republic stated that it would be more beneficial to add a sub-paragraph to article 17 which would address the rights of the child. If this would be done, article 18 could become an article devoted *solely* to the right to a nationality which "should be established in applicable terms to all human beings, both adults and children." The title proposed would be *right to a nationality.*[189] The president of the committee supported the idea of creating an article for nationality *exclusively*.[190] Paragraph 2, reading "every

or any other social condition. Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969

[186] Secretaria General de la Organizacion de los Estados Americanos (OEA), *Conferencia Especializada Inter-Americana Sobre Derechos Humanos*, 7-22 de Noviembre de 1969, OEA/Ser.K/XVI/1.2

[187] Ibid.

[188] Article 24, paragraph 3 ICCPR reads as follows: *3. every child has the right to acquire a nationality.*

[189] Secretaria General de la Organizacion de los Estados Americanos (OEA), *Conferencia Especializada Inter-Americana Sobre Derechos Humanos*, 7-22 de Noviembre de 1969, OEA/Ser.K/XVI/1.2

[190] Ibid.

person has the right to acquire the nationality of the state where he/she was born if he has no right to any other”[191] [M.J.R.V.] and paragraph 3, which read “nobody shall be arbitrarily deprived of his/her nationality or the right to change it”[192][M.J.R.V.] were put forth for a vote and passed. Initially, it seemed that the ACHR was going to take the same pathway as the ICCPR and mention nationality only in respect to children. However, it seems that the majority of American states supported the idea that nationality should be contained in one article created to specifically address nationality. This shows that overall, there was consensus in the region at the time of drafting the ACHR that nationality was a human right and it was necessary to regulate it under a legally binding human rights document. It also shows that states of the region were willing to be bound by the international obligations established in the convention regarding nationality, constraining their discretion on nationality matters.

3.c. Inter-American Commission[193]

The Inter-American Commission on Human Rights (IACommHR)[194] of human rights is one of the main organs of the Inter-American human rights system. The IACommHR makes *in situ* visits, and drafts reports and press releases on the human rights situation taking place on the territory of an OAS member state. The IACommHR can also hold audiences on various topics on general or specific situations in various OAS member states.[195] Perhaps one of the most important powers the IACommHR has is that it can “order the adoption of precautionary measures in urgent situations or ask the IACrtHR to take provisional measures.”[196] [M.J.R.V.] The precautionary

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[191] Secretaria General de la Organizacion de los Estados Americanos (OEA), *Conferencia Especializada Inter-Americana Sobre Derechos Humanos*, 7-22 de Noviembre de 1969, OEA/Ser.K/XVI/1.2
[192] Ibid.
[193] For an in-depth analysis of the commission, see Pasqualucci, Jo. “The Americas”. In Moeckli, Daniel, Sangeeta Shah, Sandesh Sivakumaran, and D. J. Harris. *International Human Rights Law*. Oxford: Oxford UP, 2014. Print.
[194] Article 33 ACHR:
The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by state parties to this convention:

(a) The inter-American Commission on Human Rights, referred to as “the commission” and,
(b) The inter-American court of Human Rights, referred to as “the court”

Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969
[195] Blanchard, Marisol, and María Claudia Pulido. "La Comisión Interamericana De Derechos Humanos Y Sus Mecanismos De Protección Aplicados a La Situación De Los Refugiados, Apátridas Y Solicitantes De Asilo." *El Asilo Y La Protección Internacional De Los Refugiados En América Latina: Análisis Crítico Del Dualismo "asilo-refugio" a La Luz Del Derecho Internacional De Los Derechos Humanos*. By Leonardo Franco, Gianelli Dublanc María Laura, and Alberto D'Alotto. New York: UNHCR, 2004. Print.
[196] Ibid.

measures "establish an urgent action procedure which is used to safeguard the fundamental rights of those who are in imminent danger of suffering irreparable harm."[197] [M.J.R.V.] The set of norms that guide the functioning of the Inter-American commission takes not only the ACHR into consideration, but also the American Declaration as an "essential and applicable instrument."[198][M.J.R.V.] This is particularly true for member states who have not ratified the ACHR.

Regarding nationality, the Inter-American commission, in its *Third Report on the situation of human rights in Chile,* stated that

> *It is generally considered that since nationality of origin is an inherent attribute of man, his natural right, and is not a gift or favor bestowed through the generosity or benevolence of the State, the State may neither impose it on anyone by force, nor withdraw it as punishment or reprisal.*[199]

The commission held the view that the deprivation of nationality is often used as a weapon in a political battle, and that the use of this weapon *always* has the effect of "leaving a citizen of a country without a land or home of his own." [200] According to the IACommHR, if deprivation of nationality would become "generalized"[201] by all states, it would result in an effective method for creating statelessness.[202] The IACommHR therefore made it very clear that deprivation of nationality as a form of punishment is "anachronistic, outlandish and legally unjustifiable in any part of the world"[203] and is "a thousand times more odious and reprehensible when applied in our own Americas, and should forever be banned from being applied by governments *everywhere*."[204] While the commission has the power to make recommendations to OAS member states to promote the respect for the fundamental rights of the people of the Americas—both citizens and non-

[197] Blanchard, Marisol, and María Claudia Pulido. "La Comisión Interamericana De Derechos Humanos Y Sus Mecanismos De Protección Aplicados a La Situación De Los Refugiados, Apátridas Y Solicitantes De Asilo."*El Asilo Y La Protección Internacional De Los Refugiados En América Latina: Análisis Crítico Del Dualismo "asilo-refugio" a La Luz Del Derecho Internacional De Los Derechos Humanos*. By Leonardo Franco, Gianelli Dublanc María Laura, and Alberto D'Alotto. New York: UNHCR, 2004. Print.
[198] Salvioli, Fabián. "El aporte de la Declaración Americana de 1948 para la protección internacional de los derechos humanos." *Memoria del seminario sobre El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Corte Interamericana de Derechos Humanos, San José de Costa Rica* (2003).
[199] Inter-American Commission for Human Rights, *Third report on the situation of human rights in Chile,* OEA/Ser.L/V/II.40, doc. 10, 1977. Paragraph 10
[200] Ibid. Paragraph 11
[201] Ibid. Paragraph 11
[202] Ibid. Paragraph 11
[203] Ibid. Paragraph 11
[204] Ibid. Paragraph 11

citizens alike—it is necessary for member states to accept and implement these recommendations in good faith.[205]

3.d. Inter-American Court of Human Rights jurisprudence

The Inter-American Court of Human Rights[206] is the organism that has "supervisory authority" over the ACHR.[207] The IACrtHR has issued various decisions on cases dealing with the scope and content of the protections found in article 20 ACHR.[208] The IACrtHR has also made various decisions regarding the American Declaration through advisory opinions at the request of OAS member states.[209] Regarding interpretation, through its endorsement of the ICJ's *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the IACrtHR has rejected "historical interpretations"[210] of human rights legal documents. The IACrtHR interprets documents "in light of the normative framework in force at the moment theinterpretation is done."[211] This is consistent with the content of article 29[212] ACHR, which

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[205] Blanchard, Marisol, and María Claudia Pulido. "La Comisión Interamericana De Derechos Humanos Y Sus Mecanismos De Protección Aplicados a La Situación De Los Refugiados, Apátridas Y Solicitantes De Asilo."*El Asilo Y La Protección Internacional De Los Refugiados En América Latina: Análisis Crítico Del Dualismo "asilo-refugio" a La Luz Del Derecho Internacional De Los Derechos Humanos*. By Leonardo Franco, Gianelli Dublanc María Laura, and Alberto D'Alotto. New York: UNHCR, 2004. Print.

[206] Article 33:
The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by state parties to this convention:
- *(c) The inter-American Commission on Human Rights, referred to as "the commission" and,*
- *(d) The inter-American court of Human Rights, referred to as "the court"*

Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969

[207] Adjami, Mirna, and Julia Harrington. "The Scope and Content of Article 15 of the Universal Declaration of Human Rights." *Refugee Survey Quarterly* 27.3 (2008): 93-109.

[208] Ibid.

[209] Salvioli, Fabián. "El aporte de la Declaración Americana de 1948 para la protección internacional de los derechos humanos." *Memoria del seminario sobre El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Corte Interamericana de Derechos Humanos, San José de Costa Rica* (2003).

[210] Lixinski, Lucas. "Treaty interpretation by the Inter-American Court of Human Rights: Expansionism at the service of the unity of international law." *European Journal of International Law* 21.3 (2010): 585-604.

[211] Ibid.

[212] *No provision of this Convention shall be interpreted as*
a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein
b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have

requires for any interpretation of the ACHR to be "in accordance with other relevant instruments."[213]

Article 29 ACHR, according to Lixinski, sets rules that are similar to those set in article 31 of the Vienna Convention on the Law of Treaties (VCLT).[214] Article 29.b ACHR can be said to have the same effect of Article 31(3)(c) VCLT, "in promoting interpretation taking into account the normative context of the instrument, but including in this normative context only instruments which are applicable to the state concerned."[215] The IACrtHR has made use of the VCLT to assert that the ACHR must be "interpreted taking into account other treaties and instruments related to it, and also, more importantly, the system within which the Convention is inserted."[216] It is therefore not surprising than in its interpretations of article 20 ACHR, the IACrtHR has made use of other current international documents that discuss nationality, and has always supported in its decisions the view that nationality is a human right in its own right. Any international human rights instrument can be used as "a means to expand the jurisdiction of the Inter-American system, as human rights are interdependent, even if they are not all contained within the key instrument the court is interpreting [ACHR]."[217] A very important element of the "application and interpretation" of legal documents by the IACrtHR is that these instruments must always be interpreted in a way that would be most favorable to the individual.[218] Judge Cançado Trindade has argued that human rights treaties have a "special nature as they go beyond the regulation of

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Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969

[213] Lixinski, Lucas. "Treaty interpretation by the Inter-American Court of Human Rights: Expansionism at the service of the unity of international law." *European Journal of International Law* 21.3 (2010): 585-604.

[214] Ibid.

[215] Ibid.

[216] This view can be found in various cases of the court, including *Case of the Yakye Axa Indigenous Community v. Paraguay,* Inter-American Court of Human Rights, Merits, Reparations, and Costs, Judgment of 17 June 2005. Series C No. 125, at para. 126. See also *Case of Tibi v. Ecuador*, Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 7 Sept. 2004, Series C No. 114, at para. 144; *Case of the Gómez-Paquiyauri Brothers v. Peru*, Inter-American Court of Human Rights, Merits, Reparations, and Costs, Judgment of 8 July 2004, Series C No. 110, at para. 164; *Case of the 'Street Children' (Villagrán-Morales et al.) v. Guatemala*, Inter-American Court of Human Rights, Merits, Judgment of 19 Nov. 1999, Series C No. 63, at paras 192–193; and *The Right to Information on Consular Assistance In the Framework of the Guarantees of the due Process of Law, Advisory Opinion*, Inter-American Court of Human Rights, OC-16/99 of 1 Oct. 1999, Series A No. 16, at para. 113. As cited in Lixinski, Lucas. "Treaty interpretation by the Inter-American Court of Human Rights: Expansionism at the service of the unity of international law." *European Journal of International Law* 21.3 (2010): 585-604.

[217] Lixinski, Lucas. "Treaty interpretation by the Inter-American Court of Human Rights: Expansionism at the service of the unity of international law." *European Journal of International Law* 21.3 (2010): 585-604.

[218] *Mapiripán Massacre v. Colombia* case, Inter-American Court of Human Rights (IACrtHR) Series C No. 122, 15 September 2005. Paragraph 106

state interests."[219] Therefore, these documents "require an effective protection of guaranteed rights focusing on the human person."[220] This is also known as a *pro homine* interpretation.[221] Human rights treaties were drafted for one purpose: to protect human rights. Choosing the *pro homine* principle to guide an interpretation of a human rights document is an effective way to ensure that the treaty is being interpreted according to its purpose: to protect human rights.

Regarding the right to a nationality, the decisions made by the IACrtHR in cases dealing with nationality are essential, since interpretation by the court of article 20 ACHR has contributed to a better understanding of the article. Following sections will analyze the IACrtHR's jurisprudence on article 20 ACHR, divided into its 5 elements. Finally, it is essential to acknowledge an important tenet of this thesis: the sovereignty of states over nationality matters. This principle has been acknowledged by the IACrtHR in all 5 cases, and it is a key component of this thesis' whole analysis. The cases analyzed will be the existing cases that have discussed Article 20 ACHR: *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica; Castillo Petruzzi et al. v. Peru; Baruch Ivcher Bronstein v. Peru; Yean and Bosico Children v. The Dominican Republic;* and *Expelled Dominican and Haitian Persons v. the Dominican Republic.*

3.d.i. General overview of the cases

The first time that a question explicitly relating to nationality was analyzed by IACrtHR was in the *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* of January 19th, 1984 brought by Costa Rica to the IACrtHR.[222] Prior to this decision, there was no legal background based on previous advisory opinions or judgments by the IACrtHR on nationality matters.[223] Therefore, it was essential for the IACrtHR to "set the first parameters."[224] [M.J.R.V.] Costa Rica brought forth a question regarding a constitutional reform in their nationality law for naturalization. The main question was whether the proposed amendment to the Costa Rican Constitution, which would create stricter conditions for naturalization, was

[219] Trindade Cançado, Antônio Augusto. "Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century." *Tul. J. Int'l & Comp. L.* 8 (2000): 5.
[220] Ibid.
[221] Lixinski, Lucas. "Treaty interpretation by the Inter-American Court of Human Rights: Expansionism at the service of the unity of international law." *European Journal of International Law* 21.3 (2010): 585-604.
[222] del Rosario Rodríguez, Marcos Francisco. "El derecho a la nacionalidad." *Revista Internacional de Derechos Humanos/ISSN* 1.0 (2011): 81.
[223] Ibid.
[224] Ibid.

compatible with the ACHR.[225] The IACrtHR found that the proposed amendments would not constitute discriminatory practices.

In 1999 the IACrtHR's considerations in the *Castillo Petruzzi v. Peru* case "deepened the scope and limits to the exercise of the right to a nationality."[226] [M.J.R.V.] The case should be understood within the social context of Peru at the time: the fight against "terrorist groups" in its territory. During this time, the state approved various laws that were based in a "state of exception", deriving from the situation of emergency that affected the country.[227] 4 Chilean nationals were put on trial by Peru for the crime of treason to the homeland, despite the fact that they were not Peruvian nationals.[228] The question brought forth was whether a violation of 20 ACHR had taken place, since Peru sentenced Chilean nationals for treason despite the fact that Peru did "not have the right to try and convict the four Chilean citizens for the crime of treason."[229] Additionally, by convicting the 4 Chilean nationals, the state allegedly "imposed on them and attempted to create within them an artificial bond of allegiance and loyalty to Peru."[230] For them to owe loyalty to Peru and be able to commit treason to the homeland, they would first have had to voluntarily obtain Peruvian nationality and have voluntarily renounced their Chilean nationality. The IACrtHR found that no violation of article 20 had taken place.

The *Ivcher Bronstein v. Peru* case dealt with the arbitrary deprivation of nationality suffered by Mr. Bronstein[231] who was a naturalized Peruvian national. The main significance of this case is that the IACrtHR distinguished the "vulnerabilities that result from a direct violation of the right to a nationality."[232] [M.J.R.V.] as a result of being deprived of his Peruvian nationality, Mr. Bronstein suffered various human rights violations in addition to the violation of his right to a nationality. Since he had renounced his nationality of origin (Israeli) in order to become a Peruvian national,

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[225] Chan, Johannes M. M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14
[226] del Rosario Rodríguez, Marcos Francisco. "El derecho a la nacionalidad." *Revista Internacional de Derechos Humanos/ISSN* 1.0 (2011): 81.
[227] Ibid.
[228] Ibid.
[229] *Castillo Petruzzi et al. Case, (Castillo Petruzzi et al. v Peru)* Inter-American Court of Human Rights (IACrtHR), 30 May 1999. Paragraph 97 (a)
[230] Ibid*.* Paragraph 97 (b)
[231] Mr. Bronstein was a businessman in Peru, serving as CEO of a television channel. He had acquired Peruvian nationality though naturalization, having voluntarily relinquished his Israeli nationality in order to become a Peruvian national. as cited in *Ivcher-Bronstein Case (Baruch Ivcher Bronstein vs. Peru)*, Inter-American Court of Human Rights (IACrtHR), 6 February 2001. Paragraph 83 (b)
[232] del Rosario Rodríguez, Marcos Francisco. "El derecho a la nacionalidad." *Revista Internacional de Derechos Humanos/ISSN* 1.0 (2011): 81.

after the deprivation he was left without a nationality—he became (temporarily) stateless. The IACrtHR found that article 20 had been violated, as Mr. Bronstein's deprivation of nationality had no legal basis and was done with the intent to harm him and hamper him from being able to carry out his function as CEO of the TV channel where he worked.

