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David C. Baluarte
Washington and Lee University School of Law

Article

The Risk of Statelessness: Reasserting a Rule for the Protection of the Right to Nationality

David C. Baluarte†

A global effort to combat statelessness and defend the universal right to nationality is currently underway. Nevertheless, questions persist about the proper scope of the right to nationality, the appropriate form of statelessness protection, and the legal limits of state discretion to deny or deprive an individual of nationality. These questions have animated a heated transnational debate about statelessness in Hispaniola, where the government of the Dominican Republic has designed a legal system that excludes persons of Haitian descent from Dominican nationality. Central to this conflict is a question about whether actions by the Dominican state leave persons of Haitian descent stateless – without nationality anywhere in the world. This question has been the subject of a decade-long dialogue between the Inter-American Court of Human Rights and the Dominican justice system, which have expressed manifestly contrary views about the existence of statelessness in Hispaniola. In its most recent decision on the matter, the Inter-American Court declared that the Dominican state has an obligation to grant nationality to children born in its territory who face a "risk of statelessness." This Article is the first to explore this doctrinal development, and it raises both legal and practical concerns regarding this new rule of protection. This Article warns of potential parallels between the "risk of statelessness" and "de facto" statelessness, which is a category

† Associate Clinical Professor of Law and Director of the Immigrant Rights Clinic at the Washington and Lee University School of Law. The author would like to thank the Frances Lewis Law Center at Washington and Lee for its support of this article. Comments during the presentation of this Article to the faculties of Wake Forest University School of Law, American University Washington College of Law, and Benjamin N. Cardozo School of Law were very helpful in sharpening the analysis. Jaya Ramji-Nogales, Mark Drumbl, and Rick Wilson provided valuable insights. Finally, the author has deep appreciation for conversations with colleagues from the Institute on Statelessness and Inclusion and the Americas Network on Nationality and Statelessness on matters of nationality.

unprotected under the international law of statelessness. It argues for the continued use of legal statelessness as the definitive trigger for statelessness protection and for the establishment of a standard of proof that will permit a determination of statelessness for persons who have disputed or unresolved nationality claims.

TABLE OF CONTENTS

INTRODUCTION

Events in recent years have revealed large numbers of people who have no nationality anywhere in the world and who suffer myriad violations of their human rights as a result of this acute vulnerability. The United Nations High Commissioner for Refugees (UNHCR) estimates that there are at least ten million stateless persons globally,[1] and efforts to map

1. U.N. High Comm'r for Refugees [UNHCR], What Does It Mean To Be Stateless?, http://www.unhcr.org/ibelong/what-does-it-mean-to-be-stateless [https://perma.cc/PKF5-8T7A]. To confront this challenge, in 2014, UNHCR launched a campaign to eradicate statelessness within ten years. *See* UNHCR, A Campaign to End Statelessness: Launched on the 60th Anniversary of the 1954 Convention Relating to the Status of Stateless Persons 1 (Feb. 2014), http://www.unhcr.org/en-us/53174df39.pdf [https://perma.cc/SC6W-6EMY].

stateless populations have identified significant challenges related to statelessness in every region of the world.[2] A common characteristic of these stateless populations is the marginalization they suffer, often intentionally engineered by the state that they inhabit, and the vulnerability that accompanies an existence without legal identity or protection.[3] Stateless persons often do not have basic identity documents, and their access to education, health services, and employment opportunities can be elusive.[4] Stateless persons are often targeted by security officials and immigration authorities, and are more likely to be subjected to arbitrary detention and expulsion.[5] Moreover, discrimination and the threat of physical violence seem to characterize the daily experience of many stateless persons.[6]

At the core of the challenge of addressing statelessness is the tradition of state control over the means of nationality acquisition and divestment. States have long considered their authority over the rules of membership in the nation to be among their most inherent powers.[7] However, when the United Nations proclaimed in the Universal Declaration of Human Rights that the right to a nationality was among the core human rights that member states committed to respect and defend,[8] the sovereign grip on nationality began to loosen. This was because the human right to nationality included both a guarantee of nationality to all and a prohibition against the arbitrary deprivation of that right.[9] Less than a decade later, a regime for the international protection of stateless persons was created in furtherance of the universal protection of the right to nationality.[10]

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2. *See The World's Stateless*, INST. ON STATELESSNESS & INCLUSION 53-132 (Dec. 2014), http://www.institutesi.org/worldsstateless.pdf [https://perma.cc/67Y2-KS7Z] (covering global, regional, and national statelessness statistics).

3. *See* David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RTS. Q. 245, 264-70 (2006); Jillian Blake, *Haiti, the Dominican Republic, and Race-Based Statelessness in the Americas*, 6 GEO. J. L & MOD. CRITICAL RACE PERSP. 139, 143-53 (2014); Katherine Southwick, *Preventing Mass Atrocities Against the Stateless Rohingya in Myanmar: A Call for Solutions*, 68 J. INT'L. AFF. 137, 139-42 (2015).

