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978-1-107-03244-6 - Nationality and Statelessness Under International Law

Edited by Alice Edwards and Laura Van Waas

Excerpt

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Introduction

ALICE EDWARDS* AND LAURA VAN WAAS

‘International statelessness law’ is the clear runt of the international legal regime. So much so, in fact, that it has yet to truly assert itself as a field of study in its own right – unlike, for instance, international refugee law, international human rights law or even ‘international migration law’. Yet international statelessness law deals with a plethora of fascinating and fundamental questions about the interactions between States, the relationship between people and their governments, and the aspirations versus the limitations of the contemporary human rights framework. As such, international statelessness law has much to contribute to our understanding of the functioning of the modern international legal system.

With at least 10 million stateless people around the world,¹ the sheer weight of numbers also demands that we pay closer attention to international law relating to statelessness and renew efforts to interpret and apply it. These 10 million people, lacking a legal identity, are largely invisible and forgotten, yet their suffering is real and, at times, acute. To be cast adrift by every country is a powerfully distressing state of being: ‘I feel like nobody who belongs to nowhere. Like I don’t exist.’² Moreover, statelessness interferes with the enjoyment of a wide range of civil, cultural, economic, political and social rights, which, despite the great aspiration of international human rights that they are to be enjoyed by all human beings equally and thus transcend citizenship categories, this is yet to become reality.

In Burma we are forced to build roads. We are forced to build jetties and piers and we are forced to build military camps and move all of the military equipment. We are forced to work sentry duty at night. If we doze

* The views expressed in this Introduction are the personal views of the author and do not necessarily reflect those of the United Nations or the UNHCR.

¹ UNHCR, *Global Trends 2012: Displacement. The New 21st Century Challenge*, June 2013, available at www.unhcr.org/51bacb0f9.html, last accessed 9 May 2014.

² Stateless woman from Ukraine whose story was captured by Greg Constantine as part of the photography series *Nowhere People*, available at www.nowherepeople.org, last accessed 9 May 2014.

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off from exhaustion we are beaten. When we wake up we are beaten. And when we are beaten we are made to give away a chicken to pay for our punishment. My father was a farmer and had some land but it was confiscated by the military to build a military camp. I can remember working in the field with my father. When they confiscated our land we cried, but we had no way to say anything.³

While the stateless in Myanmar are one of the world's most oppressed groups, disenfranchisement and lost livelihoods are recurring themes for most of the world's stateless people from Kuwait's Bidoon, to Kenya's Nubians, to those rendered stateless due to state dissolution or individual deprivation of nationality. Promoting the study of international statelessness law is key to addressing their plight and preventing new groups and individuals from being exposed to the same problems in future.

The phenomenon of statelessness, or the lack of recognition as a national of any State, is intrinsically linked to broader questions surrounding the regulation and content of nationality. The study of statelessness law, therefore, necessarily goes hand-in-hand with an exploration of nationality law. This is reflected in the title and contributions to this volume, which set out and critique the main legal frameworks relevant to nationality and statelessness matters, with a particular focus on where these intersect. It is hoped that through this book, a modest contribution is made to examining and answering some of the most important legal questions around nationality and statelessness, and that it will encourage practitioners, scholars and students to take up the study of statelessness and lead to its reduction, or even eradication, once and for all.

Although the regulation of nationality remains largely within the exclusive domain of States, statelessness has been on the international agenda since the United Nations was founded. The Secretary-General's 1949 *Study of Statelessness* was a defining moment in the positioning of the UN in the aftermath of the Second World War, in which statelessness was recognized as being connected to genocide, armed conflict, persecution and racism.⁴ Ultimately, however, statelessness took a back seat to what were considered the more pressing needs of the Second World War's refugees.⁵

³ Account of the plight of the stateless Muslim minority, commonly known as the Rohingya, from Northern Rakhine State in Myanmar as told in Greg Constantine, *Exiled to Nowhere. Burma's Rohingya*, 2012, part of the *Nowhere People* book series.

⁴ United Nations, *A Study of Statelessness*, UN Doc. E/1112 (August 1949).

