V

Law Relating to Stateless Persons

1. Introductory Remarks

As has become clear in the preceding chapters, international refugee law does not provide a well-defined status in respect of Palestinian refugees. Part Two of this book will therefore examine whether other areas of international law contain rules that are relevant to the refugees' status. A limitation will have to be made in that it is impossible in the scope of this study to carry out a comprehensive analysis of the applicability of the enormous body of rules of international law that might theoretically be relevant to the status of Palestinian refugees. The author has decided to focus on three areas of international law that are of particular relevance. Thus, the present chapter will deal with the rules of international law concerning stateless persons, and their applicability to Palestinian refugees. Chapters VI and VIII will explore some aspects of humanitarian law and human rights law that are of special significance in the context of this study.

'A person who is not considered as a national by any State under the operation of its law' is called stateless, *apatride, apolide, or heimatlos.*[1] As nationality[2] is the principal link between the individual and the state and for that matter between the individual and international law, statelessness is an anomaly.[3] According to Batchelor, 'The stateless person is denied the vehicle for access to fundamental rights, access to protection and access to expression as a person under the law.'[4] Having no nationality, 'one is stripped of even the right to have rights, there being no foundation from which other rights might reliably flow.'[5]

Weis distinguishes between original and subsequent statelessness: 'A person may either be stateless at birth, as a result of the fact that he does

[1] Convention Relating to the Status of Stateless Persons of 28 Sep. 1954, art. 1. Entry into force: 6 June 1960. Text: 360 *UNTS* 117 (No. 5158); also in UNHCR, 1988, 59. See also, Weis, P., *Nationality and Statelessness in International Law*, Alphen aan den Rijn, Germantown, Sijthoff & Noordhoff, 1979, 161; Batchelor, C. A., 'Stateless Persons: Some Gaps in International Protection', 7 *IJRL* 232 (1995).

[2] The terms nationality and citizenship are used synonymously throughout this book unless otherwise indicated.

[3] Cf. Weis, P., 'The United Nations Convention on the Reduction of Statelessness, 1961', 11 *ICLQ* 1073 (1962).

[4] Batchelor, 1995, 235.

[5] Ibid.

not acquire a nationality at birth according to the law of any State, or he may become stateless subsequent to birth by losing his nationality without acquiring another.[6] Another distinction that is frequently made is that between *de jure* statelessness – the situation referred to at the beginning of this paragraph – and *de facto* statelessness, which refers to the lack of an effective nationality.[7]

To what extent is the state free to grant, deny or revoke citizenship?[8] Article 1 of the Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws[9] provides: 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.' According to the International Court of Justice in the *Nottebohm Case*,[10] 'a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with the general aim of making the legal bond of nationality accord with the individual's genuine connection with the State.'

In other words, nationality is a matter of domestic concern provided a state's action does not conflict with international law. In this respect, the Permanent Court of International Justice, in an Advisory Opinion, stated:[11]

> The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon 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.

Since the Second World War the development of international human rights law has considerably restricted the freedom of states concerning matters of nationality. Article 15 of the Universal Declaration of Human Rights states that 'Everyone has the right to a nationality'. Today many commentators consider that the Declaration or parts of it have acquired the status of customary international law.[12] The Declaration, however, does not indicate upon whom the obligation falls to grant nationality.[13] A

[6] Weis, 1979, 162. [7] See n. 22 and accompanying text, below.

[8] Generally on nationality see Weis, 1979; Brownlie, 1990, ch. XVIII; also Batchelor, 1995, 234.

[9] The Hague, 12 Apr. 1930. Entry into force: 1 July 1937. Text: 179 *LNTS* 89 (No. 4137). 27 states signed but did not ratify; 13 states have ratified or acceded to the Convention; cf. Brownlie, 1990, 386, n. 21.

[10] *ICJ Reports*, 1955, 4.

[11] *Advisory Opinion on the Tunis and Morocco Nationality Decrees*, PCIJ, Ser. B, No. 4 (1923), 24.

[12] Cf. Batchelor, 1995, 237. [13] Ibid.

number of recent human rights instruments attempt to close this gap. The Convention on the Rights of the Child, for example, stipulates that children have the right to acquire a nationality and that they must acquire that of the state of birth if they would otherwise be stateless.[14]

Article 15 of the Universal Declaration also stipulates that 'No one shall be arbitrarily deprived of his nationality'. This brings Chan to the conclusion that, while there may not necessarily be a positive duty on states to confer nationality there is, arguably, 'a negative duty not to create statelessness',[15] and accordingly any denationalization must be accompanied by strict rules of procedure and should not result in statelessness.[16] Since nationality is the principal link between the individual and international law, and since 'the rules of international law relating to diplomatic protection are based on the view that nationality is the essential condition for securing for the individual the protection of his rights in the international sphere,'[17] it is clear that statelessness is undesirable from the point of view of the individual. But statelessness is also undesirable from the point of view of states and of the international community as a whole, as it may lead to friction between states.[18]

For the above reasons, there have been frequent international efforts to eliminate or reduce statelessness and to regulate the status of stateless persons. During the era of the League of Nations the first international instruments dealing with the subject were adopted.[19] As was mentioned above, in 1948 the Universal Declaration of Human Rights proclaimed the right to a nationality. Also in 1948, the United Nations Economic and Social Council (ECOSOC) commissioned a study on the phenomenon of statelessness, which was published the following year.[20] The study distinguished between stateless persons who are also refugees and the ones who are not; focusing primarily on the first category. Follow-up action on the study[21] resulted in the adoption of the Convention on the Status of

[14] Arts. 2, 7. [15] Chan, J. M. M., 'Nationality as a Human Right', 12 *HRLJ* 11 (1991).

[16] Cf. Batchelor, 1995, 238. See also ch. VII, n. 46 and accompanying text.

[17] Weis, 1979, 162, citing Oppenheim, L. F. L., *International Law*, vol. i, 8th edn. by Lauterpacht, H., London, Longmans, Green & Co., 1955, 669.

[18] Ibid.

[19] For example, the 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws, referred to in n. 9, above, includes various provisions intended to reduce statelessness. Also, the Protocol Relating to a Certain Case of Statelessness (The Hague, 12 Apr. 1930; entry into force: 1 July 1937; text: 179 *LNTS* 115) providing for the acquisition of the nationality of a contracting state by a person born in its territory of a mother possessing the nationality of that state and of a father without nationality, or of unknown nationality. See Weis, 1979, 163. A third instrument adopted on the same day, the Special Protocol Concerning Statelessness (LN doc. C.27.M.16.1931.V), never received sufficient ratifications or accessions.

[20] *A Study of Statelessness*, UN doc. E/1112 (1 Feb. 1949); E/1112/Add. 1 (19 May 1949). Part I of the study is reproduced in Takkenberg and Tahbaz, 1989, vol. i, 10.

[21] ECOSOC decided to establish a committee to work on the definitions and work out solutions; ECOSOC res. 248(IX)B, 8 Aug. 1949. The *Ad hoc* Committee on Statelessness and

Refugees in 1951, applicable to both refugees who formally speaking still have a (or more than one) nationality – in this context also referred to as *de facto* stateless persons – as well as to refugees who are at the same time *de jure* stateless,[22] to be followed by the adoption of the Convention on the Status of Stateless Persons in 1954, hereinafter referred to in this chapter as the 1954 Convention, applicable to non-refugee stateless persons.[23] In 1961, a United Nations Conference adopted the Convention on the Reduction of Statelessness, hereinafter referred to as the 1961 Convention. The relevance of the latter two instruments for Palestinian refugees will be examined below, in sections 3 and 4 respectively. First, in section 2, it will be examined under what circumstances and to what extent Palestinian refugees may, at the same time, be considered as stateless persons.