One of the most substantial decisions by the IACrtHR regarding nationality is the decision in the *Yean and Bosico Children v. The Dominican Republic* case of September 8th, 2005. The Dominican civil registry denied registration to two girls, Yean and Bosico, despite having been born on Dominican territory.[233] This denial resulted in various violations of the girls' human rights,[234] including a violation of their right to a nationality. Various fundamental rights, such as the right to a name, the right to equality, to legal personality, to education, were affected, since these rights are linked to the right to a nationality.[235] From this case, it was established that the *genuine link* between individual and state can be "proved by various elements considered together."[236] According to the IACrtHR, any "fact or act by an individual or the state that shows a real union between them satisfies this purpose."[237] For example, place of birth, place of residence, or "self-identification with the people of the said State"[238] can satisfy the requirement of the existence of a genuine link between individual and state. In the case of the Yean and Bosico children, it was clear to the IACrtHR that their connection, and the "structure of their lives and their relationships are with the Dominican Republic."[239] Therefore, it was impossible for them to be Haitian rather than Dominican—as the state alleged—since there was no genuine link between these children and Haiti. Their genuine link was with the Dominican Republic,[240] and being rendered stateless had harmful consequences on them as individuals. The Dominican Republic follows the *jus soli* principle for the attribution of nationality, and consequently the "the right to

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[233] del Rosario Rodríguez, Marcos Francisco. "El derecho a la nacionalidad." *Revista Internacional de Derechos Humanos/ISSN* 1.0 (2011): 81.
[234] Ibid.
[235] Ibid.
[236] *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Frederick John Packer, Expert witness.
[237] Ibid.
[238] Ibid.
[239] Ibid.
[240] Ibid.

nationality based on having been born on Dominican territory is protected…irrespective of the nationality or legal status of the parents."[241] The IACrtHR ruled in favor of the girls.

In a recent development, the IACrtHR ruled in favor of a group of individuals who had been expelled from the Dominican Republic as a result from a ruling by the Dominican constitutional court in 2013. This ruling applied retroactively, stating that all persons born from 1929 onwards, to parents who were not in the country legally were not Dominican nationals.[242] The victims of this case were among the affected by the ruling. The Dominican state strongly opposed the recent ruling. The government issued a declaration on the ruling, citing article 1 of the 1930 Hague Convention, adhering to the idea that the state is sovereign in the determination of its rules for the acquisition of nationality.[243] This article cited by the government does in fact acknowledge the state's power to determine its body of nationals. However, the state's authority in this matter is clearly constrained by its international legal obligations. The Dominican Republic has obligations owed to the international community, and regarding the ACHR, to the member states of OAS to live up to its obligations and ensure that no individual under its jurisdiction's rights are violated. The Dominican state is doing the opposite, and so in line with the article it cited to defend its policies, the Dominican Republic's recent discriminatory laws which have resulted in a large number of cases of statelessness cannot be recognized neither by other states nor by the regional and international human rights systems. The next section will analyze the IACrtHR's case law, divided in the 5 elements mentioned in section 1.

3.d.ii. On the general right to a nationality

In its *Advisory Opinion on Proposed Amendments*, the IACrtHR acknowledged that the right of every person to a nationality "has been recognized…by international law."[244] In the IACrtHR's view, article 20 ACHR has two aspects,[245] one of them being the general right to a nationality, which provides the individual with a necessary "minimal measure of legal protection in

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[241] *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Paragraph 111

[242] *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 313

[243] Presidencia República Dominicana. "Declaración. Gobierno Dominicano Rechaza La Sentencia De La Corte Interamericana De Derechos Humanos." *Scribd*. N.p., 24 Oct. 2014. Web.

[244] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84,* Inter-American Court of Human Rights (IACrtHR), 19 January 1984. Paragraph 34

[245] The other aspect being the prohibition of arbitrary deprivation of nationality

international relations"[246] through the link of nationality. The IACrtHR maintained this view throughout its decisions in all 5 of its cases on nationality matters.[247] In the *Yean and Bosico* case, making use of the definition of nationality the IACrtHR laid down in its *advisory opinion on the proposed amendments*, the IACrtHR established that

> *The importance of nationality is that, as the political and legal bond that connects a person to a specific State, it allows the individual to acquire and exercise rights and obligations inherent in membership in a political community. As such, nationality is a requirement for the exercise of specific rights.*[248]

Therefore, the violation of the right to a nationality results in the violation of various other rights, a view supported in the ruling of the *Expelled Dominican and Haitians* case.[249] In this same case, the IACrtHR reiterated its assertion that in line with article 27 ACHR,[250] nationality possesses a non-derogatory character,[251] as it had established in the *Yean and Bosico* case. This means that the right to a nationality cannot be suspended at any time regardless of the circumstances.

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[246] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84,* Inter-American Court of Human Rights (IACrtHR), 19 January 1984. Paragraph 34

[247] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84,* Inter-American Court of Human Rights (IACrtHR), 19 January 1984. Paragraph 34; *Castillo Petruzzi et al. Case, (Castillo Petruzzi et al. v Peru)* Inter-American Court of Human Rights (IACrtHR), 30 May 1999. Paragraph 100; *Ivcher-Bronstein Case (Baruch Ivcher Bronstein vs. Peru)*, Inter-American Court of Human Rights (IACrtHR), 6 February 2001, paragraph 87; *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Paragraph 139; *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 254.

[248] *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Paragraph 137

[249] *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 253

[250] Article 27 ACHR states that

Article 27. Suspension of Guarantees

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

[251] *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Paragraph 136. As cited in *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 253

3.d.iii. On the prohibition of arbitrary deprivation of nationality

As it was previously mentioned, the IACrtHR established in its *advisory opinion on the proposed amendments* that article 20 ACHR has various aspects, one of which is the protection against arbitrary deprivation of the individual's nationality. Without this protection contained in article 20 ACHR, the individual could 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."[252] This view has been upheld by the IACrtHR in in all 5 cases,[253] and it can be concluded that no derogation is ever permissible, at least within the inter-American system, from this rule. No state has the authority to arbitrarily deprive an individual of his/her nationality. Any procedure depriving a national of his/her nationality is therefore arbitrary and unlawful.[254]

In the *Yean and Bosico* case, the IACrtHR found that due to discriminatory practices, which will be addressed in the following section, the state "failed to grant nationality to the children, which constituted an arbitrary deprivation of their nationality,"[255] as this *denial* deprived them of their right to a nationality. As a matter of fact, the girls were rendered stateless for an extended period of time, which had a negative impact in their ability to access various other rights. According to van Waas, then "discrimination in access to nationality can therefore be qualified as *arbitrary* deprivation of nationality."[256] In the *Expelled Dominicans and Haitians* case, the ACommHR, when presenting its arguments, alleged that the impediments that the Dominican state placed on the victims to obtain the Dominican nationality, to which they have the right to by virtue of *jus soli*, constituted an arbitrary deprivation of nationality.[257]

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[252] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84,* Inter-American Court of Human Rights (IACrtHR), 19 January 1984. Paragraph 34

[253] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84,* Inter-American Court of Human Rights (IACrtHR), 19 January 1984. Paragraph 34; *Castillo Petruzzi et al. Case, (Castillo Petruzzi et al. v Peru)* Inter-American Court of Human Rights (IACrtHR), 30 May 1999. Paragraph 100; *Ivcher-Bronstein Case (Baruch Ivcher Bronstein vs. Peru)*, Inter-American Court of Human Rights (IACrtHR), 6 February 2001, paragraph 87; *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Paragraph 139; *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 254.

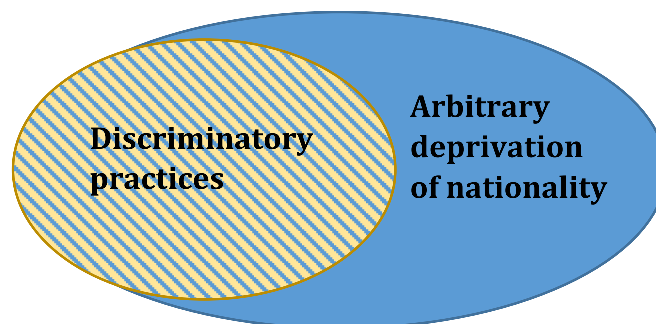
[254] *Ivcher-Bronstein Case (Baruch Ivcher Bronstein vs. Peru)*, Inter-American Court of Human Rights (IACrtHR), 6 February 2001, paragraph 83 (c)

[255] *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Paragraph 174

[256] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. pg. 110

[257] *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 233

As the analysis in section 2.d.ii. has shown, arbitrary deprivation of nationality is inextricably intertwined with discriminatory practices in nationality matters. However, it should be kept in mind that while all discriminatory practices are arbitrary, not all arbitrary practices are discriminatory. For this reason, the approach taken in this work has been to address them separately, but acknowledging their strong link. This distinction can be seen in the *Ivcher Bronstein* case, in which the IACrtHR held that "…no authority has the power to deprive a Peruvian of nationality."[258] In this case, deprivation did not result from *discriminatory* practices, as it was the case in the *Yean and Bosico* and *Expelled Dominicans* cases. Mr. Bronstein was arbitrarily deprived of his nationality not due to his ethnicity, not due to his religion, not due to the fact that his biological origin was Israeli. He was arbitrarily deprived of his nationality for having broadcast information in his television channel that the Peruvian authorities disliked, and the aim of the deprivation was to prevent him from continuing to be CEO of said television channel. There was no *legal* basis for this deprivation; it was based on the state's discretion. His deprivation of nationality was the result of the state's desire to silence his political opinions. It is therefore clear that under what constitutes *arbitrary deprivation of nationality* there is an overlapping area between arbitrary deprivation of nationality and discriminatory practices under which arbitrary deprivation of nationality resulting from discriminatory practices falls. However, there is also an area that covers deprivation of nationality not resulting from discriminatory practices, but from a state's decision to deprive someone of their nationality to achieve certain aims, such as silencing their political opinions.



[258] *Ivcher-Bronstein Case (Baruch Ivcher Bronstein vs. Peru)*, Inter-American Court of Human Rights (IACrtHR), 6 February 2001, paragraph 83 (c)

3.d.iv. On the prohibition of discriminatory practices in nationality matters

In its *advisory opinion on proposed amendments,* the IACrtHR addressed the issue of discrimination in nationality matters. In the IACrtHR's view, there is no discriminatory treatment if "the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice."[259] In the *advisory opinion*, the IACrtHR established that it is permissible for the requisites for the acquisition of nationality through naturalization to vary regarding the nationality of origin of the person.[260] In the *Yean and Bosico* case and the *Expelled Dominicans and Haitians* case, the IACrtHR dealt with discriminatory practices, resulting in arbitrary deprivation of nationality that should have been acquired by virtue of *jus soli*. It considered that

> *(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;*
> *(b) The migratory status of a person is not transmitted to the children,*[261]

This same view was upheld in the *expelled Dominicans* case, where the IACrtHR found that the practice of "the introduction of the criterion of the irregular status of the parents as an exception to the acquisition of nationality by virtue of *jus soli*"[262] is a discriminatory practice.[263] This is especially true when it is placed within the current context of discrimination in the country: it is against a specific group that has been targeted by the Dominican authorities for decades—persons of Haitian origin.

Article 1.1 ACHR establishes the obligation of state parties to the ACHR to respect and guarantee the full exercise of the rights enshrined in the ACHR without discrimination.[264] This

[259] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84,* Inter-American Court of Human Rights (IACrtHR), 19 January 1984. Paragraph 57
[260] The proposed amendments gave preferential treatment to individuals from Central America, Ibero-America and Spain, due to the cultural, linguistic and religious closeness Costa Rica has with the various countries of these regions.
[261] *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Paragraph 156
[262] *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 318
[263] On a side note, the CERD Committee has established that under the convention, "differential treatment based on…immigration status will constitute discrimination 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." UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXX on Discrimination Against Non-Citizens*, 1 October 2000. Paragraph 4
[264] *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Inter-American Court of Human Rights (IACrtHR) Judgment of August 5, 2008. Series C No. 182. Paragraph 209*; Véliz Franco et al. v. Guatemala* case. Order of the President of the Inter-American Court of Human Rights, Inter-

norm of general character is applicable to all the dispositions set forth by the ACHR.[265] This means that every form of treatment that can be considered discriminatory in relation to the enjoyment of any rights guaranteed by the ACHR would be incompatible with the convention.[266] The principle of equal and effective protection before the law and the principle of non-discrimination[267] requires that the state, when establishing the mechanisms for acquisition of nationality, must take precautions to ensure that discrimination does not take place.[268] Establishing a set of criteria does not necessarily result in discrimination or in inequality.[269] However, it is *never* permissible for such criteria to be based on gender or "any other factor that could derive some form of discrimination or inequality."[270] [M.J.R.V.] The IACrtHR determined that the state parties to the ACHR must guarantee the principles of equality and non-discrimination to all individuals under their jurisdiction, regardless of their migratory status.[271] This obligation is extended to the right

American Court of Human Rights (IACrtHR), April 10, 2013. Paragraph 214. As cited in *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 262

[265] *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Inter-American Court of Human Rights (IACrtHR) Judgment of August 5, 2008. Series C No. 182. Paragraph 209*; Véliz Franco et al. v. Guatemala* case. Order of the President of the Inter-American Court of Human Rights, Inter-American Court of Human Rights (IACrtHR), April 10, 2013. Paragraph 214. As cited in *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 262

[266] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84,* Inter-American Court of Human Rights (IACrtHR), 19 January 1984. Paragraph 53; *Comunidades Afrodescendientes Desplazadas de la Cuenca del Río Cacarica (Operación Génesis v. Colombia* case. Preliminary Objections, Merits, Reparations and Costs. Inter-American Court of Human Rights (IACrtHR), Judgment of November 20, 2013. Series C No. 270. Paragraph 332; *Véliz Franco et al. v. Guatemala* case. Order of the President of the Inter-American Court of Human Rights, Inter-American Court of Human Rights (IACrtHR), April 10, 2013. Paragraph 204. As cited in *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 262

[267] *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03. Inter-American Court of Human Rights (IACrtHR), September 17, 2003. Series A No.18, paragraph 101. As cited in *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 264

[268] *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Paragraph 141. As cited in *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August8, 2014. Series C No. 282. Paragraph 264

[269] del Rosario Rodríguez, Marcos Francisco. "El derecho a la nacionalidad." *Revista Internacional de Derechos Humanos/ISSN* 1.0 (2011): 81.

[270] Segovia, Juan Fernando. *Derechos Humanos y Constitucionalismo.* Ed. Marcial Pons, Madrid. 2004. Pg. 36-37. As cited from del Rosario Rodríguez, Marcos Francisco. "El derecho a la nacionalidad." *Revista Internacional de Derechos Humanos/ISSN* 1.0 (2011): 81.

[271] *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Paragraphs 155 & 156. As cited in *Expelled Dominican and Haitian Persons vs. the Dominican Republic*

to a nationality.[272] Article 20 ACHR does not *explicitly* contain a provision on the prohibition of discriminatory practices, which is covered by article 1.1 ACHR. Article 20 ACHR contains a provision on the arbitrary *deprivation* of nationality, which in many cases derives from discriminatory practices. Discriminatory practices—aside from those resulting in *deprivation* of nationality—can also result in the preclusion of the acquisition nationality. Therefore, the IACrtHR's interpretation expanded the scope of article 20 ACHR to include this prohibition.