⁵ For more on the relationship between refugee law and statelessness law, see A. Edwards and L. van Waas, 'Statelessness' in G. Loescher, E. Fiddian-Qasimeyah, K. Long and N. Sigona (eds.), *Oxford Handbook on Refugee and Forced Migration Studies* (Oxford University Press, 2014).

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Today, questions around nationality and statelessness are increasingly on international and national agendas and the dedication of an edited collection to the intersection of nationality and statelessness is therefore timely, if not long awaited. The break-up of the Soviet Union and the former Yugoslavia in the 1990s gave rise to renewed questions around nationality in the context of state succession⁶ and saw the agreement of new legal instruments.⁷ Resolving nationality questions and avoiding statelessness have also been fundamental to ending the conflicts between Ethiopia and Eritrea,⁸ and have been central to the peace negotiations between South Sudan and Sudan and the transition of the south into independent statehood in 2011.⁹ Clearly questions over statehood are central to the resolution of the Palestinian question, and in due course the framing of the State of Palestine's nationality legislation will be pivotal.

Armed conflict as a cause and consequence of statelessness is well documented. In many parts of the world, there are cases of the deliberate administrative removal of members of minority ethnic groups from the citizenship registers, or the official deprivation of nationality by legislative enactment. In some cases, these situations have given rise to human rights claims to restitution of nationality and compensation.¹⁰

⁶ On the Soviet Union, see G. Ginsburgs, 'Soviet Citizenship Legislation and Statelessness as a Consequence of the Conflict of Nationality Laws' (1966) 15(1) *Int'l & Comp. L. Q.* 1–54; G. Ginsburgs, 'The "Right to a Nationality" and the Regime of Loss of Russian Citizenship' (2000) 26(1) *Rev. Central & East European L.* 1–33; I. Ziemele, *State Continuity and Nationality: The Baltic States and Russia. Past, Present and Future as Defined by International Law* (Leiden: Martinus Nijhoff Publishers, 2005). On the former Yugoslavia, see R. Mullerson, 'The Continuity and Succession of States, By Reference to the Former USSR and the Yugoslavia' (1993) 43 *Int'l & Comp. L. Q.* 473–93; Working papers of the Europeanisation of Citizenship in the Successor States of the Former Yugoslavia, CITSEE Project, based at the University of Edinburgh, available at www.citsee.ed.ac.uk/.

⁷ See, e.g., European Convention on the Avoidance of Statelessness in Relation to State Succession 2006, ETS 200, 15 March 2006 (not yet entered into force).

⁸ See, e.g., K. Southwick, 'Ethiopia–Eritrea: Statelessness and State Succession' 32 (2009) *Forced Migration Review* 15–17.

⁹ See, e.g., 'Peace and Security Council Should Protect the Right to a Nationality in Sudan', International Refugee Rights Initiative and the Open Society Foundation, 28 January 2011, available at: [www.refugee-rights.org/Publications/2011/CRAI_PSC_Sudan_PressRelease_Jan2011\[1\].pdf](http://www.refugee-rights.org/Publications/2011/CRAI_PSC_Sudan_PressRelease_Jan2011[1].pdf); UNHCR, 'Khartoum Symposium Discusses Citizenship Ahead of Referendum', *News Story*, 9 November 2010, available at: www.unhcr.org/4cd981529.html, last accessed 9 May 2014.

¹⁰ See, e.g., *Kuric and Others v. Slovenia*, ECtHR, Applic. No. 26828/06, Grand Chamber Decision 26 June 2012; Human Rights Watch, *The Horn of Africa War: Mass Expulsions and the Nationality Issue* (2003); African Commission on Human and Peoples' Rights, *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97–196/97 and 210/98, 11 May 2000.