2. Are Palestinian Refugees Stateless Persons?

2.1 The existence of a Palestinian nationality

As discussed in chapter I,[24] Palestine was a British mandate during the time of the League of Nations.[25] Under the mandates system,[26] the

Related Problems met twice in New York in 1950. The most important UN documents from this period are collected in Takkenberg and Tahbaz, 1989, vol. I, 114–422.

[22] This distinction was introduced in the study mentioned in n. 20, above. The Social Department of the Secretariat, which elaborated the study, gave the term 'stateless persons' a wider meaning by including in its study not only *de jure* stateless persons but also *de facto* stateless persons, *i.e.*, persons who 'without having been deprived of their nationality no longer enjoy the protection and assistance of their national authorities.' UN doc. E/1112, 9.

[23] Cf. the preamble of the 1954 Convention.

[24] See ch. I, sub-section 3.1. The information in this sub-section is based on: Bierwith, C., *Zum Einbürgerungsanspruch in der Bundesrepublik Deutschland geborener Kinder palästinensischer Eltern* [Naturalization claims of children born in the FRG of Palestinian parents], Bonn, ZDWF (ZDWF-Schriftenreihe Nr. 43) 1990; Goodwin-Gill, G. S., 'The Rights of Refugees and Stateless Persons: Problems of Stateless Persons and the Need for International Measures of Protection', paper presented to the World Congress on Human Rights, New Delhi, India, 10–15 Dec. 1990, in Saksena, K. P. (ed.), *Human Rights Perspectives and Challenges (In 1990 and Beyond)*, New Delhi, Lancer Books, 1994, 378, 384–7; Goodwin-Gill, 1996, 241–6; Lawand, 1996, 560–5; Weis, 1979, 20–5.

[25] The mandate was based on art. 22, para. 4, of the Covenant of the League of Nations, which reads as follows: 'Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.' The terms of the British Mandate over Palestine were laid down in an agreement of 24 July 1922; see ch. I, n. 12.

[26] Both the mandate system of the League of Nations and the corresponding principles of the trusteeship system of the United Nations create a special regime for territory de-

inhabitants of such territories were not to be considered as nationals of the administering powers, although they might benefit from the exercise of diplomatic protection.[27] Accordingly, Palestinian citizens[28] were treated in Great Britain on the same footing as British Protected Persons;[29] at the same time a Palestinian citizen was not a British subject.[30] According to Weis, this approach is in accordance with international law:[31]

It follows from the special status of Mandated and Trust Territories that the conferment by the Administering Authority of the status of protected persons on the inhabitant of a Mandated or Trust Territory does not confer on those persons the status of nationals of the administering State according to International law. The position of these persons is somewhat anomalous whether one regards them as having no nationality in the sense of international law or as being "for

scribed by Judge McNair as follows: 'The Mandates System . . . is a new institution – a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other . . . The doctrine of sovereignty has no application to this new system. Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State . . . sovereignty will revive and rest in the new State. What matters . . . is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of territory being administered by it. The answer to that question depends on the international agreements creating the system and the rules of law which they attract. Its essence is that the Mandatory acquires only a limited title to the territory entrusted to it, and that the measure of its powers is what is necessary for the purpose of carrying out the Mandate.' Separate opinion, *International Status of South West Africa, ICJ Reports* (1950), 128, 150; cited in Brownlie, 1990, 179.

[27] See League Council resolution of 22 Apr. 1923, *Official Journal*, 604, quoted in Weis, 1979, 20, which reads as follows: 'The Council of the League of Nations; Having considered the report of the Permanent Mandates Commission on the national status of the inhabitants of territories under B and C mandates; In accordance with the principles laid down in Art. 22 of the Covenant resolves as follows: (1) The status of the native inhabitants of a mandated territory is distinct from that of the Mandatory Power and cannot be identified therewith by any process having general application; (2) The native inhabitants of a mandated territory are not invested with the nationality of the Mandatory Power by reason of the protection extended to them; (3) It is not inconsistent with (1) and (2) above that individual inhabitants of the mandated territory should voluntarily obtain naturalisation from the Mandatory Power in accordance with arrangements which it is open to such Power to make, with this object, under its own law; (4) It is desirable that native inhabitants who receive protection of the Mandatory Power should in each case be designated by some form of descriptive title which will specify their status under the mandate.' See also Brownlie, 1990, 395.

[28] Prior to the British mandate, the inhabitants of Palestine were Turkish nationals.

[29] Cf. Weis, 1979, 18–20, 22.

[30] In a judicial decision by the English High Court in *R. v. Ketter* [1940] 1 KB 787, it was held that the appellant, a native of Palestine born at a time when that territory was under Turkish sovereignty, but holding a passport marked 'British passport – Palestine', had not become a British subject by virtue of art. 30 of the Treaty of Lausanne of 24 July 1923 (*UKTS*, No. 16/1923), nor under the terms of the Mandate agreement of 24 July 1922, since Palestine was not transferred to and, consequently, was not annexed by Great Britain by either the Treaty or the Mandate; cited in Weis, 1979, 21.

[31] Weis, 1979, 24.

various purposes of international law . . . attributable to the territory itself' – they are protected by the Mandatory or Trustee.

Mandate-citizenship was regulated by the Palestine Citizenship Order, 1925–41[33] and included acquisition by birth.[34] Palestinian citizens were eligible for a British passport issued by the government of Palestine. The passport referred to the national status of its holder as 'Palestinian citizen under Article One or Three of the Palestinian Citizenship Order, 1925–41.'[35]

Palestinian citizenship, as a product of the mandatory's authority, terminated with the mandate and with the proclamation of the state of Israel on 15 May 1948,[36] although there is some authority in international law for the continuance of certain internal laws upon the cession or abandonment of territory.[37] In his detailed study on 'Naturalization claims of children born in the Federal Republic of Germany of Palestinian parents', Bierwith extensively discusses the matter.[38] In his opinion, the creation of the state of Israel on part of the territory of the former British mandate does not rule out the possibility of the continuation of the 'Quasi-Staat Palästina' [quasi-state Palestine] in the remainder of the mandate area.[39] However, as there has not been a restoration of effective Palestinian government upon the termination of the mandate, this has not been the case and Bierwith therefore concludes: 'With the extinction of the at least quasi-state Palestine, as there is no nationality without a state, the Palestinian nationality has also lapsed once and for all.'[40]

[32] Weis refers to Brownlie, 39 *BYIL* 316, citing a decision of the German Court of Restitution Appeals of 15 Nov. 1951 (18 *Int. Law Reports* 55) where a person of Czech origin who had acquired Palestinian nationality was held to be a 'United Nations National'. Bierwith, 1990, 58, uses the phrase 'Quasi-Staatsangehörigkeit' [quasi-nationality] or 'Mandatszugehörigkeit' [mandate-citizenship] to express the special status of Palestinian nationals as distinct from the regular class of nationals of a state.