3.d.v. On the application of *jus soli* in cases where the child would be stateless

Article 20 ACHR has a clear provision on the application of the jus soli principle when a child born on a state party's territory does not have the right to any other nationality. In the *Yean and Bosico* case, the IACrtHR stated that

> *(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.*[273]

Therefore, the Dominican Republic has the obligation to "adopt all necessary positive measures"[274] to guarantee that every child born in its territory who would otherwise be stateless acquires the Dominican nationality. This view was upheld in the recent *Expelled Dominicans* case. One of the greatest challenges for the effective application of this provision is the obstacles that people often face when trying to obtain the necessary documents to prove birth on a state's territory. For this reason, the IACrtHR mentioned that the requirements to prove birth on Dominican soil "should be reasonable and not represent an obstacle for acceding to the right to nationality."[275]

In the E*xpelled Dominicans* case, the IACrtHR believed that the moment from which the right to a nationality—and the rights that come along with it—must be respected and protected is

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case. Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 264

[272] *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Paragraphs 155 & 156. As cited in *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 264

[273] *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Paragraph 156

[274] Ibid*.* Paragraph 171

[275] Ibid. Paragraph 171

the moment when the individual is born.[276] It is the duty of the state where the child was born to find out whether a child, at the time of its birth, can or cannot have access to the nationality of another state if he/she does not obtain the nationality of the state where he/she was born.[277] If the state cannot be sure whether the child born on its territory can or cannot have any other nationality, the state then has the obligation to automatically grant the child nationality to avoid statelessness at birth, in line with article 20.2 ACHR.[278] This would also be applicable in situations where the parents are unable, due to obstacles, to register the child as a national of their state.[279] The IACrtHR found that law no. 169-14, which establishes a naturalization procedure to address the situation of thousands who were deprived of or denied their Dominican nationality, is contrary to the "right of every person to acquisition of nationality at birth."[280] This is especially when the individual is born in a *jus soli* country where nationality should be granted automatically at birth on national soil. Expecting persons who had the right to Dominican nationality at birth to apply for Dominican nationality through naturalization is a violation of their right to a nationality.[281]

3.d.vi. On the right to change one's nationality

No cases at the IACrtHR have dealt with an explicit violation of an individual's right to change his/her nationality, therefore, there is not much clarity regarding the nature of this provision. A strict interpretation of the provision would cover only cases in which an individual has been *prevented* by a state party to the ACHR to voluntarily change his nationality. However, a broad interpretation of the provision could include situations in which a state has for example, against the individual's will, forced its nationality upon an individual.[282] This results in a change of

[276] article 24 ICCPR states that
1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.
UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
[277] *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 259
[278] Ibid. Paragraph 261
[279] Ibid. Paragraph 261
[280] Ibid. Paragraph 324
[281] Ibid. Paragraph 324
[282] Special Rapporteur Manley O. Hudson, in his report, found that *"(bb) Conferment of nationality by operation of law: Under the law of some States nationality is conferred automatically by operation of law, as the effect of certain changes*

nationality, the addition of a new nationality, and could result in the revocation of the individual's original nationality, since some states revoke their nationality upon acquisition of a new nationality. This would be an example of involuntary change of nationality and *could* constitute a violation of the right to change one's nationality.

In the *Castillo Petruzzi* case, the Inter-American commission alleged that Peru had arbitrarily "imposed on them and attempted to create within them an artificial bond of allegiance and loyalty to Peru,"[283] violating their right to voluntarily change their nationality. However, the IACrtHR found that this had not been the case, as there was never an intention by Peru to "create or artificially impose… the bond that is distinctive of nationality."[284] Additionally, in the *Ivcher Bronstein,* the IACrtHR held that the only way a Peruvian national can be lose his/her nationality is through *voluntary* renunciation of nationality, regardless of whether the nationality was acquired at birth or through naturalization.[285] In other words, any change in an individual's nationality must be *voluntary*, whether it is regarding loss or acquisition of nationality.

3.e. Section 3: Conclusions

In the American region, it has become apparent that the right to a nationality has formally existed since the creation of OAS and the proclamation of this right in the American Declaration and the ACHR. It is difficult to determine how long this right, or the idea of this right, has existed in the region prior to these developments. The adoption of the American Declaration was the starting point for the formal adoption and subsequent development of this right in the region. The compulsory character of the declaration, despite its originally non-legally binding character, ensures that every single state in the region is bound by certain human rights norms,[286] which

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in civil status: adoption, legitimation, recognition by affiliation, and marriage…appointment as teacher at a university also involves conferment of nationality under some national laws. Thus, certain modes of conferment of nationality practiced by certain Latin-American States in the last century such as the imposition of nationality on aliens (collective naturalization) who had acquired, real property in the country (Peru, Mexico) or who were residing in the country on a certain date (Brazil) were considered by other States as inadmissible and were held to be inconsistent with international law" As cited in Hudson, Manley O. [Special Rapporteur appointed by the International Law Commission]. *Report on Nationality, including Statelessness*, A/CN.4/50 (1952)

[283] *Castillo Petruzzi et al. Case, (Castillo Petruzzi et al. v Peru)* Inter-American Court of Human Rights (IACrtHR), 30 May 1999. Paragraph 97

[284] Ibid. Paragraph 102

[285] *Ivcher-Bronstein Case (Baruch Ivcher Bronstein vs. Peru)*, Inter-American Court of Human Rights (IACrtHR), 6 February 2001, paragraph 83 (c)

[286] However, for a state to be held accountable for any violations, it must have accepted jurisdiction of the IAcrtHR. See table in section 3.d

includes ensuring that every person has a nationality. The inclusion of the right to a nationality in article 20 ACHR was the first time a general right to a nationality was recognized in a legally binding human rights instrument. Article 20 ACHR, as the analysis in section 3.b has shown, is a well-rounded article, containing the necessary dispositions to ensure that every person's right to a nationality is protected. As a normative human rights document, non-compliance by a state with article 20 ACHR's provisions results in a violation of said article, for which a state can be held accountable at the IACrtHR.

A key feature of the IACrtHR's decisions on cases of nationality is its acknowledgement that states continue to have sovereignty over nationality matters. In its advisory opinion, the IACrtHR explained that the state continues to enjoy sovereignty over the regulation of nationality.[287] It then went on to elaborate on the relationship between the state's sovereignty over the regulation of nationality and the protection of human rights, stressing that this sovereignty is not absolute.[288] In the *Castillo Petruzzi* case, the IACrtHR referred to its *advisory opinioin on proposed amendments*, reiterating that "international law does impose certain limits on the broad powers enjoyed by the states"[289] and that "nationality is today perceived as involving the jurisdiction of the state as well as human rights issues,"[290] a view upheld in the *Ivcher Bronstein* case. In cases that involve the regulation of nationality, it is not only the competence of the state but also its obligations under international law that play an important role.[291]

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[287] "*It is generally accepted today that nationality is an inherent right of all human beings…Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manner in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction... nationality is today perceived as involving the jurisdiction of the state as well as human rights issues." Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84,* Inter-American Court of Human Rights (IACrtHR), 19 January 1984 paragraphs 32-33.

[288] "*…in order to arrive at a satisfactory interpretation of the right to nationality…it will be necessary to reconcile the principle that the conferral and regulation of nationality fall within the jurisdiction of the state... with the further principle that international law imposes certain limits on the state's power, which limits are linked to the demands imposed by the international system for the protection of human rights" Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84,* Inter-American Court of Human Rights (IACrtHR), 19 January 1984. Paragraph 38

[289] *Proposed amendments to the naturalization provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paras. 35-36 as cited in *Castillo Petruzzi et al. Case, (Castillo Petruzzi et al. v Peru)* Inter-American Court of Human Rights (IACrtHR), 30 May 1999. Paragraph 101

[290] Ibid*.* Paragraph 101

[291] *Castillo Petruzzi et al. case*. Judgment of May 30, 1999. Series C No. 52, paragraph 101 as cited in *Ivcher-Bronstein Case (Baruch Ivcher Bronstein vs. Peru)*, Inter-American Court of Human Rights (IACrtHR), 6 February 2001 paragraph 88

In the *Yean and Bosico* case, the IACrtHR mentioned that at the "current stage of the development of international human rights law"[292] the state's sovereignty over nationality matters is constrained by its obligations vis-à-vis article 20 ACHR to provide individuals with protection before the law and to "prevent, avoid and reduce statelessness."[293] Judge Cançado Trindade, in his separate opinion, considered that the issues of nationality can no longer be perceived "merely from the perspective of the State's discretional authority, because general principles of international law are involved, such as the obligation to protect."[294] He considers that the ideas regarding nationality that derive from "traditional doctrine that revolves around the State have been totally surpassed."[295] Among these surpassed notions on nationality are the unlimited power of the State over nationality matters, the exclusive will of the State, and the sole interest of the State.[296] In his view, this development has upgraded nationality matters from the state's exclusive jurisdiction "to the level of the international juridical system."[297] In the recent *Expelled Dominicans and Haitians* case, the IACrtHR once again acknowledged the fact that the determination of who is a national continues to fall within the state's internal competence.[298] However, this competence is constrained by the "parameters set by international legal norms to which states, in full exercise of their sovereignty, voluntarily decided to adhere to"[299] by becoming state parties to international legal instruments. Therefore, according to current international human rights law, it is imperative for states—when exercising their competence to determine their body of nationals—to keep in mind their duty to prevent and reduce statelessness and their duty to ensure equal and effective protection to all individuals without discrimination.[300]

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[292] *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Paragraph 140
[293] Ibid. Paragraph 140
[294] *Separate Opinion of Judge A.A. Cançado Trindade, Inter-American Court on Human Rights, Case of Yean and Bosico v. Dominican Republic*, (IACrtHR) Series C, Case 130, 8 September 2005. Paragraph 3
[295] Ibid. Paragraph 3
[296] Ibid. Paragraph 3
[297] A.A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Edit. Renovar, 2002, pp. 413 and 475; and cf., for a general overview, A.A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations", 25 International and Comparative Law Quarterly - London (1976) pp. 713-765. as cited in *Separate Opinion of Judge A.A. Cançado Trindade, Inter-American Court on Human Rights, Case of Yean and Bosico v. Dominican Republic*, (IACrtHR) Series C, Case 130, 8 September 2005. Paragraph 2
[298] *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 256
[299] Ibid. Paragraph 256
[300] *Yean and Bosico Children v. The Dominican Republic case*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005. Paragraph 140. In *Expelled Dominican and Haitian Persons vs. the Dominican Republic case.* Inter-

To date, there have been 5 decisions by the IACrtHR regarding the right to a nationality, explored in section 3.d. It should be pointed out that the IACrtHR's decisions on each case often refer to its previous decisions, and the IACrtHR's opinion on certain matters have remained the same. Additionally, as it was mentioned in section 3.d, the IACrtHR rejects any historical interpretations of the ACHR, and interprets it in light of the current state of the human rights framework. Therefore, it could be concluded that the IACrtHR's rulings reflect this current state of the human rights framework. In general terms, a number of conclusions can be reached after analyzing the cases. First, the IACrtHR has made it very clear that the state continues to have discretion when deciding who is a national.[301] However, this discretion is not absolute; states are constrained by their international human rights obligations. Third, violations of article 20 ACHR only resulted from loss or denial of nationality.[302] Fourth, discriminatory practices are strictly prohibited.[303] Fifth, the state where a child is born is the state most responsible for ensuring that the child obtains a nationality if the child would be otherwise stateless. These various conclusions from the IACrtHR have yielded a reinforced framework for the protection of an individual's right to a nationality.

4. How does article 20 ACHR compare to other international (human rights) instruments at cross-regional level?

This section will analyze various regional human rights documents against the backdrop of the elements of article 20 ACHR. This will be done at two levels: at a general level, including all the relevant human rights documents, and at a specific level, focusing on the more complex systems.

American Court of Human Rights (IACrtHR). Preliminary Objections, Merits, Reparations and Costs. 28 August, 2014. Series C No. 282. Paragraph 256

[301] As *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* has shown, states have a wider discretionary margin when deciding on rules for naturalization. However, on rules for the acquisition of nationality at birth, this margin is considerably smaller and is heavily constrained by the state's human rights obligations, particularly that of the avoidance of statelessness.

[302] In *Castillo Petruzzi et al. v Peru* the IACrtHR found no violation of article 20 ACHR since there had been no loss of nationality. However, in cases where loss of nationality did take place, such as *Baruch Ivcher Bronstein v. Peru,* the IACrtHR has determined that loss of nationality is always arbitrary since the right to a nationality is a fundamental right and no authority has the right to deprive an individual of their nationality.

[303] However, as *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* has shown, the IACrtHR considers that a state showing preference for nationals of states that share similarities with the state does not constitute discrimination. Discrimination based on race, religion, origin, gender, are strictly forbidden.

It should be kept in mind that the entire document will be taken into consideration for the analysis, since articles are not isolated norms, they are contained within a document which is (often) contained within a system. This is particularly true for the prohibitions of discrimination in nationality matters, since most documents contain a specific provision prohibiting discriminatory practices in the enjoyment of the rights outlined in the document. Along with the Inter-American system of human rights, the European and African human rights systems are the most comprehensive regional human rights systems. Like in the Inter-American system, the European and African systems are equipped with courts that can hear cases of violations of the rights stipulated in their respective regional documents, and a substantial amount of case law on issues of nationality exists. The Arab charter is a relatively new development, and as a document it does not possess the same enforcement mechanism as the documents in the Americas, Europe and Africa possess. Finally, the ASEAN declaration is a *declaration,* which means it contains the rights that all ASEAN members should strive try to protect, but it does not give rise to obligations. The importance of this regional comparison is to discover whether the findings of section 3 hold true in other regions of the planet. For this, the focus will be on whether similar elements to those found in article 20 ACHR can be found in other systems.

4.a. Regional Instruments: General Level

Including the Americas, we find 5 regional human rights "systems": the Inter-American system, the European system, the African system, the Arab system, and the ASEAN system. These systems, share various common features, including the fact that they all possess at least one fundamental rights instrument, at least one human rights body, and they were all "established under the auspices of an intergovernmental organization."[304] Of these systems, we see that 3 of them, the Inter-American, European and African systems have organs which have issued decisions on cases dealing with nationality and statelessness, which makes the exploration of these systems at a deeper level highly relevant for this work. Another key feature of the Inter-American, European, and African systems is that these systems have complaints mechanisms, "through which individuals can seek justice and reparation for human rights violations committed by a State

[304] The intergovernmental organizations that established the regional systems are made up of member states: they are: the African Union, Organization of American States, Council of Europe, League of Arab States, and Association of Southeast Asian Nations. As cited in "Regional Systems." *International Justice Resource Center.* N.p., n.d. Web.

party."[305] The lack of a complaints mechanism in the Arab system continues to be a "major constraint on guaranteeing effective access to justice for victims"[306] of violations of their rights provided in the charter. The ASEAN system lacks this mechanism as well. However, this is due to the legal character of the human rights document pertinent to the system: a declaration. Enforceability is not in a declaration's legal nature. For these reasons—along with lack of any relevant case law—these two systems will be analyzed at the general level, while the European and African systems will be analyzed both at general and at a more in-depth level. The American system will not be analyzed as it has been analyzed in section 3, but the analysis in this section will be performed using the elements of article 20 ACHR as the backdrop for the analysis.