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As nationality is the principal gateway to political participation, the spread of multi-party democracy has put an increasing strain on access to nationality in some countries, while opening it up in others. In the former, disenfranchisement through statelessness can therefore be an attractive tool for those who seek to gain or hold onto power.¹¹ The Arab Spring has also demonstrated how the extreme politicization of nationality policy can contribute to generating new cases of statelessness through the deliberate deprivation of nationality,¹² as well as to opening new doors to the resolution of long-standing situations of statelessness.¹³

Ethnic, racial and gender discrimination are at the source of many governmental actions to deprive individuals of their nationality. Apart from discrimination against ethnic minorities in respect of nationality laws, women and children may be disproportionately affected by statelessness. Women continue to be discriminated against in the enjoyment of the equal right to a nationality, and in turn they may be unable to pass on their nationality to their children.¹⁴ Lack of birth registration and other

¹¹ Consider the case of Kenneth Kaunda, former President of Zambia, who was effectively declared stateless in 1999 by the country's High Court after his political opponents called his nationality into question. 'Founder of Zambia is Declared Stateless in High Court Ruling', *New York Times*, 1 April 1999. See also C. Pouilly, 'Africa's Hidden Problem', *Refugees Magazine*, Number 147, Issue 3, 2007; J. Goldston, 'Holes in the Rights Framework: Racial Discrimination, Citizenship and the Rights of Noncitizens', *Ethics and International Affairs* 20 (2006) 321–47;

¹² 'Bahrain Revokes 31 Opposition Activists' Citizenship', BBC News Middle East, 7 November 2012, available at: www.bbc.co.uk/news/world-middle-east-20235542, last accessed 9 May 2014.

¹³ Consider Decree No. 49 issued by President Assad of Syria in March 2011, in response to protests early in the Syrian crisis, paving the way for the naturalization – after fifty years of statelessness – of the country's stateless *Ajanib* Kurds. Z. Albarazi, 'The Stateless Syrians', SSRN, 2013, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269700. Consider also the repeated promises by the Kuwaiti authorities, following ongoing protests by members of the country's stateless Bidoon population, to take measures to address their situation. C. Hilleary, 'In Kuwait's Arab Spring, Bidun Fight for Citizenship', *Middle East Voices*, 23 January 2012, available at: <http://middleeastvoices.voanews.com/2012/01/in-kuwait%E2%80%99s-arab-spring-bidun-fight-for-citizenship/>; Human Rights Watch, 'Kuwait: Promises, Mostly Unfulfilled, on Citizenship', 5 February 2012, available at: www.hrw.org/news/2012/02/05/kuwait-promises-mostly-unfulfilled-citizenship. All websites last accessed 9 May 2014.

¹⁴ A. Edwards, *Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women*, UNHCR, Legal and Protection Policy Research Series, POLAS/2009/02, Geneva, August 2009, available at www.unhcr.org/4a8d0f1b9.html, last accessed 9 May 2014; International Law Association, Committee on Feminism and International Law, Rapporteurs C. Chinkin and K. Knop, *Final Report on Women's Equality and Nationality in International Law* (2000).

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administrative obstacles to acquiring nationality,¹⁵ as well as systems of nationality acquisition based on patrilineal descent further risk statelessness in children.¹⁶ International adoption and surrogacy arrangements also pose an additional challenge to guaranteeing the right to a nationality for children.¹⁷

Statelessness has also been raised as an issue in the climate change debates around the status of persons who may no longer have a physical territory upon which to live should it submerge under rising tides.¹⁸ Meanwhile, governments are increasingly interested in who is and who is not a national, especially in the post-9/11 security environment,¹⁹ as well as in relation to questions around irregular migration. The latter has caused particular problems for persons with no 'effective nationality', or 'who cannot prove or verify their nationality'.²⁰ Attempted deportations of long-staying and permanent residents have also raised legal issues around the meaning of nationality in today's world.²¹ Not all of these issues were

¹⁵ See, e.g., Human Rights Watch, "‘Illegal People’: Haitians and Dominico-Haitians in the Dominican Republic" (2002), available at: www.hrw.org/reports/2002/domrep/ last accessed 9 May 2014; Inter-American Court of Human Rights, *Dilicea Yean and Violeta Bosico v. Dominican Republic*, I-ACtHR, Judgment of 8 September 2005, Series C No. 130; African Committee of Experts on the Rights and Welfare of the Child, *Nubian Minors v. Kenya*, Communication No. Com/002/2009, 22 March 2011.