[33] S.R. & O., 1925, No. 25.

[34] Art. 3, Palestine Citizenship Order; cf. Bierwith, 1990, 61; Goodwin-Gill, 1994, 384.

[35] Copy of sample passport on file with author.

[36] Cf. ch I, sub-section 3.1.

[37] Goodwin-Gill, 1994, 397, n. 31, refers to debates in the United Kingdom on the Palestine Act, cited in O'Connell, D. P., *State Succession in Municipal Law and International Law*, vol. i, 1967, 128.

[38] Bierwith, 1990, 77–91.

[39] Also De Waart, P. J. I. M., *The Legal Status of Palestine Under International Law*, Birzeit, Birzeit Univ. Law Center, 1996, 16, is of the opinion that those parts of the mandate area which did not become part of the state of Israel continue to have an 'international status'. See also, by the same author, *Dynamics of Self-Determination in Palestine: Protection of Peoples as a Human Right*, Leyden, Brill, 1994, 46–53, 99–107.

[40] Bierwith, 1990, 91; English translation by the author; original German text of passage quoted: 'Mit dem Untergang des zumindest Quasi-Staates Palästina ist, da es eine Staatsangehörigkeit ohne Staat nicht geben kann, auch die palästinensische Staatsangehörigkeit unauflebbar erloschen.'

A related but distinct question is whether the recognition of the Palestinian people's right to self-determination[41] has resulted in the re-emergence of Palestinian citizenship. Since the mid-1980s, a number of European states, including the Federal Republic of Germany and Austria, took the position that Palestinians were not able to claim the benefits of the 1954 and 1961 Conventions, as their statelessness could not be definitely established.[42] These states referred in this respect to the efforts of the PLO to establish a Palestinian state and to increased international recognition of the Palestinians' claim to self-determination and national independence. The issue has become more complex since the proclamation, on 15 November 1988, of the existence of the state of Palestine by the Palestine National Council (PNC)[43] and, most recently, after the mutual recognition of the PLO and Israel and the introduction of limited self-rule in the Gaza Strip and parts of the West Bank.

Although there can be no doubt that the entity 'Palestine' should be considered a state *in statu nascendi* and although it is increasingly likely that the ongoing peace process will eventually culminate in the establishment of a Palestinian state,[44] it is premature to conclude that statehood, as defined by international law, is at present (spring 1997) firmly established.[45] Whatever the political position, the entity 'Palestine' currently does not fully satisfy the international legal criteria of statehood: a permanent population, a defined territory, government, and the capacity to enter into relations with other states.[46] And, as there is no state, *ipso facto* Palestinian nationality is non-existent as well. Palestinians who have not acquired the nationality of a third state[47] therefore continue to be stateless for the purpose of international law.

[41] For a discussion of the right to self-determination in relation to the Palestinian people, see ch VII, section 3.

[42] For this reason, the German government used to categorize Palestinians in its population statistics as 'persons of undetermined nationality' ['Personen mit ungeklärter Staatsangehörigkeit'] rather than as stateless persons. This practice prompted a legal debate, especially in German courts, which continued for almost a decade until the 1993 ruling of the Federal Administrative Court, referred to in n. 88, below.

[43] PNC's Declaration of Independence, also known as the Algiers Declaration. Text in UN doc. A/43/827-S/20278, Ann. III, 15 (1988), also in 27 *ILM* 1668, 1670 (1988).

[44] See ch. IX, section 3. See also: CPAP, *Palestinian Statehood*, Washington, D.C., 1994.

[45] Cf. Bierwith, 1990, 93–105; Crawford, J., 'The Creation of the State of Palestine: Too Much too Soon?', 1 *EJIL* 307 (1990); Goodwin-Gill, 1994, 385; Kirgis, F. L., 'Admission of "Palestine" as a Member of a Specialized Agency and Withholding the Payment of Assessments in Response', 84 *AJIL* 218 (1990); Prince, 'The International Legal Implications of the November 1988 Palestinian Declaration of Statehood', 25 *SJIL* 681 (1988); Segal, J., 'Does the State of Palestine Exist?', *JPS* 73 (Autumn 1989) 14; Van de Craen, F. L. M., 'Palestine', in Benhardt, R. (ed.), *Encyclopedia of Public International Law*, Amsterdam, New York, Oxford, North-Holland Publ., 1985, vol. xii, 275, 279.

[46] Art. 1, 1933 Montevideo Convention on Rights and Duties of States. Text: 165 *LNTS* 19; also 28 *AJIL* supp. 75 (1934). See also, Brownlie, 1990, 72–9.

[47] See sub-section 2.2, below.

In the opinion of this author, the mutual recognition of the PLO and Israel and the recent introduction of limited self-rule in the Gaza Strip and parts of the West Bank does not basically change the above conclusion.[48] Neither the Declaration of Principles on Interim Self-Government Arrangements[49] nor the subsequent agreements between Israel and the PLO,[50] establish a Palestinian state and the latter agreements only transfer limited powers and responsibilities to the newly created Palestinian Authority. For example, the Cairo Agreement explicitly states that 'the Palestinian Authority will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the Gaza Strip or the Jericho Area, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions'.[51]

It may be argued at the same time, however, that the Cairo Agreement does establish some kind of *de facto* Palestinian citizenship in respect of the residents of the autonomous areas. Section 27 of Annex I to the Agreement outlines the transfer of powers and responsibilities in the area of 'Population Registry and Documentation'. The Palestinian Authority is to receive the population registry in respect of the autonomous areas; is to have the power to substitute the existing Israeli identity cards of the residents with new Palestinian ID cards; is to have the authority to issue a Palestinian 'passport/travel document'; and, finally, may grant 'permanent residency in the Gaza Strip and the Jericho Area with the prior approval of Israel.' The Agreement falls short of officially recognizing a Palestinian citizenship or nationality, and due to the inability of the Palestinian Authority to establish foreign relations, it will not be able to extend diplomatic protection to residents of the autonomous areas travelling abroad while making use of their 'passport/travel document'.[52] For the purpose of international law, residents of the self-rule areas who do not possess the nationality of a third state must, therefore, continue to

[48] Similarly, Gasser, H. P., 'On the applicability of the Fourth Geneva Convention after the Declaration of Principles and the Cairo Agreement', paper presented to an international colloquium on *Protection Mechanisms and Political Change*, held in Gaza City from 10–12 Sep. 1994, 5. On the effect of autonomy for the creation of statehood, see Segal, 1989, 26.

[49] See ch. I, sub-section 6.1.

[50] Ibid.

[51] Art. VI, para. 2.a, Agreement on the Gaza Strip and the Jericho Area, signed in Cairo, 4 May 1994; text: 33 *ILM* 622 (1994); cf. ch. I, n. 132. See Singer, J., 'Aspects of Foreign Relations under the Israeli–Palestinian Agreements on Interim Self-Government Arrangements for the West Bank and Gaza', 28 *Israel Law Review*, 268, 269 (1994).