It is important to introduce the various regional systems. At the European level, two organizations can be identified: the European Union, which overlooks the Charter of Fundamental Rights of the EU (see section 4.b.i) and the Council of Europe system, which overlooks the ECHR. The specific CoE organ overlooking the ECHR is the European court of Human Rights (ECrtHR). Regarding human rights, there is a key distinction between the two European organizations: the EU focuses on union law, while the CoE has a well-established human rights system under the ECHR. Document-wise, the European Convention on Human Rights (ECHR), the European Convention on Nationality (ECN), and the Charter of Fundamental Rights of the EU (EU Charter) all correspond to the European region, the first two to the CoE system, and the latter to the EU system. At African level, two instruments have been taken into account for this analysis: the African Charter on Human and People's Rights (ACHPR) and the African Covenant on the Rights and Welfare of the Child, both under the African Union (AU) system. The Arab Charter, is found within the system of the Arab League, and is overlooked by the Arab Human Rights Committee. The Covenant on the Rights of the Child in Islam (CRCI) also falls within the Arab League's system. It should be pointed out that two versions of the Arab Charter have been included. One from 1994 and one from 2004. In 1994, the charter was not able to enter into force since no member state ratified it, and was heavily criticized "for falling below international standards for human rights."[307] However, after going through a process of "modernization" at the hands of the

[305] "Regional Systems." *International Justice Resource Center.* N.p., n.d. Web.
[306] Shelton, Dinah. *Regional Protection of Human Rights*. Vol. I. New York: Oxford UP, 2013. Pg. 100
[307] Ibid. Pg. 100

Permanent Arab Commission on Human Rights,[308] it entered into force in 2004. This process of modernization meant that the provisions of the charter would be brought "into compliance with international standards of human rights."[309] Both versions contain provisions that deal with nationality, but the content of the 1994 provisions on nationality are significantly different from the 2004 version's provisions. Finally, the ASEAN Human Rights Declaration is the human rights instrument that contains the human rights standards that ASEAN member states should adhere to.

The following table contains the various provisions regarding nationality found in the 4 regions analyzed in this section. It should be noted that the table below characterizes some provisions as a "limited" acknowledgement of one of the 5 elements discussed across this paper. The reason for this is that while the element is acknowledged, the wording limits the scope of the element. For example, the provision acknowledging a general right to a nationality in the ACHRW is limited to the right of every child to a nationality. It is an acknowledgement of the right to a nationality, but with the limited scope of being applicable only to children.

Document	Acknowledgement of the right to nationality	Application of *jus soli* when the child would be stateless[310]	Prohibition of arbitrary deprivation of nationality	Right to change one's nationality	Prohibition of discriminatory practices in nationality matters
ECHR	No	No	No	No	Yes
Art 4, 5, 6, 8 ECN	Yes	Yes	Yes	Yes	Yes
Art 21 EU Charter	No	No	No	No	Yes
ACHPR	No	No	No	No	Yes
Art 6 ACRWC	Limited	Limited	No	No	Yes
Art 24 AC 1994	No	No	Limited	Limited	Yes
Art 29 & 3 AC 2004	Yes	No	Yes	Yes	Yes
Art 7 CRCI	Limited	Limited	No	No	Yes
ASEAN HRD	Limited	No	Yes	Yes	Yes

[308] Shelton, Dinah. *Regional Protection of Human Rights*. Vol. I. New York: Oxford UP, 2013. Pg. 100
[309] Ibid. Pg. 100
[310] As it has been established, there are 3 internationally recognized limitations on a state's sovereignty over nationality matters: the prohibition of arbitrary deprivation of nationality, the prohibition of discrimination on nationality matters, and the duty to avoid statelessness. for the purposes of this paper, this provision, on the duty to apply *jus soli* in cases where the child would be stateless will be the "measure" of compliance with the avoidance of statelessness

4.a.i. On the general right to a nationality

Regarding a general right to a nationality, there is no consensus across the various regional instruments. Some instruments do not mention the right at all (the ACHPR and the ECHR), some acknowledge a general right to a nationality (the ECN) and others contain a limited right to a nationality (ACRWC).

The 1994 version of the Arab Charter, in article 24, did not contain an acknowledgement of a general right to a nationality. However, in the 2004 version of the charter, article 29[311] acknowledges this right. Article 18 ASEAN HRD[312] does not recognize a general right to a nationality; the right to a nationality is limited insofar as the individual has the right to a nationality "as prescribed by law." The question arises as to what happens when law prescribes that certain people can have access to a state's nationality while others cannot. The answer is simple: statelessness can arise.

4.a.ii. On the prohibition of arbitrary deprivation of nationality

Regarding the right not to be arbitrarily deprived of nationality, except for the ECHR and the ACHPR which do not contain any provisions on nationality at all, the various other regional instruments can be divided in two groups: the fundamental general rights instruments and the specialized instruments. As seen in the table above, these specialized instruments are mainly devoted to children issues. It is evident that the instruments applicable to every human being in its specific region, such as the Arab charter, contain provisions on the prohibition of arbitrary deprivation. On the other hand, specialized instruments, like the CRCI, do not contain such a provision. The 1994 Arab charter acknowledges the right not to be arbitrarily deprived of one's nationality of origin, but this seems to leave a gap for deprivation of nationality obtained by

[311] Article 29.

1. *Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality.*
2. *States parties shall take such measures as they deem appropriate, in accordance with their domestic laws on nationality, to allow a child to acquire the mother's nationality, having due regard, in all cases, to the best interests of the child.*
3. *Non one shall be denied the right to acquire another nationality, having due regard for the domestic legal procedures in his country*

League of Arab States, *Arab Charter on Human Rights*, 22 May 2004

[312]Article 18

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.

Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration*, 18 November 2012

naturalization. However, Article 29 of the 2004 version of the Arab Charter of the charter acknowledges the right of everyone to not be arbitrarily deprived of his/her nationality.

4.a.iii. On the prohibition of discriminatory practices in nationality matters

At regional level, it is clear that discriminatory practices are strictly prohibited. However, not all the provisions found in the various regional human rights instruments dealing with discriminatory practices in nationality matters *explicitly* prohibit said practices. In fact, only the ECN *explicitly* prohibits such practices, stating that "the rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination..."[313] The other regional instruments contain *broad* provisions prohibiting discriminatory practices, and it is *implied* that these broad provisions prohibiting discriminatory practices extend to nationality matters as well. An example would be article 3[314] of the 2004 version of the Arab Charter, in which the provisions prohibiting discriminatory practices found in article 3 extend to the provisions on nationality, found in article 29.

Article 29.2 of the 2004 Arab Charter prescribes that state parties shall take the measures that "they deem appropriate" [315] and "in accordance to their domestic laws on nationality"[316] to allow women to pass their nationality to their children. This provision should not be included in a human rights document, as it is clearly a gender-based discriminatory provision. The provision recognizes gender discrimination as part of many nationality laws of member states of the Arab League and does not condemn these practices. Instead, it makes an attempt to mitigate the impact that these provisions in the various nationality laws can have. However, a more normative approach to the issue, such as *explicitly* prohibiting gender-based discriminatory practices in nationality laws would yield more positive results rather than leaving the decision on whether to allow women to pass nationality to her child in situations where the state deems it appropriate. This provision, rather than prohibiting discriminatory practices in nationality matters, actually

[313] Article 5.1. Council of Europe, *European Convention on Nationality*, 6 November 1997, ETS 166
[314] For example, article 3.2 Arab Charter (2004) states that
2. The States parties to the present Charter shall take the requisite measures to guarantee effective equality in the enjoyment of all the rights and freedoms enshrined in the present Charter in order to ensure protection against all forms of discrimination based on any of the grounds mentioned in the preceding paragraph
League of Arab States, *Arab Charter on Human Rights*, 22 May 2004
[315] League of Arab States, *Arab Charter on Human Rights*, 22 May 2004
[316] Ibid.

permits such practices. Interestingly, article 3.1 Arab Charter prescribes that all rights found in the charter shall be enjoyed "without distinction on grounds of race, color, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability."[317] Article 29.2 Arab Charter seems to violate article 3.1 Arab Charter's provision.

4.a.iv. On the application of *jus soli* in cases where the child would be stateless

The ECN contains a clear provision regarding the application of *jus soli* in situations where the child would become stateless. Aside from this instrument, limited versions of such a provision can be found in the ACRWC and the CRCI. The CRCI prescribes an obligation on state parties to "make every effort"[318] to ensure that no child born on its territory is rendered stateless. However, this document does not *impose* an obligation upon state parties to ascribe nationality by virtue of *jus soli* to children who are born in its territory and are in danger of becoming stateless. It seems to lay the responsibility of avoiding childhood statelessness upon the state where the child was born.

4.a.v. On the right to change one's nationality

While the 1994 Arab charter prohibits the denial of the right to change one's nationality (naturalization), it is prohibited only when it takes place "without a legally valid reason." This last phrase is vague and leaves of room for states to interpret it in a way that suits their interests. However, the 2004 version of the charter contains a provision recognizing the right of every individual to change his/her nationality. The ASEAN declaration also contains a provision on the right to change one's nationality. While it does not contain a provision *explicitly* recognizing the *right* to change one's nationality, the ECN does acknowledge changes in nationality in articles 6.3 and article 8.1. Article 6.3 provides for naturalization through *jus domicilli,* and article 8.1 provides for changes in nationality through voluntary renunciation of one's nationality. However, there is one restriction to this, and that is any situation in which an individual, through renunciation of nationality, would become stateless. This provision can be interpreted as requiring member states

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[317] League of Arab States, *Arab Charter on Human Rights*, 22 May 2004
[318] Article 7 states that:
State parties shall safeguard the elements of the child's identity, including his/her name, nationality...and shall make every effort to resolve the issue of statelessness for every child born on their territories..."
Organization of the Islamic Conference (OIC), *Covenant on the Rights of the Child in Islam*, June 2005, OIC/9-IGGE/HRI/2004/Rep. Final

not to permit renunciation of nationality until the individual has a guarantee that another nationality will be acquired upon renunciation.

4.b. The European and African Systems in Depth

4.b.i. The European System(s)

At European level, two systems can be identified: that of the Council of Europe (CoE), and that of the EU. The CoE is the European organization that is "responsible for over 200 treaties on various issues."[319] One of the most important of these documents is the ECHR, which has similar content as various other international instruments that deal with fundamental civil and political rights.[320] As the table above has shown, the right to a nationality is not included in the ECHR. The drafting of the ECHR took place in 1950: only 2 years after the UDHR was adopted, and before other universal and regional human rights documents that contain provisions on nationality were adopted. Therefore, at the time, there had been no *concrete* measures taken towards the limitation of state sovereignty over nationality matters under international law.[321] Additionally, the absence of this right from the ECHR does not mean that deprivation of nationality cannot "raise other issues under the convention,"[322] as case law of the European Court of Human Rights (ECrtHR) has shown. Furthermore, the CoE has adopted conventions and several recommendations to address issues with nationality resulting in statelessness. In 1997, the Council of Europe adopted the ECN, and in 2006 the Convention on the Avoidance of Statelessness in relation to State Succession was adopted.[323] Thus, exclusion of the right to a nationality from the ECHR does *not* mean that CoE member states completely disregard the importance of nationality. The ECN has been instrumental in the CoE's efforts to address issues regarding statelessness and nationality. The ECN's aim is to ensure that basic human rights principles in the field of nationality are respected by member states.[324] However, this convention is not a human rights convention, but a

[319] Greer, Steven. "Europe." In Moeckli, Daniel, Sangeeta Shah, Sandesh Sivakumaran, and D. J. Harris. *International Human Rights Law*. Oxford: Oxford UP, 2014. Print. Pg. 418
[320] Ibid. Pg. 422
[321] However, the issue of statelessness began to be included into the agenda, and in 1954 the Convention on the Status of Stateless Persons was adopted. This was one major step for the right to a nationality in its
[322] Chan, Johannes M.M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14.
[323] Adjami, Mirna, and Julia Harrington. "The Scope and Content of Article 15 of the Universal Declaration of Human Rights." *Refugee Survey Quarterly* 27.3 (2008): 93-109.
[324] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 61

"consolidation of developments in municipal and international law with regard to nationality,"[325] and thus has a very different status from the ECHR or the ACHR. Nevertheless, as part of the European system of human rights, it is an essential document for this analysis.

The EU, on the other hand, is a political and economic union among European nations. Therefore, EU law focuses on the regulation of political and economic activities within and among EU member states. The EU system overlooks the Charter of Fundamental Rights of the European Union, which contains a wide array of fundamental human rights. While both the EU and CoE systems have courts, there is a key difference between them: the ECrtHR of the CoE deals with violations of provisions under the ECHR, while the European Court of Justice (ECJ) deals with matters of EU law, making sure that EU law is applied in the same manner across member states.[326] It should be kept in mind that there is interaction between these two systems—meaning an interaction between EU law and human rights law. In fact, the ECHR was amended under optional protocol 14, allowing for EU institutions to accede to the ECHR.[327] Furthermore, membership at the CoE is a precondition for EU membership.[328] It can be said that the CoE and EU have "different roles [but] shared values,"[329] which include human rights, democracy and the rule of law.

At the European level, the *Kuric and others v. Slovenia* case, the *Karassev v. Finland* case, and the *Genovese v. Malta* case, before the European Court of Human Rights will be analyzed. While the ECrtHR has noted that the ECHR does not guarantee the right to a nationality,[330] this has not precluded the ECrtHR from making decisions in cases where individuals were barred from obtaining a state party's nationality. At European level, it is also interesting to take into account the *Rottmann v. Freistaat Bayern,* case at the ECJ of the European Union, dealing with whether the revocation of nationality of an EU member state when said nationality was obtained through fraud would be in accordance with EU law.

[325] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 61
[326] "Court of Justice of the European Union." *EUROPA*. European Union, n.d. Web.
[327] Council of Europe, *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention,* 13 of May, 2004, ETS 194
[328] "David Cameron's Challenge to Europe's Human Rights System." *David Cameron's Challenge to Europe's Human Rights System*. Open Society Foundations, n.d. Web. 12 Dec. 2014.
[329] "The Council of Europe and the European Union." - *Council of Europe*. N.p., n.d. Web.
[330] *Karassev and Family v. Finland,* application no. 31414/96, Council of Europe: European Court of Human Rights, 12 January 1999*.* The facts.

4.b.i.1. On the general right to a nationality

Provision (a) of Article 4[331] ECN acknowledges the general right to a nationality, stating that "everyone has the right to a nationality."[332] An interesting provision found in the ECN but in no other regional human rights instrument is the provision found in article 4(b) ECN which states that statelessness shall be avoided. This highlights the importance of ensuring that every human being has a nationality, as statelessness is the antithesis of having a nationality.

Regarding case law, at European level there have *not* been acknowledgements of a general right to a nationality, since this right does not exist in the ECHR. However, there have been, to a certain degree, acknowledgements of the importance of nationality, and of the effects that lack of nationality, resulting from deprivation or denial can have on the individual's identity. In the *Kuric and others v. Slovenia* case, the applicants argued that the Slovenian authorities prevented them from acquiring Slovenian nationality, despite the fact that the applicants had "spent a substantial part of their lives in Slovenia"[333] and had developed a strong network of relationships and attachment to Slovenia and its people, comprising part of an individual's private life. Due to this link, the chamber concluded that the applicants had "a private or family life or both in Slovenia,"[334] which falls under article 8 ECHR. Therefore, it was found that the Slovenian state, by *erasing* the plaintiffs and by refusing to take action to regularize their situation, caused the applicants to be unable to exercise their rights under article 8 ECHR.[335] This was aggravated due to the applicants' situation as stateless persons,[336] and while not all applicants were stateless, their situation was "factually the same."[337] The ECrtHR considered that all the applicants—both those who were *de jure* stateless and those who did possess a nationality—were *effectively* rendered stateless as a

[331] *Article 4 – Principles*
The rules on nationality of each State Party shall be based on the following principles:
a. *everyone has the right to a nationality;*
b. *statelessness shall be avoided;*
c. *no one shall be arbitrarily deprived of his or her nationality;*
Council of Europe, *European Convention on Nationality*, 6 November 1997, ETS 166
[332] Council of Europe, *European Convention on Nationality*, 6 November 1997, ETS 166
[333] *Kuric and others v. Slovenia,* Application no. 26828/06, Council of Europe: European Court of Human Rights, 26 June 2012. Paragraph 336
[334] Ibid. Paragraph 337
[335] Ibid. Paragraph 337
[336] Ibid. Paragraph 337
[337] Vlieks, Caia. *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?* Discussion Paper 09/14. European Network on Statelessness, 2014.

result of the erasure in combination with lack of regularization of their status.[338] The ECrtHR considered that under customary international law, there is a "positive obligation to avoid statelessness and to ameliorate the condition of those who were left stateless."[339] As it has been mentioned, the antithesis of the right to a nationality is statelessness; statelessness is the embodiment of the violation of this right. Therefore, this acknowledgement of an obligation under customary international law to avoid statelessness can only be met by ensuring a general right to a nationality. The ECrtHR concluded that there had been a violation of article 14 ECHR in conjunction with article 8 ECHR.[340] The ECrtHR also cited the ECN, however, Slovenia was not a state party at the time.