4. Weissbrodt & Collins, *supra* note 3, at 266; Hélène Caux, *Stateless in West Africa*, UNHCR: TRACKS (Feb. 25, 2015), http://tracks.unhcr.org/2015/02/stateless-in-west-africa/ [https://perma.cc/J3WF-AJC7].

5. Weissbrodt & Collins, *supra* note 3, at 267; *see also* Human Rights Watch, *We Are Dominican: Arbitrary Deprivation of Nationality in the Dominican Republic* (July 1, 2015), https://www.hrw.org/report/2015/07/01/we-are-dominican/arbitrary-deprivation-nationality-dominican-republic [https://perma.cc/CB2Q-BUW8] [hereinafter *Human Rights Watch Report on Arbitrary Deprivation of Nationality in the Dominican Republic*] (noting that Dominican Republic practices "continue to arbitrarily deprive individuals of their right to Dominican nationality and citizenship-related rights").

6. Weissbrodt & Collins, *supra* note 3, at 270; *see also* Amnesty Int'l Austl., Who Are the Rohingya Refugees? (Oct. 7, 2015), https://www.amnesty.org.au/who-are-the-rohingya-refugees [https://perma.cc/W7V5-QE83] (describing violence faced by the Rohingya).

7. *See* Peter J. Spiro, *Citizenship, Nationality, and Statelessness, in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 283-86 (Vincent Chetail & Céline Bauloz eds., 2014).

8. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 15 (Dec. 10, 1948).

9. *Id.*

10. Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117 [hereinafter 1954 Convention].

Nevertheless, many states have viewed the statelessness protection regime with skepticism, and resisted international control over what they consider to be a sovereign matter.

One major situation of statelessness is currently playing out on the island of Hispaniola, where the right to Dominican nationality for the children of Haitian migrants has been the topic of heated debate for decades. On one side of the debate, human rights advocates have argued that persons born to migrants in the Dominican Republic have acquired Dominican nationality under the Constitution as a matter of birthright.[11] On the other, Dominican authorities have argued that an exception to the Constitutional rule of birthright nationality excludes from Dominican nationality the children of non-resident migrants, the vast majority of whom are Haitian.[12] For these children with a disputed claim to Dominican nationality, much is at stake, including access to education, prospects for employment, legal identity, and protection from the collective expulsions that have swept the Dominican Republic for years.[13]

A main point of contention in the Dominican nationality debate is whether children of Haitian descent who are denied Dominican nationality are left stateless. This is more than semantics; it is significant both politically and legally if this population is classified as stateless. In political terms, it matters whether Dominican-born persons of Haitian descent are left stateless if they are denied Dominican nationality because stateless persons are covered by the mandate of the UNHCR.[14] The UNHCR's engagement in any such situation brings to bear technical and financial assistance that may not be available otherwise, as well as legitimacy in political spheres.[15] In legal terms, it matters whether Dominican-born

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11. *See* Human Rights Watch, Dominican Republic: Thousands at Risk of Deportation to Haiti (June 30, 2015), https://www.hrw.org/news/2015/06/30/dominican-republic-thousands-risk-expulsion-haiti [https://perma.cc/4W8C-GU3S].

12. *See* Monique A. Hannam, *Soy Dominicano – The Status of Haitian Descendants Born in the Dominican Republic*, 47 VAND. J. TRANSNAT'L L. 1123, 1143 (2014); Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 121 (Sept. 8, 2005).

13. Amnesty Int'l, *"Without Papers, I Am No One": Stateless People in the Dominican Republic*, AI Index AMR 27/2755/2015, at 42-48 (Nov. 2015), https://www.amnestyusa.org/files/without-papers_stateless-people-dominican-republic.pdf [https://perma.cc/AYJ2-UNPV] [hereinafter *Amnesty Int'l Report on Stateless People in the Dominican Republic*].

14. *See* G.A. Res. 3274 (XXIX) (Dec. 10, 1974); G.A. Res. 31/36 (Nov. 30, 1976); *see also* G.A. Res. 50/152, ¶¶ 14-15 (1995) (encouraging UNHCR to continue to help stateless persons); G.A. Res. 61/137, ¶¶ 2-4 (2006) (recognizing UNHCR's work).