[52] It should be mentioned, however, that in countries recognizing 'Palestine' as a state, the PLO office may be in a position to exercise *de facto* or, in case the office has diplomatic status, even *de jure* diplomatic protection in respect of Palestinians residing there, including residents of the autonomous areas.

be considered as stateless persons until such time as a Palestinian state has been officially established.[53]

2.2 *Acquisition of the nationality of third states*[54]

Israel had no nationality legislation until 1952. The existence of a state implies a body of nationals, and a population within a relatively well-defined territory is an accepted criterion of statehood.[55] With one exception, however, Israeli courts held that, on the termination of the mandate, former citizens of Palestine had lost their citizenship without acquiring any other.[56] For the purposes of Israeli municipal law, the issue was resolved by a Supreme Court decision,[57] and by the 1952 Nationality Law.[58]

The 1952 Law confirmed repeal of the Palestine Citizenship Orders 1925–42, retroactively to the day of the establishment of the state of Israel.[59] It declared itself the exclusive law on citizenship, which was available by way of return,[60] residence, birth, and naturalization.[61]

[53] For the consequences of the continued statelessness of Palestinians for issues related to private international law, see Börner, A., 'Palästina und die Palästinenser im IPR', 17 *Praxis des Internationalen Privat- und Verfahrensrechts* 47 (1997).

[54] In this sub-section the possible collective acquisition of citizenship by groups of Palestinians will be examined; acquisition of the nationality of third countries by individual Palestinians reaches beyond the scope of this study.

[55] See n. 46 and accompanying text, above; also, Goodwin-Gill, 1994, 384.

[56] Cf. Goodwin-Gill, 1994, 385 and n. 32, referring to *Oseri v. Oseri* (1953) 8 *PM* 76; 17 *ILR* 111 (1950); this decision of the Tel Aviv District Court, apparently based on the fact of termination of Palestinian citizenship, may also have been inspired by a desire not to recognize Palestinian Arabs as citizens of Israel. Weis, 1979, 140, n. 27a, also refers to a decision by the same court in *Estate of Shifris*, where it was held that in the absence of a nationality law of Israel, a former Palestinian citizen who died in 1950 was to be regarded as stateless (*Pesakim Mehoziim*, vol. iii, 222 (1950–1951). According to Goodwin-Gill, only in one case was the fact of residence and the international law governing succession of states invoked; see *A.B. v. M.B.* 17 *ILR* 110 (1950); in this decision, also by the Tel Aviv District court, it was held: 'So long as no law has been enacted providing otherwise, my view is that every individual who, on the date of the establishment of the State of Israel, was resident in the territory which today constitutes the State of Israel, is also a national of Israel.' See also: Weis, 1979, 140 and n. 27a.

[57] Goodwin-Gill, 1994, 385 and n. 33, citing *Hussein v. Governor of Acre Prison* (*Piskei Din*, vol. vi (1952), 897, 901; 17 *ILR* 111 (1950)). The Supreme Court held that Palestinian citizenship ceased to exist, in the territory of Israel and in the other parts of the former mandated territory of Palestine, after the establishment of the state of Israel and the annexation of the other parts to neighbouring states. See also *Nakara v. Minister of the Interior* (1953) 7 *PD* 955; 20 *ILR* 49 (1953).

[58] Nationality Law, 5712/1952, 93 *Official Gazette* 22. Entry into force: 14 July 1952.

[59] Sect. 18, para. (a).

[60] The Law provides for the acquisition of Israel nationality by operation of law upon immigration. Sect. 2 of the Law, entitled 'Nationality by Return', provides: '(a) Every *oleh* [i.e., Jewish immigrant] under the Law of Return, 5710–1950, shall become an Israel national'. See Weis, 1979, 114.

[61] Sect. 1.

Former Palestinian citizens of Arab origin are eligible for Israeli nationality provided they meet the conditions of section 3, which reads as follows:

(a) A person who, immediately before the establishment of the State, was a Palestinian citizen and who does not become an Israel national under section 2, shall become an Israel national with effect from the day of the establishment of the State if:
(1) he was registered on the 4th Adar, 5712 (1st March 1952) as an inhabitant under the Registration of Inhabitants Ordinance, 5709–1949; and
(2) he is an inhabitant of Israel on the day of the coming into force of this Law; and
(3) he was in Israel, or in an area which became Israel territory after the establishment of the State to the day of the coming into force of this Law, or entered Israel legally during that period.[62]
(b) A person born after the establishment of the State who is an inhabitant of Israel on the day of the coming into force of this Law, and whose father or mother becomes an Israel national under subsection (a), shall become an Israel national with effect from the day of his birth.

These strict requirements meant that the vast majority of those who as a result of the 1948 war were displaced outside the territory of what became Israel, were effectively denied Israeli citizenship. If international law raised a presumption of entitlement to local citizenship for residents at the moment of establishment of the state,[63] subsequent developments have made such claims redundant.[64]

As was extensively discussed in the previous chapter, Palestinian refugees were admitted to neighbouring countries on what was expected to be a temporary basis; local citizenship, for the most part, was not available. The exception is Jordan, which conferred citizenship on all residents who had been Palestinian citizens prior to 15 May 1948, including those of the West Bank. However, as a result of King Hussein's 1988 decision to sever 'the legal and administrative links' between the West Bank and the rest of Jordan, the Palestinians of the West Bank effectively

[62] According to Goodwin-Gill, 1994, 397, n. 36, there were some authorized returns for the purpose of family reunification.

[63] Cf. Goodwin-Gill, G. S., *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, 4; also Goodwin-Gill, 1994, 385. According to Brownlie, 1990, 661, 'the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality.' See also ch. VII, n. 51 and accompanying text.

[64] Goodwin-Gill, 1994, 385, n. 38, refers to the *Prevention of Infiltration (Offenses and Jurisdiction) Law 1954*. Under sect. 30(a) of this Law, the Minister of Defence is empowered to order the deportation of an infiltrator, defined by sect. 1 as a person who has entered Israel knowingly and unlawfully, and who, at any time between 29 Nov. 1947 (the date of the UN decision to partition Palestine) and his entry was a national, resident or visitor in the Arab countries hostile to Israel, or a former Palestine citizen or resident who had left his ordinary place of residence in an area which became part of Israel.

lost their Jordanian citizenship.[65] Also those Jordanian citizens of Palestinian origin, who have recently been allowed to 'return' to the autonomous areas of the Gaza Strip or parts of the West Bank, have been deprived of their Jordanian citizenship.

Goodwin-Gill in 1990 summarized his conclusions in respect of the national status of Palestinians, which in the opinion of this author continue to reflect accurately the present position, as follows:[66]

> Just as Israel has denied citizenship to the majority of Palestinian Arabs, the Arab countries of refuge have, for the most part, consistently rejected local integration and citizenship as a solution to a problem which, in their view, can only be resolved by repatriation and self-determination. With limited exceptions, Palestinian refugees have not been granted (and for the most part, have not sought) citizenship in the countries of refuge. From the international law perspective, they are therefore stateless persons, notwithstanding the recognition accorded by some States to the entity 'Palestine', and notwithstanding the United Nations' recognition of the Palestine Liberation Organization as the legitimate representative of the Palestinian people.[67] For many Palestinian citizens by birth, such citizenship will have lapsed or terminated with the events of 1948; and likewise for many, no other citizenship will have been acquired in the interim.