In the *Genovese v. Malta* case, the ECrtHR faced the challenge of bringing the issue of nationality "within the scope" of article 8 ECHR.[341] The ECrtHR found that the denial of nationality can have a negative impact on the individual's private life, and this is "wide enough to embrace aspects of a person's social identity."[342] As it has been established, nationality and the individual's social identity are linked, since nationality is the legal bond established when such a link exists between an individual and a state. While the right to nationality is not a right under the ECHR, and while the denial of nationality did not result in a violation of article 8 ECHR, the ECrtHR considered that the impact that this denial had on the applicant's "social identity was such as to bring it within the general scope and ambit of that Article."[343]

4.b.i.2. On the prohibition of arbitrary deprivation of nationality

Regarding the prohibition of arbitrary deprivation of nationality, provision (c) of Article 4[344] ECN contains this prohibition. Regarding case law, in the *Rottmann v. Freistaat Bayern* case

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[338] Vlieks, Caia. *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?* Discussion Paper 09/14. European Network on Statelessness, 2014.
[339] *Kuric and others v. Slovenia,* Application no. 26828/06, Council of Europe: European Court of Human Rights, 26 June 2012. Paragraph 396
[340] Ibid. Paragraph 332
[341] *Genovese v. Malta*, Application no. 53124/09, Council of Europe: European Court of Human Rights, 11 October 2011. Paragraph 33. As cited in Vlieks, Caia. *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?* Discussion Paper 09/14. European Network on Statelessness, 2014.
[342] *Genovese v. Malta*, Application no. 53124/09, Council of Europe: European Court of Human Rights, 11 October 2011. Paragraph 33
[343] Ibid. Paragraph 33
[344] *Article 4 – Principles*
The rules on nationality of each State Party shall be based on the following principles:
- d. *everyone has the right to a nationality;*
- e. *statelessness shall be avoided;*

before the ECJ, the question at hand was whether it would be against EU law for an EU member state to deprive one of its nationals of his nationality—and consequently of EU nationality—if the nationality was acquired through fraud, rendering the individual stateless.[345] Deprivation of nationality in cases of fraud would not be incompatible with a member state's international legal obligations, since for example article 8.2 of the 1961 statelessness convention and articles 7.1 and 3 ECN permit deprivation of nationality if it was obtained by fraudulent means, even when the individual would consequently become stateless.[346] In the *Rottmann v. Freistaat Bayern,* the ECJ found that when deprivation results from fraud and is permitted by law, "that deprivation cannot be considered to be an arbitrary [or unlawful] act."[347] The ECJ, however, left it in the hands of domestic courts to "ascertain whether the withdrawal decision…observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned…"[348] This case has contributed to the delineation of the borders of deprivation of nationality, since it contributed to cementing a tenet that is based, under international law,[349] on the permission of deprivation of nationality in cases where nationality was obtained by fraud, even in cases that would result in statelessness. This contradicts Brandvoll's assertion mentioned in section 2.d.ii that any deprivation of nationality is arbitrary if it results in statelessness.[350] Mr. Rottmann was not deprived of his nationality as a result of the state's whim. He was deprived of his nationality for a reason that finds its basis on domestic and international law; when nationality is obtained by fraud, deprivation of nationality is permitted.

4.b.i.3. On the prohibition of discriminatory practices in nationality matters

The ECHR contains a provision, in article 14, prohibiting discrimination in the enjoyment of the rights found in the convention, however, nationality is not included in the convention. Therefore, article 14 does not *explicitly* prohibit discriminatory practices in nationality matters.

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f. no one shall be arbitrarily deprived of his or her nationality;
Council of Europe, *European Convention on Nationality*, 6 November 1997, ETS 166

[345] *Rottmann v. Freistaat Bayern, C-135/08,* European Union: Court of Justice of the European Union, 2 March 2010. Paragraph 36

[346] Ibid. Paragraph 52

[347] Ibid. Paragraph 53

[348] Ibid. Paragraph 55

[349] For example, under the 1961 statelessness convention

[350] Brandvoll, Jorunn. "Deprivation of Nationality." In Edwards, Alice and Van Waas, Laura. *Nationality and Statelessness Under International Law.* Cambridge University Press. 2014. Print. Pg. 197

However, as case law by the ECHR has shown, discrimination can result in a violation of the right to a nationality, and while this right is not found in the ECHR, the violation of this right can result in the violation of various other rights that are covered by the ECHR. Article 5 ECN clearly prohibits any discrimination in a state's internal rules governing the attribution of nationality.[351] Additionally, this article prohibits differential treatment among nationals, since some states make differences between nationals who obtained their nationality at birth and those who obtained it through naturalization. Article 21.1 EU Charter also contains a provision on the prohibition of discrimination.[352] However, this provision is broader than that contained in the ECHR, as the provision in the EU Charter prohibits *any* form of discrimination, and this prohibition is not limited to the impact of discrimination on the enjoyment of other rights in the document. This difference between the two provisions prohibiting discrimination in these two instruments could be due to the different character of each document. Regardless of what the reason for this difference might be, the result is enhanced protection against discrimination for the individuals under the jurisdiction of states that are both EU member states and state parties to the ECHR.

In the *Karassev v. Finland* case, the plaintiff alleged a violation of article 14 in conjunction with article 8 ECHR. The applicant's complaint emphasized "the allegedly arbitrary nature of the refusal to recognize the applicant as a citizen of Finland."[353] The ECrtHR mentioned that despite the fact that the right to a nationality is not included in the ECHR, it is possible for "arbitrary denial of a citizenship might in certain circumstances raise an issue under Article 8 of the Convention"[354] since this has an impact on the individual's private life. Arbitrary practices, such as arbitrary denial of nationality, can constitute discriminatory practices. However, the ECrtHR found that Finland's

[351] Article 5 – Non-discrimination

1. The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.
2. Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.

Council of Europe, *European Convention on Nationality*, 6 November 1997, ETS 166

[352] Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02

[353] *Karassev and Family v. Finland,* application no. 31414/96, Council of Europe: European Court of Human Rights, 12 January 1999. The facts.

[354] Ibid.

refusal to recognize the applicant's claims to Finnish nationality "was not arbitrary in a way which could raise issues under Article 8 of the Convention."[355]

In the *Genovese v. Malta* case, the ECrtHR dealt with discrimination based on legitimacy. The applicant found out he was not eligible for Maltese nationality since he was an illegitimate child born outside of marriage.[356] At the time, only the mother was able to pass down Maltese nationality to the child if the child was born outside of wedlock,[357] and since it was his father who possessed Maltese nationality, the applicant was unable to obtain his father's nationality. This is known as reverse gender discrimination, since it is the father who is discriminated as he is unable to pass his nationality to his child when the child is "illegitimate." As a result from this form of discrimination, the applicant was *denied* Maltese nationality. The ECrtHR found that the applicant had been discriminated for having been born outside of wedlock,[358] a practice that is unacceptable, and concluded that article 14 in conjunction with article 8 ECHR had been violated.[359]

4.b.i.4. On the application of *jus soli* in cases where the child would be stateless

At European level, article 6.2[360] ECN provides for nationality to be acquired by a child born on a member state's territory if the child would be otherwise stateless, similar to article 20.2 ACHR, creating a safeguard against childhood statelessness. Additionally, according to Vlieks, "the nationality policies of different European countries include provisions on the prevention of

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[355] *Karassev and Family v. Finland,* application no. 31414/96, Council of Europe: European Court of Human Rights, 12 January 1999. The facts.
[356] Köhn, Sebastian. "ECHR and Citizenship: The Case of Genovese v. Malta | European Network on Statelessness." *European Network on Statelessness*, 11 Oct. 2011. Web
[357] Ibid.
[358] Ibid.
[359] *Genovese v. Malta*, Application no. 53124/09, Council of Europe: European Court of Human Rights, 11 October 2011
[360] *Article 6 – Acquisition of nationality*

1. *Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality. Such nationality shall be granted:*
    a. *at birth ex lege; or*
    b. *Subsequently, to children who remained stateless, upon an application being lodged with the appropriate authority, by or on behalf of the child concerned, in the manner prescribed by the internal law of the State Party. Such an application may be made subject to the lawful and habitual residence on its territory for a period not exceeding five years immediately preceding the lodging of the application.*

Council of Europe, *European Convention on Nationality*, 6 November 1997, ETS 166

statelessness,"[361] which can be found compiled in the EUDO Citizenship database.[362] These policies are targeted at children born on the territory of a CoE member state who cannot have access to any other nationality and would otherwise be stateless.[363]

Among the various claims the European Court of Human Rights analyzed in the *Karassev and Family v. Finland* case, was whether Finland's "failure to grant nationality to a child born in Finland who would otherwise be stateless"[364] could constitute a violation of article 8 ECHR, either article 8 alone or in conjunction with article 14 ECHR. The applicant was born on Finnish territory, and was registered as a resident, but was rendered stateless at birth.[365] The Finnish authorities refused to recognize him as a national, as he did not "meet the condition contained in section 1, subsection 1(4), of the Citizenship Act"[366] which provides that in order for the child to obtain Finnish nationality at birth, he/she cannot receive the nationality of any other country. Finnish authorities determined that he was not eligible for Finnish nationality as he has received Russian nationality, the nationality of his parents. The applicant alleged that this interpretation was wrong, since the Russian authorities did not recognize him as a national.[367] While the ECrtHR concluded that the application as inadmissible, this case raises questions of whether Finland took every necessary measure to ensure that the child born on its territory had indeed obtained another nationality.

4.b.i.5. On the right to change one's nationality

It has been established in section 4.a.v that while the ECN does not contain a provision *explicitly* recognizing the *right* to change one's nationality, it acknowledges changes in nationality in articles 6.3 and 8.1 ECN. Article 6.3 ECN provides for naturalization, and article 8.1 ECN provides that changes in nationality can be done through voluntary renunciation of nationality. However,

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[361] Vlieks, Caia. "Statelessness—any attention at the national level?" Weblog Statelessness Programme. 27 August 2012. As cited in Vlieks, Caia. *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?* Discussion Paper 09/14. European Network on Statelessness, 2014.
[362] Vonk, Olivier, and de Groot, Gerard Rene. *EUDO CITIZENSHIP*. San Domenico di Fiesole: Robert Schuman Centre for Advanced Studies, European University Institute. 2013
[363] Vlieks, Caia. "Statelessness—any attention at the national level?" Weblog Statelessness Programme. 27 August 2012. As cited in Vlieks, Caia. *Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?* Discussion Paper 09/14. European Network on Statelessness, 2014.
[364] "Karassev and Family v. Finland." *European Network on Statelessness*. N.p., n.d. Web.
[365] *Karassev and Family v. Finland,* application no. 31414/96, Council of Europe: European Court of Human Rights, 12 January 1999. The facts.
[366] Ibid.
[367] Ibid.

the one restriction on the right to change one's nationality is when renunciation would result in statelessness.

4.b.ii. The African System

The ACHPR of, also known as the Banjul Charter, adopted in 1981 by the African Union (AU) does not contain provisions on nationality. This is similar to the lack of any mention of the right to a nationality in the ECHR,[368] making it impossible to analyze its provisions. However, this exclusion, similarly to the exclusion of any mentions of nationality in the ECHR, does not mean that nationality matters have not been taken into consideration in the African region. There have been discussions on nationality among AU members, and as a matter of fact, Resolution 234 on the Right to a Nationality was adopted in 2013 by the African Commission on Human and People's rights.[369] This resolution acknowledges that it is in the general interest that all AU member states "recognize, guarantee and facilitate the right to nationality of every person on the continent and to ensure that no one is exposed to statelessness."[370] Additionally, the ACRWC contains a provision on the rights of children to a nationality, which seeks to resolve the issue of childhood statelessness in the region. At the African level, the cases analyzed will be the *Children of Nubian Descent v. Kenya* case before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), dealing with a violation of article 6(4) [371] of the ACRWC, and the *Malawi African Association and Others v. Mauritania* case before the African Commission on Human and Peoples' Rights.

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[368] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 61
[369] African Commission on Human and Peoples' Rights, *234: Resolution on the Right to Nationality*, 23 April 2013
[370] Preamble. African Commission on Human and Peoples' Rights, *234: Resolution on the Right to Nationality*, 23 April 2013.
[371] *Article 6: name and nationality*

1. *Every child shall have the right from his birth to a name*
2. *Every child shall be registered immediately after birth*
3. *Every child has the right to acquire a nationality*
4. *States 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.*

Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990

4.b.ii.1. On the general right to a nationality

At African level, the ACRWC contains a provision on the right of every *child* to a nationality; for this reason, this is a limited form of this right. Additionally, it is interesting to note that the African Commission, in Resolution 234's preamble, reaffirmed that "the right to nationality of every human person is a fundamental human right implied within the provisions of Article 5 of the ACHPR."[372] No provision on nationality can be found in the ACHPR.

4.b.ii.2. On the prohibition of arbitrary deprivation of nationality

Regarding arbitrary deprivation of nationality, at African level, resolution 234 addresses this element. This resolution calls upon AU member states to take various measures, including making sure that decisions related to nationality "do not contain any elements of arbitrariness,"[373] refraining from discriminatory policies for nationality acquisition and repealing laws which "deny or deprive persons of their nationality on discriminatory grounds."[374]

The *Malawi African Association and others v. Mauritania* case provides us with a complex interpretation of arbitrariness and its effects. During the late 1980's, Mauritania expelled between 50,000[375] and 70,000[376] persons of non-Arab origin from its territory. While not all the individuals expelled were Mauritanian nationals, many were, and at the time of expulsion, the authorities destroyed their identity cards, leaving them effectively undocumented and without any way to prove their nationality.[377] In the year 2,000, the African Commission issued a decision on the case, and ruled that the individuals suffered massive human rights violations.[378] The majority of the victims of these violations were black Mauritanians, and the majority of the policies implemented

[372] Article 5 ACHPR states that
Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.
Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) as cited in African Commission on Human and Peoples' Rights, *234: Resolution on the Right to Nationality*, 23 April 2013.
[373] Preamble. African Commission on Human and Peoples' Rights, *234: Resolution on the Right to Nationality*, 23 April 2013.
[374] Ibid.
[375] *Malawi African Association and Others v. Mauritania,* Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, African Commission on Human and Peoples' Rights, 11 May 2000. Paragraph 13.
[376] "IHRDA v. Mauritania." *Open Society Foundations (OSF)*. N.p., 1 Apr. 2009. Web.
[377] *Malawi African Association and Others v. Mauritania,* Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, African Commission on Human and Peoples' Rights, 11 May 2000. Paragraph 13.
[378] "IHRDA v. Mauritania." *Open Society Foundations (OSF)*. N.p., 1 Apr. 2009. Web.

which resulted in these violations were arbitrary and discriminatory policies, since they were driven by the bias of the government against a specific group. Among these policies was the arbitrary deprivation of nationality, in violation of article 12.1,[379] [380] and subsequent expulsion from Mauritania.[381]

4.b.ii.3. On the prohibition of discriminatory practices in nationality matters

Article 2 ACHPR contains a prohibition on discrimination. Similarly to the provision found in the ECHR, and article 1.1 ACHR, it prohibits discrimination in the enjoyment of the rights prescribed in the document. Since the right to nationality is nowhere to be found in the instrument, similarly to the ECHR, there is no *explicit* protection against discriminatory practices in nationality matters to be derived from the ACHPR. However, since nationality is often the pathway to access to other rights, it could be said that deprivation or denial of nationality resulting from discriminatory practices in nationality matters can preclude the individual from full enjoyment of all his/her rights under the ACHPR. The ACRWC provides for the enjoyment of every child of every right in the charter without discrimination; this includes the right to a nationality, provided in article 6 ACRWC. Additionally, as it was mentioned in section 4.b.ii.2, resolution 234 "calls upon" AU member states to refrain from undertaking discriminatory practices in internal nationality regulations. However, this resolution does not impose any *obligation* upon member states.