15. The UNHCR has set up operations in the Dominican Republic and been instrumental in efforts to support civil society in its response to shifting Dominican nationality policy in recent years. *See* UNHCR, The Caribbean: Factsheet (Mar. 2017), http://reporting.unhcr.org/sites/default/files/UNHCR%20The%20Caribbean%20Factsheet%20-%20March%202017.pdf [https://perma.cc/A3PG-NZQD] (noting that the UNHCR maintains a country office in the Dominican Republic); *see also* UNCHR, UNHCR Urges Dominican Republic to Refrain from Deportations of Stateless Individuals (June 19, 2015), http://www.unhcr.org/558417759.html [https://perma.cc/W4DY-MTTY] (summarizing a press briefing by a UNHCR spokesperson outlining the UNHCR's positions on the status of stateless residents of Haitian descent).

persons of Haitian descent are stateless because the law of statelessness requires a grant of nationality in the place of birth if a child would otherwise be stateless, and largely prohibits deprivation of nationality that leaves a person stateless.[16]

Perhaps because of the political and legal importance of the statelessness classification, each side of the nationality debate in the Dominican Republic takes a position that flatly contradicts the other.[17] Specifically, the nationality rights movement argues that statelessness is widespread in Hispaniola, while Dominican authorities deny its existence.[18] The two sides of this debate were articulated in the 2005 exchange between the Inter-American Court of Human Rights (Inter-American Court) and the Dominican Supreme Court of Justice (SCJ). That year, the Inter-American Court decided *The Girls Yean and Bosico v. Domincan Republic*, in which it found that the child of a Dominican mother and a Haitian father who had been denied a Dominican birth certificate had been left stateless.[19] The SCJ reviewed the statelessness question just a few months later and found there to be no problem because the children of Haitians born in the Dominican Republic derived Haitian nationality from their parents under the Haitian Constitution.[20] The contrary positions of these two tribunals have characterized the debate for nearly a decade.[21]

This debate evolved after the Constitutional Court of the Dominican Republic issued a decision that nullified Dominican nationality for more than 130,000 persons of Haitian descent in 2013.[22] The Constitutional Court reiterated the reasoning of the SCJ from years earlier, finding that its

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16. Convention on the Reduction of Statelessness, arts. 1, 8, *opened for signature* Aug. 30, 1961, 989 U.N.T.S. 175 [hereinafter 1961 Convention].

17. *See generally* Stacie Kosinski, *State of Uncertainty: Citizenship, Statelessness, and Discrimination in the Dominican Republic*, 32 B.C. INT'L & COMP L. REV. 377, 378-82 (2009) (outlining the conflicting principles upon which nationality can be based).

18. *See* Case of Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶¶ 240, 247 (Aug. 28, 2014) (outlining both parties' arguments).

19. Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 166 (Sept. 8, 2005).

20. Suprema Corte de Justicia [SCJ] [Supreme Court of Justice], 14 diciembre 2005, BOLETÍN JUDICIAL [B.J.] No. 1141, pp. 8-9 (Dom. Rep.), http://ojd.org.do/Jurisprudencia/Constitucional/B.J.-num.-1141-diciembre-2005.pdf [https://perma.cc/UF7J-A97K].

21. For a general discussion of nationality in the Dominican Republic and the relationship between the Dominican Republic and the Inter-American Court, see Marselha Gonçalves Margerin, Monika Kalra Varma & Salvador Sarmiento, *Building a Dangerous Precedent in the Americas: Revoking Fundamental Rights of Dominicans*, 21 HUM. RTS. BRIEF 9 (2014).

22. Tribunal Constitucional de la República Dominicana [TCRD] [Constitutional Court of the Dominican Republic], 25 septiembre 2013, Sentencia TC/0168/13 [Judgment TC/0168/13], http://tribunalconstitucional.gob.do/sites/default/files/documentosSentencia%20TC%20168-13%20-%20C.pdf [https://perma.cc/2YGQ-NUFD]. The UNHCR estimates that there are 133,770 stateless people in the Dominican Republic. While the initial estimate of stateless persons was in the order of 210,000, UNHCR subsequently announced a downward revision of that estimate based on more precise data analysis. *See* UNHCR, *UNHCR Mid-Year Trends 2015*, at 14 (2015), http://unhcr.org/en-us/56701b969.pdf [https://perma.cc/M52G-7Z24].

decision did not pose statelessness problems because denationalized children of Haitian descent derived Haitian nationality from their parents.[23] The Inter-American Court responded to the decision of the Constitutional Court the next year in *Expelled Dominicans and Haitians v. Dominican Republic*, finding human rights violations stemming from the denial of Dominican nationality documents to persons of Haitian descent born in Dominican territory.[24]

With regard to the ongoing debate on statelessness, the Inter-American Court took a novel analytical approach and extended protection under the international law of statelessness to individuals who face a "risk of statelessness."[25] Specifically, the Inter-American Court placed the burden on the Dominican state to demonstrate that persons who had been born in the Dominican Republic had access to Haitian nationality.[26] In finding that the Dominican Republic had not met this burden, and that certain individuals of Haitian descent faced a "risk of statelessness," the Court found a violation of the right to nationality and ordered the Dominican Republic to issue Dominican nationality documents.[27] In so doing, the Court extended a well-established rule of protection that requires a state to grant its nationality to stateless children born in its territory, such that the rule now encompasses children who are born at "risk of statelessness."