¹⁶ See, e.g., J. Bhabha (ed.), *Children without a State: A Global Human Rights Challenge* (Cambridge, MA: MIT Press, 2011); D. Hodgson, 'The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness' (1993) 7(2) *Int'l J. Law, Pol'y and Family* 255–70. On the practical effects of statelessness in children: J. Boyden and J. Hart, 'The Statelessness of the World's Children' (2007) 21(4) *Children and Society* 237–48.

¹⁷ For a recent example of a case relating to surrogacy arrangements, see 'Stateless Twins Live in Limbo', *The Times of India*, 2 February 2011.

¹⁸ See, e.g., J. McAdam, "Disappearing States", Statelessness and the Boundaries of International Law' in J. McAdam, *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010), 105–29.

¹⁹ See cases raising diplomatic protection questions in the terrorism context: *R (on the application of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs and another* [2002] EQCA Civ 1598 (English Court of Appeal); *R (Al Rawi and others) v. SSFCA and another (UNHCR intervening)* [2006] EWCA Civ 127 (English Court of Appeal); *Canada (Prime Minister v. Khadr)* (2010) S.C.C. 3 (Supreme Court of Canada); *Kaunda and Others v. The President of the Republic of South Africa and Others*, Case CCT 23/04 (Constitutional Court of South Africa).

²⁰ D. Weissbrodt, *The Human Rights of Non-citizens* (Oxford University Press, 2008), at 84. See, further, C. Batchelor, 'Stateless Persons: Some Gaps in International Protection', *Int'l J. Ref. L.*, 7 (1995), 232.

²¹ See two Australian cases: *Minister for Immigration and Indigenous Affairs v. Stefan Nystrom* [2006], HCA 50, 8 Nov. 2006, which involved an unsuccessful challenge before the High Court of Australia concerning the deportation under 'character grounds'

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able to be addressed in this book, but a good portion of them are reflected and discussed.

Nationality and Statelessness under International Law is primarily a legal text, focusing on the legal dimensions of nationality and statelessness, albeit situated within their political context, and introduces the reader to them. The authors hope the book will be a resource for scholars, researchers, legal practitioners and governmental and international policy-makers. It is also geared to students and university teachers, with each chapter being followed by a set of questions to guide self-study or classroom discussion. At the same time, the authors believe it provides an introduction to these issues for scholars and students of other disciplines: in order to successfully contribute to this field of study, a thorough understanding of statelessness as a legal concept is crucial. Contrary to several other works in this area, the book adopts a thematic approach, rather than, for instance, presenting population-specific dilemmas. In this way, the book hopes to offer possible solutions to such challenges through the law. The observations made should therefore be relevant across different countries, regions and contexts.

The book is composed of eleven chapters. The first two contributions comprise an extended introduction to the concepts of nationality and statelessness, from both legal and political-philosophical perspectives. Alice Edwards' chapter provides an overview of the meaning, content and purpose of nationality under international law, including an exploration of the procedural versus the substantive aspects of the right to a nationality. Her chapter asks us to consider whether the 'right to a nationality' is limited only to the right to acquire a nationality and to protections against the arbitrary deprivation of nationality (that is, procedural guarantees), or whether it has, with the growth in human rights, come to mean more than that. Can we, as nationals, expect a certain level of treatment based on that nationality? Within this dichotomy, she deals with the limits on state discretion in conferring or removing a person's nationality, as well

relating to criminality of the relevant legislation of Nystrom, an Australian permanent resident, born in Sweden, but having returned to Australia with his parents less than one month after his birth and who had otherwise never left Australia. He was convicted of 87 criminal offences and had served eight different periods in prison. Another case of Robert Jovicic, who was deported to Serbia in 2004, despite having lived in Australia as a permanent resident since he was two years old and with no ties to Serbia: see 'Court Backs Deportation to Serbia', *The Australian*, 16 December 2006, available at: www.theaustralian.com.au/news/nation/court-backs-deportation-to-serbia/story-e6frg6nf-111112697067, last accessed 9 May 2014. See also *Jovicic v. Minister for Immigration and Multicultural Affairs* [2006] FCA 1758, 15 December 2006.