At the African level, in the case of the *Nubian Children v. Kenya,* the Kenya National Commission on Human Rights had "identified and recorded practices indicating discrimination...in the grant of birth registration and identity documents."[382] These discriminatory practices affected the children of Nubian descent. In this case, part of the ACERWC's task was to determine whether the treatment experienced by the children of Nubian descent constituted discrimination.

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[379] It was alleged that "Evicting Black Mauritanians from their houses and depriving them of their Mauritanian citizenship constitutes a violation of article 12.1" as cited in *Malawi African Association and Others v. Mauritania,* Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, African Commission on Human and Peoples' Rights, 11 May 2000. Paragraph 126.

[380] Article 12.1 states that:
"Every individual shall have the right to freedom of movement and residence within the borders of the State provided he abides by the law"
Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

[381] "IHRDA v. Mauritania." *Open Society Foundations (OSF)*. N.p., 1 Apr. 2009. Web.

[382] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya,* Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011. Paragraph 38

Interestingly, the ACERWC referred to the *Yean and Bosico* case of the IACrtHR, mentioning that it was held that "the refusal and placing of unfair obstacles by local officials to deny birth certificate and recognition of nationality…as part of a deliberate policy which effectively made the children stateless constituted racial discrimination."[383] The ACERWC also established that the "burden shifts to the state to justify the difference in treatment indicating how such a treatment falls within the notion of fair discrimination."[384] As it has been established, not all discrimination is unfair; however, in order for discrimination to be fair, it must have a legitimate aim and must be proportionate. The ACERWC ruled in favor of the children of Nubian descent.

In the *Malawi African Association and Others v. Mauritania* case, it was alleged that the policies against the group of victims were due to the victim's skin color and the fact that they spoke a different language.[385] To address this situation, article 2 ACHPR was mentioned, since this article provides for the enjoyment of all the rights and freedoms found in the convention without distinction based on race, ethnicity, religion, etc.[386] It was also established that article 2 ACHPR contains a provision which "lays down a principle that is essential to the spirit of this convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings."[387] For a state to discriminate against anyone under its jurisdiction "is an unacceptable discriminatory attitude and a violation of the very spirit of the African Charter and of the letter of its article 2."[388] The deprivation of Mauritian nationality was a result from these discriminatory and arbitrary practices. The committee made recommendations to Mauritania, stating that the state should diligently "replace the national identity documents of those Mauritanian citizens, which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania."[389]

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[383] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya,* Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011. Paragraph 56
[384] Ibid. Paragraph 56
[385] *Malawi African Association and Others v. Mauritania,* Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, African Commission on Human and Peoples' Rights, 11 May 2000. Paragraph 130.
[386] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)
[387] *Malawi African Association and Others v. Mauritania,* Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, African Commission on Human and Peoples' Rights, 11 May 2000. Paragraph 131.
[388] Ibid. Paragraph 131.
[389] Ibid*.* Decision

4.b.ii.4. On the application of *jus soli* in cases where the child would be stateless

At African level on the other hand, AU resolution 234 calls upon member states to "adopt and implement provisions in their constitutional and other legislation with a view to preventing and reducing statelessness."[390] While it expresses the importance of preventing and reducing statelessness—and one of the best ways to achieve this is through the application of *jus soli* in situations where a child born on a state's territory would be stateless—it does not specifically say which measures should be taken. However, it is clear that the concept of ascribing nationality by virtue of *jus soli* to children born on a state's territory who would otherwise be stateless has reached the African region. The ACRWC contains provisions that address children's right to a nationality, similar to those found in the CRC, but adapted to the African context.[391] The provision in article 6.4 ACRWC requires states to make constitutional changes that would allow a child to acquire the nationality of the country where he/she is born by virtue of *jus soli* if he/she does not have the right to another nationality.[392] This provision providing a safeguard against statelessness is a very positive aspect of this document.

In the *Children of Nubian Descent v. Kenya* case, regarding the ascription of nationality by virtue of *jus soli* in cases of potential statelessness, the ACERWC explained that it has no intention to "be prescriptive about the choice States make in providing for laws pertaining to the acquisition of nationality"[393] and forcing the *jus soli* principle upon state parties. However, compliance with the obligation found in article 6(4)[394] ACRWC which requires the state where the child was born

[390] Preamble. African Commission on Human and Peoples' Rights, *234: Resolution on the Right to Nationality*, 23 April 2013.
[391] Adjami, Mirna, and Julia Harrington. "The Scope and Content of Article 15 of the Universal Declaration of Human Rights." *Refugee Survey Quarterly* 27.3 (2008): 93-109.
[392] *Article 6.4.*
State Parties to the Charter shall undertake to ensure that their Constitutional legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory in which he was born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws
Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990
[393] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya,* Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011. Paragraph 50
[394] *Article 6: Name and Nationality*
1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.
4. States 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.*

to take charge of ensuring that the child has a nationality would be in the child's best interest. Through this logic, it would be Kenya who has to grant the children nationality since the children were born on Kenyan soil, and becoming Kenyan nationals would be in the children's best interest. While the committee was aware that the children could also be entitled to nationality of Sudan, it pointed out that said argument would ignore the fact that "implied in Article 6(4) is the obligation to implement the provision proactively in cooperation with other States."[395] This is essential in cases where the child could obtain the nationality of another state.[396] However, Kenya did not comply with this. The ACERWC found that the "extended denial of secure nationality status to Nubian children violates the child's right to acquire a nationality at birth," in contravention of article 6 ACRWC.[397] The committee found that Kenya violated the charter's provisions that protect children and their right to a nationality.[398]

4.b.ii.5. On the right to change one's nationality

There is no indication either in case law or in the various documents found in the African region that point towards a recognition of this right.

4.c. Section 4: Conclusions

Important conclusions on state sovereignty over nationality matters have been made by regional human rights bodies, and restrictions can be found within documents as well. At European level, Article 3ECN[399] acknowledges that nationality is a matter for states to determine, but the state's authority in this matter is constrained by the state's international legal obligations regarding nationality. The inclusion of article 3 in the ECN can be interpreted as a sign of an acknowledgement of the increasing constraints placed on member states' discretion on nationality matters. At African level, in the *Nubian children v. Kenya* case, the ACERWC acknowledged that

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Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990

[395] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya,* Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011. Paragraph 51

[396] Ibid. Paragraph 51

[397] *"Litigation: Nubian Minors v. Kenya." Open Society Foundations (OSF).* 30 Sept. 2011. Web.

[398] Ibid.

[399] *Article 3 – Competence of the State*

1. *Each State shall determine under its own law who are its nationals.*
2. *This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality.*

Council of Europe, *European Convention on Nationality*, 6 November 1997, ETS 166

"under general international law, States set the rules for acquisition, change and loss of nationality as part of their [the state's] sovereign power."[400] However, state discretion is restricted by the state's international human rights obligations, in this case by the ACRWC and other international legal documents that "protect individuals against arbitrary state actions."[401] The IACrtHR, on various occasions, has held similar views regarding the state's sovereignty being restricted by the state's international human rights obligations.

Section 4 has shown that at a general level, absolute consensus exists on the prohibition of discriminatory practices in nationality matters. This view has been reinforced at a more specific level, through case law at regional judicial bodies. Regarding prohibition of arbitrary deprivation of nationality, while this is never permitted, this element does not seem to enjoy universal recognition within various regional instruments. However, since arbitrary deprivation of nationality often results from discriminatory practices in nationality matters, the prohibition of discriminatory practices fills in the gaps left by the exclusion of a provision prohibiting arbitrary deprivation of nationality in certain regional instruments. There seems to be a relatively uniform recognition of a right to a nationality, although in the case of some instruments, a limited version of this right is expressed. Interestingly, at a general, basic level, neither the ECHR at European level nor the ACHPR at African level recognize the right to a nationality. However, on a closer look at the *system* rather than just the instrument, there is evidence that points towards increasing recognition of this right in the regions. At the general level of analysis there seems to be a general unacceptance of the application of the *jus soli* principle when the child would be otherwise stateless. However, once again, on a closer look at specific *systems*, there seems to be some degree of acceptance of this principle, exemplified in the incorporation of this principle in the domestic laws of various CoE member states and in the inclusion of such a provision in the ACRWC. In general, significant progress has been made at regional level, resulting in increased protection for the right to nationality.

[400] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya,* Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011. Paragraph 48
[401] Ibid. Paragraph 48

5. How does article 20 ACHR compare to international (human rights) instruments at the universal level?

This section will analyze various "universal" human rights law documents against the backdrop of article 20 ACHR. This will be done at two levels: at a general level including all the human rights instruments that contain provisions on nationality, and at a deeper level, analyzing the UDHR and the ICCPR. In the general analysis, one non-human rights instrument will be included: the 1961 Convention on the Reduction of Statelessness. While not a human rights document in nature, this convention is essential for any analysis on nationality and statelessness, since it contains various provisions essential for the reduction and prevention of statelessness. It is also possible that provisions such as the one found in article 20.2 ACHR were based on articles found in the convention.[402] Additionally, at general level the same approach as section 4.a will be taken, and the analysis will not be limited to the provisions relating to nationality, but will also take into consideration other provisions found within the document, such as provisions prohibiting discriminatory practices contained in other articles of the document. The second level of analysis of this section will explore the UDHR and the ICCPR at a deeper level, focusing on their respective provisions regarding nationality. While both documents contain a right to a nationality, the content is different: the UDHR contains a general right to a nationality, while the ICCPR focuses on the right to a nationality of children to prevent childhood statelessness. At both general and specific levels, the various universal provisions on nationality will be analyzed against the backdrop of the 5 elements.

5.a. Universal Instruments: General Level

At the universal level, all of the instruments analyzed in this section fall within the UN human rights system. However, not all of these instruments have the same legal status, and not all have the same character. Documents like the Universal Declaration of Human Rights (UDHR) and the UN Declaration on the Rights of Indigenous Peoples (UN DRIP) are declarations, which means they are *not* legally binding. These two instruments are *non-legally binding human rights instruments*. Other instruments, like the International Covenant on Civil and Political Rights

[402] Article 1 of the 1961 statelessness convention contains the provision that requires state parties to ascribe nationality by virtue of *jus soli* to children born on their territory who would otherwise be statelessness. This provision is found in article 20.2 ACHR. However, it is unclear whether there is a relationship.

(ICCPR) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) *are* legally binding instruments. There is also a distinction in the character of these instruments. Some instruments, like the ICCPR, are *human rights* instruments, while the 1961 Convention on the Reduction of Statelessness is *not* a human rights instrument. The ICCPR is a *legally binding human rights instrument*, and the 1961 convention is a *legally binding international legal instrument*. One final distinction between the instruments must be mentioned, and that is the difference between *specialized* instruments and instruments of a *general* character. The convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of all forms of Discrimination (CERD) are *specialized* human rights instruments, since they deal with a specific group: CEDAW focuses on women, the CRC on children, etc. On the other hand, documents like the ICCPR are of a *general* character: they apply to all human beings, and contain the fundamental human rights of *every* human being. This same distinction can be made between the non-legally binding instruments: the UDHR is of general character, while the UN DRIP is specialized, as it focuses on the rights of indigenous persons. *Specialized* instruments have been conceived in order to accord special protection to certain groups that require additional protection due to their vulnerability.

Following the approach from section 4.a., the analysis provided in the table below will not be strict in its interpretation of the various provisions. In a similar manner as in section 4.a, this section's analysis will acknowledge that some elements are *limited*. This is particularly true among the specialized instruments, since they acknowledge the right to a nationality with respect to the group they protect. For example, the CRC acknowledges the right of every child to a nationality.

Document	**Acknowledgement of the right to nationality**	**Application of *jus soli* when the child would be stateless**	**Prohibition of arbitrary deprivation of nationality**	**Right to change one's nationality**	**Prohibition of discriminatory practices in nationality matters**
Art 15 UDHR	Yes	No	Yes	Yes	Yes
Art 24 & 26 ICCPR	Limited	No	No	No	Yes
Art 9 CEDAW	No	No	No	No	Yes

Art 7 & 8 CRC	Limited	No	Yes	No	Yes
Art 5 CERD	Yes	No	Yes	No	Yes
Art 18 CRPD	Limited	No	Yes	Yes	Yes
Art 6 UN DRIP	Limited	No	No	No	Yes
CMW	Limited	No	No	No	Yes
Art 1, 8.4, 9, 1961 SC	No	Yes	Yes	No	Yes

5.a.i. On the general right to a nationality

Various universal instruments contain an acknowledgement of a general right to a nationality, or a limited acknowledgement of this right. For example the ICCPR and the CRC contain provisions on the right to a nationality, but this right is limited: these provisions only prescribed the right of children to a nationality. The UN DRIP, for example, also contains a limited right to a nationality, prescribing the right of every indigenous person to a nationality. Since many of these universal instruments are *specialized* instruments, they focus on their specific purpose: for example the CRC is a convention on the rights of the child, and all of its provisions are applicable only to children. Article 5 CERD prescribes a prohibition of discrimination and to guarantee to everyone, a set of rights, among which is the right to nationality.

5.a.ii. On the prohibition of arbitrary deprivation of nationality

There seems to be some level of consensus regarding the prohibition of arbitrary deprivation of nationality, as several instruments contain provisions on this element. Article 9 of the 1961 statelessness convention is one of these instruments, as it bans arbitrary deprivation of nationality. Article 15.2 UDHR, for example, also contains a provision on this prohibition.

5.a.iii. On the prohibition of discriminatory practices in nationality matters

At universal level, there is clear consensus regarding the prohibition of discriminatory practices in nationality matters. CEDAW, for example, contains such a provision in article 9, which requires state parties to grant women equality regarding the transmission of their nationality to their children. Worldwide, many nationality laws discriminate against women, barring them from being able to pass down their nationality to their children. This contributes to the perpetuity of statelessness. The provision found in article 9 CEDAW is meant to tackle this issue. Other

instruments, such as CERD and the ICCPR contain broad provisions on the prohibition of discriminatory practices, and particularly in CERD, it is prohibited for nationality practices to be discriminatory. Article 9 of the 1961 Statelessness Convention bans the deprivation of nationality based on discriminatory grounds.

5.a.iv. On the application of *jus soli* in cases where the child would be stateless

Unfortunately, only one of the universal instruments prescribes the application of *jus soli* in cases where the child would otherwise be stateless: the 1961 Statelessness Convention on the reduction of statelessness. The almost complete lack of the inclusion of the application of *jus soli* in cases where the child would be stateless, an effective measure against childhood statelessness, creates a major gap at the universal level, since at regional level this provision is relatively common.