3. Convention Relating to the Status of Stateless Persons

In December 1950, the General Assembly of the United Nations decided to convene a Conference of Plenipotentiaries to complete the draft Convention relating to the Status of Refugees, and the draft Protocol on Stateless Persons.[68] Meeting in July 1951 in Geneva, the Conference adopted and opened for signature the 1951 Convention,[69] but decided to take no decision on the draft protocol, referring it back for more detailed study.[70] Three years later, at a United Nations Conference in New York,

[65] See ch. IV, sub-section 3.3; also, Bierwith, 1990, 115. Although no longer considered as Jordanian subjects, such Palestinians remained eligible for Jordanian protection and a Jordanian passport, with limited validity (two years instead of five years for Jordanian citizens). As the Jordanian Nationality Law was not formally changed, according to Shehadeh, West Bank Palestinians did not formally lose Jordanian citizenship; cf. ch. IV, n. 125 and accompanying text. Whatever the validity of this argument, in fact West Bank Palestinians are no longer being treated as full-fledged Jordanian citizens and should therefore be considered to have become at least *de facto* stateless persons.

[66] Goodwin-Gill, 1994, 386.

[67] As was discussed above, the introduction of limited self-rule in the Gaza Strip and parts of the West Bank has not changed the picture.

[68] UNGA res. 429(V), 14 Dec. 1950. The draft protocol on stateless persons also appears in 'Report of the *Ad hoc* Committee on Refugees and Stateless Persons', 2nd sess., UN doc. E/1850, Annex II; Takkenberg and Tahbaz, 1989, vol. ii, 206.

[69] See ch. III, n. 1.

[70] See Final Act of the 1951 Conference, Part III. Also, Goodwin-Gill, 1994, 381.

the 1954 Convention relating to the Status of Stateless Persons was adopted, an independent convention being preferred to the draft protocol initially proposed by the *Ad hoc* Committee in 1950.[71] It is worth recalling the limited purposes of the 1954 Convention: to regulate and improve the status of stateless persons and, within the context of the purposes of the United Nations, to assure stateless persons the widest possible exercise of fundamental rights and freedoms.[72]

According to its preamble, 'those stateless persons *who are also refugees* are covered by the Convention relating to the Status of Refugees of 28 July 1951' [emphasis added], and consequently the 1954 Convention only applies to other stateless persons. The 1954 Convention is, therefore, of no relevance to stateless Palestinian refugees, to the extent that such persons are covered by the 1951 Convention. However, as was shown in chapter III, there are many Palestinian refugees who are, rightly or wrongly, unable to benefit from the latter Convention and, to the extent that these refugees are also stateless persons, they should alternatively be able to benefit from the 1954 Convention.

Unfortunately, adherence to the 1954 Convention is far more limited than in respect of the 1951 Convention. There are only 42 states party to the 1954 Convention as at 29 September 1994, including three Arab states.[73] As is the case with the 1951 Convention, most countries in the Middle East where large concentrations of Palestinian refugees are residing are not bound by the 1954 Convention. Consequently, the 1954 Convention is mainly relevant for the considerable number of Palestinian refugees residing in Europe.[74]

In order to apply the 1954 Convention, a state party is obliged to determine the statelessness of a person claiming its benefits. Article 1 of the 1954 Convention defines a stateless person in purely formal terms: 'the term stateless person means a person who is not considered a national by any State under the operation of its law.' Determination of statelessness under this definition is not a simple matter. It requires an

[71] See n. 1, above. The Convention was adopted by the UN Conference on the Status of Stateless Persons, held at UN Headquarters in New York from 13–23 Sep. 1954. The Conference was convened pursuant to ECOSOC res. 526 A (XVII) of 26 Apr. 1954. For the text of this resolution, see ECOSOC, *Official Records*, 17th sess., supp. 1, E/2596, 12. For the text of the Final Act of the Conference, see UNHCR, 1988, 79.

[72] Cf. Goodwin-Gill, 1994, 382.

[73] Information provided by UNHCR, Centre for Documentation on Refugees. Algeria, Libya and Tunisia are the only three member states of the Arab League who are party to the Convention. Israel is party to the Convention as well.

[74] Not all European states are bound by the Convention, though. European states parties are: Belgium, Bosnia and Herzegovina, Denmark, Finland, France, Macedonia (the former Yugoslav Republic of), Germany, Greece, Holy See, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom.

examination of the nationality laws of foreign states[75] and, as appeared in the previous section, may even raise fundamental questions of incidence and continuity of statehood. The potential political sensitiveness of the determination of statelessness may have been one of the main reasons why accession to the 1954 Convention has been so limited and why, in those states party to the Convention, so few stateless persons have succeeded in claiming its benefits.[76]

The 1961 Convention explicitly recognises the above problems. Article 11 of that Convention provides that 'the Contracting States shall promote the establishment within the framework of the United Nations, as soon as may be after the deposit of the sixth instrument of ratification or accession, of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.'[77] The body envisaged in this article was never established, though.[78] However, in its resolution 3274 (XXIX) of 10 December 1974, the General Assembly requested the United Nations High Commissioner for Refugees 'provisionally to undertake the functions foreseen in the 1961 Convention in accordance with its Article 11 after it comes into force.' At its thirty-first session, the General Assembly reviewed the matter, and decided, without time limit, to request the High Commissioner 'to continue to perform these functions.'[79]

Although it has been more than twenty years since the General Assembly first requested the High Commissioner for Refugees to protect and assist stateless persons, this aspect of the mandate was never given much publicity by UNHCR itself, nor has it received much attention in the literature on the organization. Batchelor, for example, in the article already quoted several times,[80] discussed the origin of article 11 of the

[75] According to art. 2 of the International Convention on Certain Questions Relating to the Conflict of Nationality Laws 'any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.' See also art. 1 of the same Convention, quoted earlier – cf. n. 9 and accompanying text, above. According to Grahl-Madsen, 1966, 155, these provisions may be considered a codification of generally accepted rules of international law.

[76] An additional reason why only few stateless persons have succeeded in claiming the benefits of the 1954 Convention may be related to the requirement that such persons be 'lawfully staying' in the territory of the state party; see, for example, arts. 15, 17, 18, 19, 21, 23, 24, 26, 28, and 31 of the Convention.

[77] At one time, the International Law Commission had favoured the idea of both a protecting agency for stateless persons, and a tribunal to decide upon their claims. Neither suggestion found much favour with states, which opted instead for the establishment of a body within the framework of the United Nations. Cf. Goodwin-Gill, 1994, 384; Batchelor, 1995, 252.

[78] For a discussion of the underlying reasons, see Batchelor, 1995, 254.

[79] UNGA res. 31/36, 30 Nov. 1976.

[80] See n. 1, above. The article is drawn from a study which the author prepared in her capacity as a consultant for the Division of International Protection of UNHCR.

1961 Convention as well as the appointment of UNHCR as provisional 'Article 11 Agency', but failed to analyse how UNHCR has carried out its responsibilities in this respect. The same applies to other commentators.[81] In 1995 the Executive Committee of the UNHCR Programme[82]

> acknowledged the responsibilities already entrusted to the High Commissioner for stateless refugees and with respect to the reduction of statelessness, and encourages UNHCR to continue its activities on behalf of stateless persons, as part of its statutory function of providing international protection and of seeking preventive action, as well as its responsibility entrusted by the General Assembly to undertake the functions foreseen under Article 11 of the 1961 Convention on the Reduction of Statelessness.

The Executive Committee did not, however, provide any guidance as to the organization's responsibility under article 11 of the 1961 Convention.