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as what possessing a nationality really means in terms of benefits or privileges. As such, the chapter sets out the overall legal framework governing nationality rights and explores what international human rights law has added to this equation. This is complemented by the subsequent chapter, which gives ‘an overview of the normative complexities and political dynamics of contemporary statelessness’. Matthew Gibney discusses the political and practical importance of the possession of citizenship in the modern state-based world for the enjoyment of rights and protections, while also challenging the idea that securing citizenship somewhere – anywhere – is the end-goal. He observes that obtaining citizenship represents the minimum right, but it does not always lead to the enjoyment of rights, nor of political participation. He also gives us insights into the interests states may have in maintaining or perpetuating statelessness, as well as what moral duty exists for states to nevertheless admit stateless people as citizens.

After these broad reflections on the function of nationality and the anomaly of statelessness, Chapters 3–5 delve into the global legal framework on statelessness in greater detail. Van Waas presents the two United Nations’ statelessness conventions – the 1954 Convention relating to the Status of Stateless Persons²² and the 1961 Convention on the Reduction of Statelessness²³ – which were developed specifically with a view to offering protection to stateless persons and prescribing safeguards for the avoidance of new cases of statelessness. Through a discussion of the drafting history of these two pivotal texts, she canvasses their relative strengths and weaknesses. Importantly, she explains the legal definition of a ‘stateless person’ set out in the 1954 Convention and the distinction between *de jure* statelessness and the emergence of the non-legal, yet popular, concept of *de facto* statelessness, the latter extending the concept of statelessness beyond mere possession of nationality to ideas around the ‘effectiveness’ of that nationality. She critiques the utility of ‘*de facto* statelessness’ as a construct, arguing in particular that it is not grounded in an international legal framework and is highly ambiguous.

Following van Waas, Chapter 4 by Mark Manly, Head of the UNHCR’s Statelessness Unit, turns to discuss one of the primary institutional elements of the UN framework for addressing statelessness, the UNHCR.

²² Convention relating to the Status of Stateless Persons, New York, 28 September 1954, in force 6 June 1960, 360 UNTS 117.

²³ Convention on the Reduction of Statelessness, New York, 30 August 1961, in force 13 December 1975, 989 UNTS 175.

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Tracing the history and development of the agency's role in statelessness, as laid down in General Assembly resolutions and conclusions of UNHCR's own Executive Committee, Manly explains how UNHCR has come to hold a global, comprehensive and multifaceted mandate, giving examples of both the operational successes achieved and the ongoing difficulties faced in implementing that mandate. In relation to the latter, the widely different interpretations of 'stateless person' that exist re-emerges in Manly's chapter as a factor that impacts on the accepted extent of UNHCR's mandate, which sits alongside the real problem of identifying and counting stateless persons, who are often not recorded in government censuses. Next, in Chapter 5, Gábor Gyulai explores a key question for the statelessness regime: what is the relationship between the international legal framework and statelessness-specific status determination and protection mechanisms at the municipal level? In particular, he examines the necessity of statelessness determination as a precursor to effective protection and looks at some of the ways in which this has taken shape in different countries. In canvassing some of the main challenges which states have to address in this context, he puts forward the basic building blocks for a functioning protection system, and in essence offers a model for states. His chapter will be particularly useful to government policy-makers.

The next set of chapters (6–8) turns to look at three of the most pressing and pervasive problems in respect of the avoidance of statelessness: securing children's right to a nationality; abolishing gender discrimination in the enjoyment of nationality rights; and interpreting and applying the prohibition of arbitrary deprivation of nationality in the context of state decisions to withdraw nationality from an individual rendering him/her stateless. In Chapter 6, René de Groot discusses the development and content of the child's right to a nationality under international and regional human rights law, as well as within the specific parameters of the 1961 Statelessness Convention and numerous Council of Europe instruments where these norms have been elaborated in greater detail. He explains the challenges to childhood statelessness through three case studies, focusing on abandoned children, international adoption or surrogacy arrangements, and foundlings. In presenting a complex legal picture, in which European standards have advanced beyond and filled some of the gaps at the international level, he proposes a solid set of propositions to address childhood statelessness. Nonetheless, these are not yet widely accepted at the international level and may need further codification.