5.a.v. On the right to change one's nationality

Only two articles in universal instruments provide for this right: article 15 UDHR and article 18 CRPD. Interestingly, at the drafting sessions for the UDHR, various states opposed the inclusion of the right to change one's nationality, as they considered such an inclusion encouraged people to leave their own countries.[403] Perhaps, this could partially explain the absence of this right in the majority of instruments at universal level which contain provisions on nationality. Article 18.1.a CRPD states that all persons with disabilities "have the right to…change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability."[404]

5.b. The UDHR and ICCPR in Depth

On December 10th, 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR). It was the first attempt by the newly founded United Nations to "draw up an international document on human rights acceptable to all members of the international community."[405] When the document was adopted, it was envisioned as "a common

[403] United Nations General Assembly, 3rd Session, 3rd Committee, 123rd Meeting, held on Friday, 5 November 1948: 01/01/1948, A/C.3/SR.123
[404] UN General Assembly, *Convention on the Rights of Persons with Disabilities. Resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106
[405] Cassese, Antonio. *International Law*. Oxford: Oxford UP, 2005. Print. Pg. 381

standard of achievement for all peoples and all nations"[406] and is said to contain the rights that the UN charter refers to, in a similar manner as the American Declaration contains the rights the OAS charter refers to. This document contains the full array of the most fundamental human rights every human being has the right to, including the right to a nationality found in article 15 UDHR. Soft law documents are international legal documents that are not treaties, but have as purpose to promote "*norms* which are believed to be good and therefore should have general or universal application."[407] The UDHR is a soft law instrument, as it does not possess legally binding character. The UDHR "possesses only moral and political force"[408] and serves as a recommendation to UN member states.[409] Furthermore, since it does not possess legally binding status, there is no supervisory body that can oversees adherence and implementation. Despite its limitations, the UDHR is a document of great importance: it has served as the base for many human rights treaties at universal (such as the ICCPR) and regional (such as the ACHR) levels.[410]

When the UDHR was adopted in 1948, it was agreed that the rights it contained should in the future be incorporated into legally binding instruments.[411] Therefore, the UDHR served as the "springboard"[412] for what would later on become two legally binding human rights documents: the ICCPR and the ICESCR of 1966. The two covenants include "most of the parallel rights which were enumerated in the Universal Declaration."[413] The high level of state parties to these fundamental rights documents "suggests substantial progress towards universal recognition of human rights norms."[414] Regarding monitoring compliance, the ICCPR established the Human Rights Committee (HRC), composed of 18 experts who examine reports submitted by state parties to the treaties.[415] The ICESCR established the Committee on Economic, Social and Cultural Rights (CESCR). The committee also monitors the states' efforts and progress in protecting and

[406] Preamble. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)
[407] Aust, Anthony. *Handbook of International Law*. Cambridge: Cambridge U, 2012. Print. Pg. 11
[408] Cassese, Antonio. *International Law*. Oxford: Oxford UP, 2005. Print. Pg. 381
[409] Ibid. Pg. 381
[410] Aust, Anthony. *Handbook of International Law*. Cambridge: Cambridge U, 2012. Print. Pg. 11
[411] Connors, Jane & Schmidt, Markus. "The United Nations". In Moeckli, Daniel, Sangeeta Shah, Sandesh Sivakumaran, and D. J. Harris. *International Human Rights Law*. Oxford: Oxford UP, 2014. Print. Pg. 375
[412] Keith, Linda Camp. "The United Nations International Covenant on Civil and Political Rights: Does it make a difference in human rights behavior?" *Journal of Peace Research* 36.1 (1999): 95-118.
[413] Ibid.
[414] Ibid.
[415] Ibid.

guaranteeing the rights embodied in the covenants.[416] One of the evident omissions when transferring the rights found in the UDHR into a legally binging fundamental rights document was the omission of the right to a nationality.[417] The only reference to nationality found in the ICCPR is found in article 24.3 which states that "every child has the right to acquire a nationality."[418] The inclusion of this "watered down version"[419] excluded the general right to a nationality from its place among the other fundamental rights in the ICCPR.

5.c. ***Travaux Préparatoires*** **UDHR & ICCPR**

Throughout the process of preparing the UDHR, the *holistic view* of the proclamation of the fundamental rights of man prevailed.[420] This view can be found in the text of the *travaux préparatoires*, the debates which took place in the United Nations Commission on Human Rights and later at in the General Assembly's Third Committee.[421] It was the meetings that took place between the 4th and 6th of November of 1948 that yielded article 15 UDHR, which contains the right to a nationality. The original text of article 15 UDHR—originally draft article 13—adopted by the Commission initially read as follows: *"No one shall be arbitrarily deprived of his nationality or denied the right to change his nationality."*[422]

The representative of France felt that the text of article 13 "did not cover sufficient ground,"[423] and proposed adding the phrase: "every human being has the right to a nationality,"[424] to the article. This statement was based on the argument that since the United Nations "was itself based on the principle of nationality, it could not accept the existence of hundreds of thousands of

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[416] Keith, Linda Camp. "The United Nations International Covenant on Civil and Political Rights: Does it make a difference in human rights behavior?" *Journal of Peace Research* 36.1 (1999): 95-118.
[417] Chan, Johannes M. M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14.
[418] Article 24(3). UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
[419] Chan, Johannes M. M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14.
[420] Trindade Cançado, Antônio Augusto. "Universal Declaration of Human Rights." (2008).
[421] Ibid.
[422] United Nations General Assembly, 3rd Session, 3rd Committee. *Draft International Declaration of Human Rights.* A/C.3/286/Rev.1. 30th October 1948
[423] United Nations General Assembly, 3rd Session, 3rd Committee, 122nd Meeting, held on Thursday, 4 November 1948: 01/01/1948, A/C.3/SR.122
[424] Ibid.

stateless persons."[425] Since the United Nations itself was not able—and did not possess the right to—usurp the place of a sovereign state, "it was its duty to approach States for the purpose of preventing statelessness and to concern itself with the fate of stateless persons."[426] France's position was supported by both Uruguay and Lebanon, who each submitted an amendment to include this right to the text. Lebanon felt that the "basic text protected the rights of persons who already possessed a nationality; but there were people who did not possess it."[427] Lebanon made it clear that this did not mean that states have an obligation to grant nationality to anyone who asks for nationality, but it did mean that there was a need for the member states of the organization to take the necessary steps to address the issue of statelessness.[428] Lebanon explained that the declaration was "not concerned with implementation; it was concerned with stating principles."[429] However, in Uruguay's view, the declaration had "a far wider purpose. Its scope should not be limited by existing legislation but it should bring about changes in legislation that would prevent the existence of statelessness."[430] Here we can see that at this point, states were beginning to acknowledge the possibility of international law obtaining a more important role in the regulation of nationality matters.

However, not all states agreed. The representative of the USSR felt it was wrong to propose any intrusions in state sovereignty to find solutions to statelessness since it would "infringe their sovereignty."[431] The USSR felt that the amendments proposed by Uruguay, France and Lebanon were superfluous, since according to the USSR "the majority of people did in fact possess nationality,"[432] an incorrect assertion. The USSR held a "classical view" of nationality, emphasizing that the "question of nationality fell entirely within the internal competence of each state"[433] and that "the declaration of human rights was not the proper place to define the right to citizenship."[434]

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[425] United Nations General Assembly, 3rd Session, 3rd Committee, 122nd Meeting, held on Thursday, 4 November 1948: 01/01/1948, A/C.3/SR.122
[426] Ibid.
[427] United Nations General Assembly, 3rd Session, 3rd Committee, 123rd Meeting, held on Friday, 5 November 1948: 01/01/1948, A/C.3/SR.123
[428] Ibid.
[429] Ibid.
[430] Ibid.
[431] Ibid.
[432] Ibid.
[433] Ziemele, Ineta, and Gunnar G. Schram. "Article 15." *The Universal Declaration of Human Rights: A Common Standard of Achievement*. By Gudmundur Alfredsson and Asbjørn Eide. The Hague: Martinus Nijhoff, 1999. 297-325. Print
[434] Ibid.

At this point in time, there were states like the USSR who still held on to their *absolute* sovereignty over nationality matters. The representative of Bolivia, opposed the USSR's standpoint, since in Bolivia's view nationality was an inalienable right, independent of "the legal status of the place of birth"[435] or the origin of the parents. As a right, nationality is inherent. The representative of the Philippines held the belief that the purpose of the proposed article was "to protect the individual against encroachment on his rights by the State,"[436] like other articles of the declaration. Drifting from this purpose would take away the whole purpose of the declaration. The declaration, as the representative of Lebanon stated, was meant to establish principles, and it was best to "leave matters of implementation to the proposed covenant."[437] Therefore, normative implementation measures, such as the one found in article 20.2 ACHR were not included.

Article 13 subsequently became article 15 in the final text of the Universal Declaration of Human Rights. The debate in the third committee "reflected the two main views underlining the debate on nationality at the time:"[438] on the one hand, some states supported the idea that nationality is an inherent human right and this right should be included in an international declaration dealing with fundamental rights. On the other hand, some states insisted that the right to a nationality fell *exclusively* under the state's sovereignty. However, the view held by a handful of states that the right to a nationality is a fundamental and inalienable right prevailed. State representatives were aware that article 15 UDHR only "constituted the statement of a general principle which was not supposed and could not contain provisions for implementation."[439] The idea was to establish a set of fundamental rights that every human being has the right to by virtue of being human, rather than creating a legally binding human rights document that would have to be implemented.[440] Based on the voting results[441] it can be established that at the time of the

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[435] United Nations General Assembly, 3rd Session, 3rd Committee, 123rd Meeting, held on Friday, 5 November 1948: 01/01/1948, A/C.3/SR.123
[436] Ibid.
[437] Ibid.
[438] Ziemele, Ineta, and Gunnar G. Schram. "Article 15." *The Universal Declaration of Human Rights: A Common Standard of Achievement*. By Gudmundur Alfredsson and Asbjørn Eide. The Hague: Martinus Nijhoff, 1999. 297-325. Print
[439] Ibid.
[440] Ibid.
[441] "*Each part was put to a vote, but not before every amendment to the original wording was also put to a vote. The French amendment inserting the right to a nationality passed by 21 in favor 9 against and 6 abstentions; paragraph 1 as a whole was adopted by 31 in favor 1 against and 11 abstentions; the prohibition against arbitrary detention was adopted unanimously; the right to change nationality was voted for by 36 in favor 6 against and one abstention; and finally, the whole article passed with 38 in favor 1 against and 7 abstentions*". As cited in Ziemele, Ineta, and Gunnar G. Schram.

UDHR's adoption, most states adhered to the view that nationality is a fundamental human right. However, it was also clear that "the understanding of the right as well as its implications differed among states."[442] Precisely these differences among states were part of the reason why the "development of any international practice on the issue"[443] has been slow.

Years later, the 17th Session of the Third Committee discussed the question of the child's right to a nationality,[444] which was included in the proposed document, the ICCPR. The committee agreed that all appropriate measures should be taken to ensure that no child is stateless,[445] and various representatives supported the inclusion of a provision to address the issue.[446] Several representatives supported the inclusion of general provisions on nationality into the document. However, other representatives pointed out that due to the "complexity of the problem no article on the right of everyone to a nationality had been included in the draft covenants…despite the fact that such an article was contained in the UDHR."[447] It was "deeply regretted"[448] by various members of the committee that a general right to a nationality was not included. The members of the drafting sessions also mentioned that attempts to solve the issue of statelessness had already been made in international instruments, such as the 1961 statelessness convention.[449] Additionally, various members opposing the inclusion of a normative provision to prevent childhood statelessness argued that "a state could not be expected to 'undertake an unqualified obligation' to grant nationality to every child born on a state's territory."[450] However, despite opposition, the right of every child to a nationality was included.

"Article 15." *The Universal Declaration of Human Rights: A Common Standard of Achievement*. By Gudmundur Alfredsson and Asbjørn Eide. The Hague: Martinus Nijhoff, 1999. 297-325. Print

[442] Ziemele, Ineta, and Gunnar G. Schram. "Article 15." *The Universal Declaration of Human Rights: A Common Standard of Achievement*. By Gudmundur Alfredsson and Asbjørn Eide. The Hague: Martinus Nijhoff, 1999. 297-325. Print

[443] Ibid.

[444] Bossuyt, Marc J. *Guide to the "travaux Préparatoires" of the International Covenant on Civil and Political Rights*. Martinus Nijhoff Publishers, 1987. Third Committee, 17th Session, A/5365. 1963. Paragraph 25

[445] Ibid. Paragraph 25.

[446] Ibid. Third Committee, 17th Session, A/C.3/SR1172. 1963. Paragraph 10; A/C.3/SR1177, paragraph 36.

[447] ibid. Third Committee, 17th Session, A/C.3/SR1172, 1963. Paragraph 17; A/C.3/SR1178, paragraph 30.

[448] Ibid. Third Committee, 18th Session, A/5655, 1963. paragraph 76

[449] Ibid. Third Committee, 17th Session, A/C.3/SR1172, 1963. Paragraph 17; A/C.3/SR1178, paragraph 30.

[450] Ibid. Third Committee, 18th Session, A/5655, 1963. paragraph 76

5.d. Nationality under the UDHR & ICCPR

5.d.i. On the general right to a nationality

The inclusion of article 15 in the UDHR was the first time that the general right to a nationality was proclaimed as a human right under international law, stating that "everyone has the right to a nationality."[451] At the drafting sessions, the proposals to include the recognition of a general right to a nationality had a strong backing from the majority of states, while other states opposed including such an acknowledgement.[452]

On the other hand, article 24.3 ICCPR ensures that every *child* has the right to a nationality. This is a limited acknowledgement of the right to a nationality, as it focuses solely on children. However, this acknowledgement of the right of children to a nationality is a great step in the prevention of childhood statelessness and consequently of statelessness later in life, since children eventually grow up to be adults. However, the absence of a general right to a nationality in the ICCPR leaves a gap, since a general right to a nationality would also serve as an acknowledgement of the necessity to take active measures to ensure that everyone has access to their civil and political rights. As it is well known, nationality is often a prerequisite for having access to these rights, so securing a nationality is a first step towards the realization of the individual's full range of civil and political rights. It can be safely established that if the ICCPR was meant to serve as the legally binding version of the UDHR, and was meant to include enforceable measures addressing the UDHR's shortcomings, it failed to do so. The difference in the legal character of the two documents can be the reason for this. The UDHR is a declaration and thus not legally binding, while the ICCPR is a covenant and is legally binding, and would impose obligations upon states. It is likely that states were willing to acknowledge the right to a nationality in a declaration, but were less willing to consent to be bound by normative measures at the point in time when the ICCPR was adopted.

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[451] Article 15
(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.
UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)
[452] United Nations General Assembly, 3rd Session, 3rd Committee, 123rd Meeting, held on Friday, 5 November 1948: 01/01/1948, A/C.3/SR.123

5.d.ii. On the prohibition of arbitrary deprivation of nationality

Mr. Cassin, present at the sessions that yielded the UDHR, stated that the concept of arbitrariness, in the way it was included in the text of the UDHR, had “a two-fold meaning.”[453] This two-fold meaning establishes that by prohibition of arbitrary deprivation of nationality it is meant that “no one could be deprived of nationality contrary to existing laws, and those laws themselves must not be arbitrary.”[454] In other words, deprivation cannot be unlawful, and the laws themselves cannot be arbitrary. The scope of article 15, regarding the prohibition of arbitrariness in dealing with nationality matters, particularly the deprivation of nationality, has two elements. The first element is the prohibition of ethnic and racial discrimination as grounds for deprivation of nationality, and the second is the prohibition of statelessness as a result from deprivation of nationality.[455] There is no provision in the ICCPR dealing with the prohibition of arbitrary deprivation of nationality.

5.d.iii. On the prohibition of discriminatory practices in nationality matters

Discrimination based on race or ethnicity is *prohibited* by every human rights document. This prohibition also “represents a rule of customary international law.”[456] This, according to Adjami and Harrington sets the limit of a state’s discretion regarding the deprivation of nationality: if it is based on race or ethnicity, it is arbitrary and thus not allowed.[457] Article 15 UDHR does not contain an *explicit* provision on this prohibition, however, it is *implicit* in the provision on arbitrary deprivation of nationality found in article 15.2 UDHR. Furthermore, article 2 UDHR[458] prescribes freedom from discrimination in the enjoyment of every right found in the declaration, which includes the right to nationality. Discriminatory practices in nationality matters

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[453] United Nations General Assembly, 3rd Session, 3rd Committee, 123rd Meeting, held on Friday, 5 November 1948: 01/01/1948, A/C.3/SR.123
[454] Ibid.
[455] Adjami, Mirna, and Julia Harrington. "The Scope and Content of Article 15 of the Universal Declaration of Human Rights." *Refugee Survey Quarterly* 27.3 (2008): 93-109.
[456] Ibid.
[457] Ibid.
[458] Article 2
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

would be inconsistent with this provision. Article 24.1 ICCPR states that every child shall have, without any discrimination "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."[459] This includes not being discriminated against in nationality matters. Article 26 ICCPR provides for equality before the law for all without discrimination, and for the protection from discrimination.

5.d.iv. On the application of *jus soli* in cases where the child would be stateless

While article 15 UDHR has many positive aspects, it has weaknesses as well. Despite the fact that it provides that every individual has the right to a nationality and grants "those who do not possess a nationality the right to acquire one,"[460] it does not specify which state must grant the individual a nationality.[461] Without a clear idea of which state has the responsibility to grant nationality, "the right to a nationality is largely meaningless."[462] As the analysis so far has shown, a common solution for this dilemma is for states to grant nationality by virtue of *jus soli* to a child born in its territory if the child would be otherwise stateless. However, as it has been mentioned, the UDHR does not possess a normative character; it is meant to set the guidelines so the inclusion of such a provision would not be enforceable.