Article 11 was incorporated in the 1961 Convention because its drafters realized that a stateless person would have neither the financial resources nor the necessary expertise to engage the authority of the state on his or her right to the nationality of that state.[83] Access to an international entity would, therefore, be critical. Accordingly, one would expect UNHCR to have actively pursued the protection of stateless persons under the two resolutions mentioned in the previous paragraph. In fact, however, UNHCR has been very cautious in providing this kind of assistance. To the knowledge of this author, it has thus far declined to express an official opinion as to the *de jure* statelessness of persons claiming the benefits of the 1954 and/or 1961 Conventions. In doing so, it has allowed legal controversy in this respect, for example over the *de jure* statelessness of Palestinians referred to in the previous section,[84] to continue, to the detriment of the individuals concerned.

Similarly to the 1951 Convention, article 1 of the 1954 Convention stipulates that it shall not apply to 'persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so

[81] See, for example, Goodwin-Gill, 1994, 384; Van Krieken, P. J., 'Disintegration and Statelessness', 12 *NQHR* 30 (1994). See, however, an earlier article by Van Krieken, 'The High Commissioner for Refugees and Stateless Persons', 26 *NILR* 24 (1979), in which reference is made to UNHCR's role under CRS61, art. 11.

[82] EXCOM concl. No. 78 (XLVI) – 1995; text in Goodwin-Gill, 1996, 509. The conclusion also requested UNHCR actively to promote accession to the CSSP54 and the CRS61 as well as to provide relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested states. For this purpose UNHCR produced an 'Information and Accession Package', see 15 *RSQ* 166.

[83] Cf. Batchelor, 1995, 253.

[84] See n. 42 and accompanying text, above.

long as they are receiving such protection or assistance.'[85] Although the wording used slightly differs from that of article 1D of the 1951 Convention, it is clear that here also reference is made specifically to the Palestinian refugees falling under the mandate of UNRWA.[86]

The fact that a qualified exclusion in respect of Palestinian refugees is incorporated in the text of the 1954 Convention, led the German Federal Administrative Court to the conclusion that Palestinians who have not acquired the nationality of a third state are stateless in the sense of article 1, paragraph 1, of the 1954 Convention. In an important decision of 23 February 1993, primarily dealing with the question whether children born in Germany of Palestinian parents have a claim to naturalization under the 1961 Convention on the Reduction of Statelessness,[87] the Court held:[88]

In adopting the Stateless Convention, the State Parties took into consideration that only those stateless persons who are also refugees are covered by the Geneva Convention, adopted three years earlier, and that there are many stateless persons who are not covered by that Convention. For this reason, they have provided stateless persons in the Stateless Convention largely with the same benefits as the Geneva Convention provides in respect of refugees. Similarly, they have incorporated in the Stateless Convention a provision to the same effect (. . .) as the special arrangement in Art. 1D, which is primarily of concern to the Palestinian refugees protected by UNRWA. Such a provision would not have been necessary, if the Palestinians were not stateless in the sense of article 1, paragraph 1, of the Stateless Convention. This special arrangement also prevents

[85] Art. 1, para. 2 (i). Similarly, also excluded are those 'recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations . . . attached to the possession of the nationality of that country'; as well as war criminals, serious non-political criminals, and similar cases; see art. 1, para. 2 (ii) and (iii).

[86] The extensive discussion of CRS51, art. 1D, in ch. III refers.

[87] For this reason the decision will be discussed further in the next sub-section.

[88] Federal Administrative Court, 23 Feb. 1993 [Bundesverwaltungsgericht, Urteil vom 23.2.1993, Bverwg 1 C 45.90] InfAuslR 7–8/93, 268, 269. English translation by the author; original text of quoted passage: 'Bei Abschluß das Staatenlosen-Übereinkommens haben sich die Vertragsparteien, wie sich aus Abs. 3 der Präambel des Übereinkommens ergibt, von der Erwägung leiten lassen, daß nur diejenigen Staatenlosen, die gleichzeitig Flüchtlinge sind, durch die drei Jahre zuvor vereinbarte Genfer Konvention erfaßt werden und daß diese Konvention auf zahlreiche Staatenlose nicht anwendbar ist. Aus diesem Grunde haben sie im Staatenlosen-Übereinkommen den Staatenlosen weitgehend dieselben Vergünstigungen gewährt wie zuvor die Genfer Konvention den Flüchtlingen. Ebenso haben sie in das Staatenlosen-Übereinkommen eine mit der Sonderregelung in Art. 1D inhaltlich übereinstimmende (. . .) Bestimmung aufgenommen, die vornehmlich die durch die UNRWA geschützten palästinensischen Flüchtlinge betrifft. Einer solchen Bestimmung hätte es nicht bedurft, wenn die Palästinenser nicht Staatenlose im Sinne des Art. 1 Abs. 1 StlÜbk wären. Mit dieser Sonderreglung ist zugleich einer politischen Auseinandersetzung um das Bestehen oder Nichtbestehen einer palästinensischen Staatsangehörigkeit vorgebeugt worden, so wie mit der übereinstimmenden Sonderregelung in der Genfer Konvention eine Kontroverse über die Flüchtlingseigenschaft der Palästinenser vermieden wurde.'

a political discussion concerning the existence or non-existence of Palestinian citizenship, like the corresponding arrangement in the Geneva Convention avoids a controversy concerning the refugee status of Palestinians.

In 1985, the Federal Administrative Court had already decided that Palestinians were in principle covered by the 1954 Convention,[89] but the legal controversy as to whether Palestinians were indeed to be considered as stateless persons rather than as 'persons of undetermined nationality' continued until the decision of 1993.[90] In its decision, the Court elegantly avoids having to address the complex and sensitive questions that are normally linked with the determination of statelessness,[91] and opens the door to a considerable improvement of the legal status of a large group of Palestinian refugees who have been residing in the Federal Republic of Germany since the 1970s and 1980s and who were previously unable to benefit from the provisions of the 1954 and 1961 Conventions. Palestinians in Germany have generally also not been recognized as Convention refugees nor have they been granted asylum under the German Constitution. In practice, Palestinians in the Federal Republic of Germany are being 'tolerated' that is, their (international) status as refugees was informally acknowledged, so far as they are allowed to remain, although without formal legal status.[92]

[89] Federal Administrative Court, 15 Oct. 1985 [Bverwg 15 Okt. 1985 – 9 C 38.85]. The case concerned the evaluation of asylum claims of Palestinians in the light of the situation in Lebanon after the Israeli invasion. From June 1982, the Lebanese government introduced a number of measures against Palestinians. Those who had participated in the fighting were required to leave Lebanon and those outside the country were refused renewal of their (Lebanese) travel documents. The government stated that its objective was to reduce the number of Palestinians in the country to around 50,000 [Minority Rights Group, 1984, 12]. In its decision the Federal Administrative Court held that these measures were not dictated by '1951 Convention' reasons (that is, by considerations of race, religion, nationality, membership of a particular social group or political opinion); they were in the nature of preventive or police measures, directed against stateless persons. In the view of the court, residence in Lebanon on the basis of various international agreements or undertakings could be terminated wherever the persons concerned violated national security or public order, for example, by participating in a civil war. The court held further that a state of residence effectively severs its link with stateless persons, when it expels or refuses to readmit them in circumstances that do not amount to persecution. It thereby also ceases to be the state of 'habitual residence' within the meaning of art. 1A (2) of the 1951 Convention; there being no 'source country' upon which to build a claim to refugee status (under the 1951 Convention), or asylum (under the German Constitution), such cases must be dealt with under the 1954 Convention. See: Goodwin-Gill, 1994, 386, 398, n. 47; ZDWF, 1986, 35, 115. See also ch. III, sub-section 3.1.