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In Chapter 7, Radha Govil and Alice Edwards explore the historical ‘gendering’ of nationality laws and their impact, in particular in terms of creating and perpetuating statelessness. The chapter focuses on the equal right to nationality, evident in a growing number of international and regional human rights instruments, and its link with statelessness. They point out arguably one of the most stark shortcomings of the 1961 Statelessness Convention: it is not in fact concerned with providing for equal rights to nationality between women and men, or between mothers and fathers, and it does *not* prohibit discriminatory nationality laws. Rather, the 1961 Convention only requires states to permit the passage of nationality from mother to child in circumstances where the child would *otherwise* be stateless. It also says nothing about a right to nationality for women independent of their husbands. The role of the United Nations Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW) as the leading source of international norms on gender equality is thus central to the eradication and elimination of inequality in nationality matters, particularly where this gives rise to statelessness. Last in this set of chapters is Jorunn Brandvoll’s contribution, which looks at the meaning of ‘arbitrariness’ in the context of a deprivation of nationality. Noting that the statelessness regime permits the deprivation of nationality even if it results in statelessness in certain circumstances, Brandvoll departs from a discussion of the relevant provisions of the 1961 Statelessness Convention, but takes a step beyond this framework by considering how developments in human rights law or within relevant regional instruments may now be shaping states’ obligations in this area.

In the final three chapters (9–11), the discussion moves away from issues relating to the general functioning of statelessness law and into the realm of how questions of nationality and statelessness are – or should be – dealt with in particular contemporary contexts that pose corresponding challenges. Judge Ineta Ziemele looks at how states regulate nationality matters in the context of state succession, which by its very nature creates significant upheaval and prompts difficult questions about the reconciliation of municipal interests and international obligations. She explores the way in which the international community’s interest in avoiding large-scale statelessness has influenced progressive standard-setting in this context. Judge Ziemele also considers the distinct difficulties posed by situations in which state succession entails the transition from an illegal regime, when international law may make conflicting demands in asking both for

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the non-recognition of the illegal regime (and its effects) and the avoidance of statelessness.

In Chapter 10, Sophie Nonnenmacher and Ryszard Cholewinski delve into the pressures placed on nationality policy by modern patterns of international migration. They consider in particular the manner in which migration is contributing to new cases or a heightened risk of statelessness among different migrant groups. At the same time, they explore the other dimension of the nexus between nationality and migration: where statelessness is acting as a push-factor, triggering migration while also sometimes hampering states' ability to effectively implement their immigration laws. In the final chapter of the book, Kim Rubenstein and Niamh Lenagh-Maguire offer an exposé of the treatment of dual nationals – including case studies of the United Kingdom and Australia – arguing that some nationals (namely dual or multiple nationals) are more vulnerable to denationalization or deportation than others, precisely because they are not at risk of statelessness. This brings them to a broader reflection on the relationship between nationality and 'one's own country', in particular in light of contemporary human rights law, taking the reader full-circle back to the question of the meaning and content of nationality under international law today.

International statelessness law is undeniably receiving increasing attention from students, scholars, researchers, governments, civil society, legal practice and the international community, specifically UNHCR. Yet, as Manly points out in Chapter 4, 'there is nothing even closely resembling an international movement of the kind which currently exist to address child soldiers, landmines, or even refugee rights'. Given the rapid pace of developments on this issue over the past few years, as discussed in many of the contributions presented here, we may nevertheless be on the cusp of such an international movement on statelessness. With the sixtieth anniversary of the 1954 Convention coinciding with the release of this book, it is hoped that the book will inspire many more scholars, students and practitioners to take up the cause of statelessness so that in the coming years, statelessness will become a phenomenon of the past, studied only by historians.