The ICCPR also lacks a provision on the application of the *jus soli* principle in cases where the child would be otherwise stateless. The HRC—the body in charge of monitoring the implementation of the ICCPR—has stated in its general comment number 17 that[463]:

> *While the purpose of this provision* [article 24 ICCPR] *is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born.*[464]

[459] Article 24. UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
[460] Van Panhuys, Haro Frederik. *The Role of Nationality in International Law.* The Netherlands, Leyden, A.W. Sijthoff, 1959.
[461] Ibid.
[462] Chan, Johannes M. M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14.
[463] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 59
[464] U N Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child),* Thirty-fifth Session, 7 April 1989. HRI/GEN/1/Rev.9 (Vol. I) Paragraph 8

While an application of *jus soli* in cases where the child could be rendered stateless would be the most logical measure to adopt in order to ensure that every child has a nationality, it is apparent that article 24.3 ICCPR does not create such an obligation upon state parties,[465] leaving the decision in the state's hands. While there is an obligation to ensure that every child has a nationality, article 24.3 ICCPR does not determine how this must be achieved. However, it seems that the HRC is suggesting that in cases when a child cannot obtain any other nationality, the country where the child was born shall grant nationality to the child when the child would otherwise be stateless.[466] In fact, when analyzing Colombia's report in 1997, the committee stated that the state has the "duty to ensure that every child born in Colombia enjoys its right to acquire a nationality"[467] and should "consider conferring Colombian nationality on stateless children born in Colombia."[468] While the committee is clearly advocating the *jus soli* principle as an "exceptional measure where the child would otherwise be stateless,"[469] the committee in its general comment number 17 leaves this decision in the state's hands.

5.d.v. On the right to change one's nationality

Article 15 UDHR acknowledges the right of every human being to change his/her nationality. As it has been previously mentioned, at the drafting sessions for the UDHR, various states opposed the inclusion of the right to change one's nationality, since they considered that such a provision encouraged people to leave their own countries.[470] However, the right was eventually included in the final text of the declaration. It is possible that the acknowledgment of this right under article 20.3 ACHR was based on the inclusion of this right in article 15.2 UDHR. It is also possible that the inclusion of this article reflected the mind-set of American states on this right. In fact, it was American states who promoted the inclusion of this right in article 15 UDHR during the drafting sessions. Furthermore, the *travaux* show that according to the delegate of the USA, the denial of the right to change one's nationality means the individual is being forced to keep

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[465] A/CONF.9 15; A/C.3/SR.1174; A/C.3SR.1178. Chan, Johannes M. M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14.
[466] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 59
[467] Human Rights Committee, Concluding Observations: Colombia, A/52/40 vol.1, Geneva: 1997, Paragraph 306. As cited in Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 59
[468] Ibid. Pg. 59
[469] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 59
[470] United Nations General Assembly, 3rd Session, 3rd Committee, 123rd Meeting, held on Friday, 5 November 1948: 01/01/1948, A/C.3/SR.123

a nationality he/she does not want, which would be against the individual's rights.[471] There is no mention of such a provision in the ICCPR.

5.e. Section 5: Conclusions

In conclusion, at universal level there seems to be consensus on 3 elements. Regarding prohibition of discriminatory practices in nationality matters, there is consensus that this is never allowed. At universal level, there seems to be a lack of recognition of the right to change one's nationality, similarly to the results of the regional analysis on this element. Additionally, the application of *jus soli* in cases where a child born on a state's territory would be otherwise stateless is not found in any universal instrument aside from the 1961 statelessness convention. Regarding the acknowledgment of the right to a nationality, it is expressed in its most general terms in article 15 UDHR, and is contained in various provisions in universal human rights instruments, but in limited terms. Since many, if not most of the universal instruments analyzed in section 5 are specialized instruments, it is not surprising that for example the CRC contains a provision acknowledging the right of every child to a nationality, rather than a general right to a nationality. Finally, there seems to be no consensus on the prohibition of arbitrary deprivation of nationality; however, this element is partially guarded by the prohibition of discriminatory practices in nationality matters, since discriminatory practices can result in arbitrary deprivation of nationality. This last element is found in every document at universal level and is never, under any circumstances, permissible. At universal level in general, while there is no consensus on some of the elements, there is a strong framework for protection, at least by law. This framework is especially enhanced by the existence of the 1961 statelessness convention. However, a weakness of the universal framework for protection is the lack of judicial bodies that can examine violations. While the HRC and other committees, like the CEDAW or CERD Committees can examine violations of the conventions they oversee. However, these are quasi-judicial bodies,[472] unlike the bodies found at regional level such as the ECrtHR or the IACrtHR which are judicial bodies.

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[471] United Nations General Assembly, 3rd Session, 3rd Committee, 123rd Meeting, held on Friday, 5 November 1948: 01/01/1948, A/C.3/SR.123

[472] "Human Rights Treaty Bodies - Petitions." *Human Rights Treaty Bodies - Petitions*. United Nations Office for the High Commissioner for Human Rights, n.d.

6. Conclusion

The *current* state of international law, "upon which the freedom of states to determine the attribution of nationality rests"[473] is strikingly different from that at the time of the *Tunis and Morocco Nationality Laws Decree Case*. While under international law there is not a clear set of "citizenship requirements to be enacted by all states"[474] to serve as guides to the attribution of nationality, state sovereignty over nationality matters has undergone a (slow) restraining process under international law. A major driving force behind this restraining process has been the emergence of human rights, which has "shifted the very foundation of public international law from a system of coordination of sovereign states to the wellbeing of human beings."[475] While previously, international law "constrained states only by telling them whom they could not[476] include as nationals,"[477] with the dawn of the era of human rights, norms telling states who must be included as a national began to emerge.[478] This assertion is supported by the fact that "a number of eminent jurists have expressed the opinion that international law does in fact regulate the question of nationality."[479]

However, it should be kept in mind that nationality "cannot be bestowed or acquired under international law, but only under municipal law."[480] Therefore, it is unthinkable to even consider completely divorcing nationality matters from state sovereignty. However, it is possible—and arguably, necessary—for this sovereignty to be constrained and kept in check by international law, in order to ensure that every person in the world has a nationality. Nevertheless, despite constraints under international law, the state will continue to "retain important discretionary

[473] Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 37
[474] Ibid. Pg. 97
[475] Hailbronner, Kay. "Nationality in Public International Law and European Law." *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries*. By Rainer Bauböck, Eva Ersboll, Kees Groenendijk, and Harald Waldrauch. Amsterdam: Amsterdam UP, 2006. 35-104.
[476] For example, barring them from granting nationality to individuals with whom they shared no connection whatsoever, and especially, barred them from granting nationality to an individual without the individual's consent
[477] Spiro, Peter J. "A new international law of citizenship." *American Journal of International Law* 105.4 (2011): 694-746.
[478] Ibid.
[479] Among them Lauterpacht, Guggenheim, Redslob, Fitzmaurice and McNair. In Brownlie, Ian. "The Relations of Nationality in Public International Law." *Brit. YB Int'l L.* 39 (1963): 284.
[480] Chan, Johannes M. M. "The Right to a nationality as a Human Right." *Human Rights Law Journal* 12.1-2 (1991): 1-14.

powers"[481] such as deciding on the rules for acquisition of nationality. It is the role of international law to regulate the standards to which these rules must abide. A premise for this paper has been the idea that the more restrictive and complex a provision or a system as a hole is in regulating nationality matters, the more protection is accorded to the individual, and the less discretion the state enjoys. In light of this idea, various conclusions can be drawn from this work.

The analysis has shown that American region's system has gone further than the other regions in regulating nationality matters. As it has been established on various occasions, article 20 ACHR contains 5 elements, which were used for the cross-regional analysis, and for the analysis at universal level. Exploration of these 5 elements, particularly through the rulings of the IACrtHR, has shown that in the Americas: 1) there is a strong recognition of a general right to a nationality, 2) the application of the jus soli principle in cases where the child would be otherwise stateless seems to enjoy almost universal status in the region, 3) and arbitrary deprivation of nationality and 4) discriminatory practices in nationality matters are strictly forbidden and unacceptable, and finally, while largely ignored, 5) there is recognition of the right to change one's nationality. These elements combined result in a strong protection framework.

It must be acknowledged that this analysis could have been completed using the elements found in any other article or instrument. For example, a successful analysis could have been completed using the elements contained in article 15 UDHR, or the various provisions contained in the ECN. However, the reason why article 20 ACHR was chosen is due to the comprehensiveness of its provisions, and due to its legal character: the ACHR is *the* legally binding human rights instrument in the American region. This is key, since part of the essence this paper has been—along with establishing how far developments have gone—to determine the strength or weakness of the existing international framework for the protection of the individual's rights relating to nationality. It was also for this reason that article 20 ACHR, which has been deemed the most far-reaching provision found in a legally binding human rights instrument that regulates nationality under international law to date, was chosen as the backdrop of analysis. Based on the analysis carried out in this paper, it can be concluded that indeed, article 20 ACHR is the most-far reaching provision to date. Case law of the IACrtHR has contributed to strengthening and shaping not only

[481] Spiro, Peter J. "A new international law of citizenship." *American Journal of International Law* 105.4 (2011): 694-746.

article 20 ACHR itself, but also the framework for protection of the rights contained therein. The restrictive framework for the protection of nationality, found in both the documents (American Declaration and the ACHR) and in the work of the system's institutions (the IACommHR and the IACrtHR) has also severely constrained the state's discretion over nationality. All these developments have resulted in severe restrictions on the state's sovereignty over nationality matters in the region.

At cross-regional level, interesting developments have taken place since 1923. There seems to be consensus on the acknowledgement of a general right to a nationality, and there is absolute consensus on the prohibition of discriminatory practices, which is applicable to nationality matters. The analysis showed that only the ECN contained all 5 provisions. This signifies that the convention serves as the strongest regional means (aside from the ACHR) for the protection of the individual regarding nationality matters. However, the ECN is not a human rights convention, and it would be inappropriate to equate it as such. Similarly to the 1961 convention, the ECN does promote the protection of a human right: the right to a nationality and is therefore relevant for an analysis of the framework for the protection of this right. Furthermore, when the entire European system is taken into consideration, this convention is essential for ensuring an adequate protection of the right to nationality for all individuals under the jurisdiction of CoE member states. At European level, it has become clear that the CoE has made efforts to address nationality and statelessness, and clear attempts have been made to regulate state discretion over nationality matters. Furthermore, the ECrtHR's consideration of nationality—despite this right not being included in the convention—and the positive results for the affected individuals that these rulings have had contribute to the CoE's clear efforts.

The 5 elements of article 20 ACHR can be found in various regional instruments. While some documents contain the majority of the elements, and others contain a few or only one element, it is evident that these elements have been acknowledged and addressed by being included in various instruments across the regions. There is absolute consensus on one element: the prohibition of discriminatory practices. Regarding the other elements, there seems to be no absolute homogeneity in their acknowledgement. This makes it clear that while other regions have not gone as far as the Americas, these regional developments point towards a positive trend in terms of awareness, acknowledgement and implementation of protections of the individual's right to nationality. The recent developments in relevant case law at African and European levels can

be said to heavily contribute to this increased awareness, acknowledgement and implementation of protections. It is clear that across the regions, strong frameworks are emerging.

The universal framework for the protection of the right to nationality is highly developed. The majority individual documents, when inspected individually, do not seem to create a strong framework for the protection of the right to a nationality, since the majority of the instruments that contain protections of nationality at universal level are specialized instruments. Therefore, they protect the rights of the specific group they protect. However, when inspected collectively, the universal framework provides for a thorough protection of the right to nationality. This is due to the fact that protections can be found at two levels: at the level of instruments that contain the fundamental rights of every human being, such as the ICCPR, and specialized instruments that contain the rights of the group they protect, and additionally contain special protections accorded only to the specific group the instrument targets. Furthermore, one of the most complete instruments for the protection of the right to nationality is found at universal level: the 1961 statelessness convention. While this instrument is *not* a human rights instrument, its aim is to reduce the effects of statelessness. As it has been mentioned, statelessness is the antithesis of the enjoyment of the right to nationality; an individual's condition as a stateless person resulted from a violation of that individual's right to nationality. Therefore, an instrument that seeks to reduce statelessness is at the same time protecting the right to nationality, since the eradication of statelessness can only be achieved when every human being's right to nationality is realized.

Upon analysis of the 5 elements of article 20 ACHR against the various provisions found in universal instruments, various conclusions can be drawn. At universal level, there seems to be a recognition of the right to a nationality. However, this recognition has been established to be limited, since the specialized instruments, which make up the majority of the instruments that were analyzed, acknowledged the right of the specific group they protect. However, collectively, at universal level there is recognition of this right. The application of *jus soli* in situations where the child born on a state's territory would be otherwise stateless does not seem to enjoy widespread recognition at universal level. However, as it was pointed out at the drafting session of the ICCPR, the 1961 convention covers this element, which is perhaps the reason why it has not been adopted by other universal instruments. The prohibition of arbitrary deprivation of nationality has been addressed by some instruments, but it is not included in all of the instruments

at universal level which contain provisions on nationality. The element that enjoys absolute recognition is the prohibition of discriminatory practices in general, but also in relation to nationality matters. Finally, at universal level there seems to be a shift towards the constraint of the state's discretion over nationality matters, but at a slower pace than at regional level. This could be due to the fact that the universal level needs to accommodate for the entire planet, while at regional level there are more similarities between states, making it easier for practices to become generalized and for shifts to take place at a faster pace.

Regarding the 5 elements, it has become clear that it is universally accepted that discriminatory practices in nationality matters are *never* allowed. This prohibition can be found in *every single one* of the documents analyzed in this paper, both at regional and universal levels. It can be inferred that the state's sovereignty over nationality matters is "most clearly restrained by the prohibition against…discrimination."[482] There is also a general trend, both at universal and regional level, which points towards universal the recognition of the right to nationality. While the wording is far from uniform, the message is similar: nationality is a human right, and a very important one.

Throughout this paper, it has become clear that there has been an incredible progress from 1923 when the PCIJ issued its ruling until the present day. This progress is largely due to the overwhelming amount of instruments that contain provisions regulating nationality matters which have been adopted at both regional and universal levels. There is no doubt that the state continues to enjoy some degree of discretion over nationality matters. However, taking all the developments both at regional and universal level, it is clear that this discretion has become constrained. In 1923 *Tunis and Morocco* case, established that whether a certain matter—nationality—falls *solely* within the state's jurisdiction depended on the development of international relations. The analysis in this work has shown that a shift has already started taking place worldwide: a shift towards a universal and comprehensive framework for protection of the right to nationality. In this framework, the state continues to enjoy discretion to establish the rules for acquisition of nationality, but these rules must be in line with international legal standards for

[482] "Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to Be Free from Arbitrary Deprivation of Nationality, and Combating Statelessness." *Submission of the Open Society Justice Initiative to the United Nations Office of the High Commissioner for Human Rights for Consideration by the UN Commission on Human Rights at Its Sixty-Second Session*. Rep. N.p.: Open Society Justice Initiative, 2005. Print

the protection of the right to nationality. This shift, which started gaining momentum in 1948, signals the emancipation of nationality from falling *exclusively* within the state's absolute sovereignty. Less than a century after the 1923 ruling, we have a strong framework for the protection of the right to nationality. In less than 100 years, we have seen a major shift from the inexistence of human rights, to a highly developed system that reaches every corner of the planet. Through this development, nationality matters started to be recognized as matters of international human rights law. However, the *full* realization of the right to a nationality for all is still a long way off. The existence of statelessness interferes with the realization of this ideal, since it poses a threat to the effectiveness of the existing framework for protection of the right to nationality. While major steps have been taken with respect to protection of the right to nationality under international human rights law, there is still a long way to go and as long as statelessness continues to affect millions across the globe, the right to nationality cannot be *fully* realized.

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