[90] Cf. n. 42 and accompanying text, above. For a more detailed account of this controversy, see Bierwith 1990, 32.

[91] See n. 75 and accompanying text, above.

[92] Cf. Goodwin-Gill, 1994, 387. This so-called 'toleration' [Duldung] is in fact no more than a 'temporary suspension of the deportation' [vorläufige Aussetzung einer Abschiebung] which is provided for in the German Aliens Law [Ausländergesetz]. It was long argued that because of its nature a 'toleration' could not be seen as a lawful stay in Germany, thereby denying beneficiaries of this arrangement access to benefits only open

The 1954 Convention provides stateless persons with similar benefits to those which the 1951 Convention provides to refugees; the two conventions are to a large extent identical. There are two main differences: the 1954 Convention has no guarantees equivalent to those in article 31 of the 1951 Convention against penalization for illegal entry, and does not provide for cooperation with a monitoring body like the UNHCR to which to turn for support against state authorities.

Similar to the 1951 Convention, the 1954 Convention provides for a special travel document for stateless persons. Article 28 of the 1954 Convention provides that 'The Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require . . .'. This article has been invoked by some of the Palestinians residing in Germany, referred to in the previous paragraph.[93]

4. Convention on the Reduction of Statelessness

While the 1954 Convention addresses the effects of existing statelessness, further international cooperation was required to eliminate, or at least reduce, future statelessness through the coordination and harmonisation of national laws.[94] For this purpose, in 1959 a United Nations Conference convened in Geneva to consider a convention for the elimination or reduction of future statelessness.[95] The Conference took as a

to aliens lawfully residing in the country. In its 1993 decision, referred to in n. 88, above, the Federal Administrative Court ruled that a 'toleration' could under circumstances be considered as a lawful (and habitual) stay in Germany; see n. 118 and accompanying text, below. See also Bierwirth, 1990, 131; Köffner and Nicolaus, 1986, 226, 231.

[93] See, for example, a 1992 decision of the Administrative Appeals Court of Bavaria, Würzburg [Bayerische Verwaltungsgericht Würzburg, W 2 K 91.1108], excerpted in 4 *IJRL* 391, concerning a Palestinian from Lebanon who had been living in Germany since 1982 as a 'tolerated' alien. He applied to the German authorities for a travel document for stateless persons. The application was rejected *inter alia* on the ground that he was not 'lawfully' staying in Germany for the purpose of CSSP54, art. 28. The court held that the authorities had not properly exercised their discretion in refusing the request, and referred the case back for a new decision, taking into account the court's judgment. According to the court, CSSP54, art. 28, obliges states to provide travel documents to stateless persons who are lawfully on their territory. With respect to stateless persons who are not lawfully staying in their territory, states have a discretion whether or not to provide a travel document. According to the court, the authorities had not properly exercised their discretion in the present case, mainly referring to the fact that the applicant was not 'lawfully' in the country. See also Administrative Appeals Court [Verwaltungsgerichtshof] Baden-Württemberg, 20 Mar. 1991–11 S 2183/90, *InfAuslR* 7–8/91, 226 and Administrative Court [Verwaltungsgericht] Berlin, 22 Jan. 1991–VG 18 A 62/89, *InfAuslR* 7–8/91, 238.

[94] The League of Nations had earlier promoted similar efforts; see n. 19, above.

[95] See generally, Weis, P., 'The United Nations Convention on the Reduction of Statelessness, 1961', 11 *ICLQ* 1073 (1962); Weis, 1979, 162; Goodwin-Gill, 1994, 383.

basis a draft prepared by the International Law Commission[96] and, after having been adjourned,[97] adopted the Convention on the Reduction of Statelessness on 28 August 1961.[98] The Convention entered into force on 13 December 1975.[99] By 29 September 1994, only 17 states had ratified or acceded to the Convention, including one Arab state (Libya). Israel has signed but not ratified the Convention.[100] As is the case with the 1951 and 1954 Conventions, the 1961 Convention is mainly relevant for Palestinian refugees residing in a number of European states[101] as well as in Australia and Canada.

According to article 1 of the Convention, a contracting state must grant its nationality to a person born in its territory who would otherwise be stateless at birth, by operation of law, or upon application; in the latter case the contracting state may make the grant of its nationality subject to one or more conditions, stipulated exhaustively in the Convention – a concession to the *jus sanguinis* countries. Subject to these conditions, no application may be rejected. This is the most significant element of the 1961 Convention: it imposes *positive* obligations on states to grant nationality in certain circumstances, in contrast with the essentially negative obligations contained in the conventions adopted under the auspices of the League of Nations.[102]

[96] The International Law Commission (ILC) decided at its 1st session, in 1949, to include 'nationality, including statelessness' in the list of topics provisionally selected for codification; cf. 'Report of the ILC covering its first session', UN doc. A/925, para. 16. It discussed the subject at its 4th session, in 1952, on the basis of a report prepared by one of its special rapporteurs and requested the preparation of draft conventions on the subject; cf. UN doc. A/CN.4/50, YBILC 1952-II, 3. Provisional drafts of a Draft Convention on the Elimination of Future Statelessness and a Draft Convention on the Reduction of Future Statelessness were adopted by ILC at its 5th session, in 1953, and were consequently submitted to governments for comment; cf. 'Report of the ILC covering its 5th session', UN doc. A/2456, para. 19, YBILC 1953-II, 200. ILC revised the drafts in the light of comments made by governments and interested organisations and, finally, the Sixth (Legal) Committee of the General Assembly, in 1954 discussed the revised drafts, and based upon its recommendation, the General Assembly consequently requested the Secretary-General 'to convene an international Conference of Plenipotentiaries for the conclusion of a Convention for the reduction or elimination of future statelessness as soon as at least twenty States have communicated to the Secretary-General their willingness to co-operate in such a conference'; cf. UNGA res. 896 (IX), 4 Dec. 1954.

[97] Fundamental differences were revealed between states which favoured the principle of *jus soli*, and those which opted for *jus sanguinis*. Endorsement of the former would have stopped many instances of original statelessness at source, but agreement was missing, and the compromise reached when the Conference reconvened in 1961 combined elements of both principles. Equally divisive was the issue of deprivation of nationality, a facility defended by many states as essential to their vital interests. Cf. Goodwin-Gill, 1994, 383.

[98] For the text of the Final Act of the Conference, see UNHCR, 1988, 90.

[99] UN doc. A/CONF.9/15, 1961; text in UNHCR, 1988, 82.

[100] Information provided by UNHCR, Centre for Documentation on Refugees, Geneva.

[101] The European states parties to the 1961 Convention are Austria, Denmark, France, Germany, Ireland, Latvia, the Netherlands, Norway, Sweden and the United Kingdom.

[102] Cf. n. 19, above.

The 1961 Convention also attempts to settle a variety of incidental problems, such as the nationality of foundlings[103] and of those born on board ships or aircraft.[104] The Convention also seeks to minimise the possibility of loss of nationality resulting in statelessness on the occasion of change of civil status,[105] and even in the case of voluntary acts of the individual, such as renunciation.[106] Finally, deprivation of nationality resulting in statelessness is prohibited in principle, but subject to a variety of exceptions, including misrepresentation or fraud in acquisition, or disloyalty.[107] Deprivation of nationality on racial, ethnic, religious or political grounds, however, is prohibited without exception.[108]

The obligation to grant nationality, entailed in article 1 of the 1961 Convention, has been invoked a number of times by children born in the Federal Republic of Germany of Palestinian parents.[109] In the important decision of 23 February 1993, already referred to above,[110] the German Federal Administrative Court ordered the naturalization of a Palestinian girl, born in February 1982, in Berlin. The girl's parents, Palestinians from Lebanon, arrived in Germany in 1981 and applied for asylum for themselves and their children. The asylum request was turned down but both parents and children were alternatively 'tolerated' to remain in Germany, as expulsion to Lebanon was considered unacceptable under the then prevailing conditions in that country.[111] In March 1987, the girl, through her parents, applied for naturalization.

The claim was not directly based on the 1961 Convention, but rather on the German federal law implementing the Convention, the Law on the Reduction of Statelessness of 29 June 1977.[112] According to its article 2, a person who has been stateless since birth and who has been born in Germany, or on board a ship under German flag or an aircraft registered in Germany, is eligible for naturalization.[113] The application should be

[103] Art. 2; continuing the principle of *jus soli* already established in the 1930 Hague Convention.

[104] Art. 3.

[105] Arts. 5 and 6.

[106] Art. 7.

[107] Art. 8.

[108] Art. 9.

[109] See, for example, Administrative Appeals Court [Verwaltungsgerichtshof] Baden-Württemberg, 4 Sep. 1990, 13 S 2915/89, *InfAuslR* 11–12/90, 336. Also, Administrative Appeals Court [Oberverwaltungsgericht] Berlin, 18 Apr. 1991, OVG 5 B 41.90, *InfAuslR* 7–8/91, 228.

[110] See n. 88 and accompanying text, above.

[111] Cf. n. 92 and accompanying text, above.

[112] Gesetz zur Verminderung der Staatenlosigkeit vom 29. Juni 1977, BGBL. I S.1101.

[113] See Bierwith, 1990, 24, 125. The original German text of art. 2 reads as follows: 'Ein seit der Geburt Staatenloser ist auf seinen Antrag einzubürgern, wenn er 1) im Geltungsbereich dieses Gesetzes oder an Bord eines Schiffes, das berechtigt ist, die Bundesflage der Bundesrepublik Deutschland zu führen, oder in einem Luftfahrzeug, das Staatsangehörigkeitszeichen der Bundesrepublik Deutschland führt, geboren ist, 2) seit

made before the applicant reaches the age of 21 and the applicant should not have been sentenced to imprisonment for a term of five years or more on a criminal charge. Finally, the person concerned should have had 'lawful and habitual residence'[114] in Germany for five years or more.

In its decision, the Federal Administrative Court first examines the preliminary question whether or not the applicant is to be considered as a stateless person. The 1961 Convention does not contain its own definition of statelessness but it is generally understood that the definition laid down in article 1 of the 1954 Convention is applicable. Article 1 of the German Law on the Reduction of Statelessness contains an explicit provision to this effect. The relevant passage of the decision, where the Court comes to the conclusion that the applicant is indeed to be considered stateless, has already been quoted above.[115]

The Court then addresses the question whether the applicant has met the requirement of 'lawful and habitual residence' in Germany for five years or more. According to the defendant this was not the case, as the applicant was only permitted to stay in Germany, based on a so-called 'toleration' permit.[116] The Court turns down the argument advocated by the defendant, and accepted by the Court of Appeals, that 'lawful and habitual residence' requires that the applicant be allowed in principle to reside in the country for an unlimited period, with the explicit consent of the Aliens Authorities and has apparently settled permanently.[117] On the other hand, as the Court states, a mere factual stay for a period of five years is not sufficient either. According to the Court 'a person has his habitual residence in Germany, when he is not just temporarily, but rather for the foreseeable future living here, so that termination of this stay is uncertain'.[118] The applicant meets this test as the 'toleration permit' of her parents has repeatedly been extended, without any certainty as to its termination. In this context the Court resolves that the residence status of children and minors is normally determined by that of their parents, provided that they live together. Finally, the Court concludes that the applicant's stay in Germany had been 'lawful' as well, as, being

fünf Jahren rechtmäßig seinen dauernden Aufenthalt im Geltungsbereich dieses Gesetzes hat und 3) den Antrag vor Vollendung des einundzwanzigsten Lebensjahres stellt, es sei denn, daßer rechtskräftig zu einer Freiheits-oder Jugendstrafe von fünf Jahren oder mehr verurteilt worden ist. (. . .).'

[114] 'Rechtmäßig dauernden Aufenthalt'.

[115] See n. 88 and accompanying text, above.

[116] Cf. n. 92 and accompanying text, above.

[117] '. . . daßder Aufenthalt mit Willen der Ausländerbehörde auf grundsätzlich unbeschränkte Zeit angelegt ist und sich zu einer voraussichtlich dauernden Niederlassung verfestigt hat.'

[118] 'Eine Person hat dann ihren dauernden Aufenthalt in Deutschland, wenn sie nicht nur vorübergehend, sondern auf unabsehbare Zeit hier lebt, so daß eine Beendigung des Aufenthalts ungewiß ist.' English translation by the author.

a stateless person, she (or her parents) were not required to carry a residence permit.[119]

5. Concluding Remarks

The fact that most Palestinian refugees are also stateless has a considerable impact. As the discussion in this and previous chapters has shown, being stateless, dispossessed, not having the passport of a state, not having even the theoretical option of returning to one's country, in other words not having 'the right to have rights', has been at the very heart of the Palestinian refugee problem. One may even argue that the element of statelessness has been more significant than the refugee aspect in negatively affecting the position of the Palestinian people.

The problem of statelessness will only be resolved if and when a Palestinian state is finally established. Until such time, it is important that the statelessness of the majority of Palestinian refugees be formally acknowledged, so that, where applicable, individual Palestinians may be able to benefit from the relevant instruments of international law. In this context it should again be emphasized that the international recognition of the Palestinian people does not in itself result in the establishment of a Palestinian nationality which meets the requirements of international law.

The provisional appointment of UNHCR as the body envisaged in article 11 of the 1961 Convention has been an important step by the General Assembly of the United Nations towards strengthening the protection of stateless persons. However, UNHCR's inhibition in developing its role under article 11 is depriving the provision of much of its meaning. Not only in view of the large number of stateless Palestinians, but also taking into consideration the growing number of stateless persons of other origins, UNHCR should be encouraged to reconsider its position in this respect.

[119] CRS61, art. 1, para. 2 (b), only allows that the grant of nationality be made subject to the condition 'that the person concerned has *habitually* resided in the territory of the Contracting State. . .' [emphasis added]. The Convention does not require that the stay has also been *lawful*. By having concluded on formal grounds that the applicant's stay in Germany was lawful, the Court avoids having to address this controversial issue; cf. Bierwith, 1990, 126.