This Article argues that in its notable effort to protect Dominican-born persons of Haitian descent from the systematic human rights violations that they face, the Inter-American Court stretched the international law of statelessness beyond its understood limits. Indeed, there is little disagreement at this point that the law of statelessness was designed to protect de jure stateless persons, who have no nationality under the operation of laws of any country.[28] To extend that body of law to protect persons at "risk of statelessness" is to extend it, in effect, to de facto stateless persons who were excluded—rightly or wrongly—from the statelessness treaty regime. Stretching the law of statelessness beyond its understood limits risks creating normative confusion, as well as undermining both the authority of the Inter-American Court and the growing movement to eradicate statelessness. This Article provides a path to realign this jurisprudence with well-established international law norms by returning to the rule that requires a finding of statelessness in order to extend statelessness protection. It makes the further contribution of providing a reasoned framework for the consideration of the "risk of statelessness" as part of that statelessness determination.

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23. *See* TCRD, 25 septiembre 2013, Sentencia TC/0168/13, pp. 77-79.

24. Case of Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 301 (Aug. 28, 2014).

25. *Id.* ¶ 298.

26. *Id.* ¶ 297.

27. *Id.* ¶ 298.

28. *See generally* Hugh Massey (Sr. Legal Adviser, UNHCR Geneva), *UNHCR and De Facto Statelessness*, U.N. Doc. LPPR/2010/01 (Apr. 2010) (discussing the origins and evolution of the law of statelessness).

The first section of this Article will provide necessary legal background on the right to nationality and statelessness. It will trace the development of nationality from an expression of pure sovereign authority to a fundamental human right under international law. It will then describe how the right to nationality was further cemented by the development of the international regime to protect stateless persons and reduce statelessness, as well as how this legal protection framework has gained influence in recent years. This section will highlight both the deep roots of nationality regulation in sovereign state authority and the measured inroads that have been accomplished in recent years to balance sovereign authority against the need to protect stateless persons.

The second section will illustrate how the transnational legal debate about the right to nationality and statelessness in the Dominican Republic has led the Inter-American Court of Human Rights to create a new rule of protection for persons who face a "risk of statelessness." It will begin by describing the history and evolution of the Dominican nationality debate. It will then describe how the nationality debate in the Dominican Republic led to a series of legal rulings by the Inter-American Court, the Dominican Supreme Court of Justice, and the Dominican Constitutional Court that have interpreted and applied the international law of statelessness in the Dominican context. Finally, this section will present a detailed account of the Inter-American Court's statelessness analysis in *Expelled Dominicans and Haitians* and will explain how its decision created a rule that requires a grant of nationality in the country of birth for a child at risk of statelessness.

The last section of this Article will argue that the statelessness determination should remain the threshold for protection under the international law of statelessness, and will explain how a risk assessment may appropriately be part of that determination. This section will first analogize the "risk of statelessness" doctrine to the concept of de facto statelessness, which is unprotected under the international law of statelessness. It will then argue for a return to the statelessness determination as the trigger for statelessness protection, and break down the different considerations that must be part of a statelessness determination process specifically tailored to the Dominican context. Finally, the Article will argue that once the appropriate rule of protection is reestablished, a standard of risk that will trigger a finding of statelessness is necessary. It will conclude that a child who is more likely than not stateless at birth should be considered a stateless person for purposes of international protection and receive a mandatory grant of nationality in the place of birth.

I. THE HUMAN RIGHT TO NATIONALITY AND STATELESSNESS PROTECTION

The international community took many important steps in its work to restore global order after the Second World War. The United Nations planted the seed that would grow into the human rights legal order with the Universal Declaration of Human Rights, and consolidated regimes for

international protection for refugees and stateless persons. In this regard, new normative frameworks arose simultaneously that required states to respect the enumerated rights of individuals subject to their jurisdiction and to provide protection to persons whose rights were violated by other states. This new order encroached upon many areas in which states had previously considered their authority to be sovereign and beyond reproach.

In particular, the decision to include the right to nationality in the Universal Declaration of Human Rights (UDHR), at the same time that the global community elaborated an international framework for the protection of stateless persons, marked a shift away from sovereign control of nationality. Indeed, such limitations imposed by human rights law are often viewed as antithetical to state sovereignty to the extent that they compromise on the principle of non-intervention in internal affairs.[29] This tension is particularly notable in the domain of nationality,[30] where regulation has long been considered inherent to sovereignty.[31] The following section examines the evolution of nationality as a fundamental human right, and the simultaneous development of the international legal order for the protection of stateless persons, which exists as the principal effort to consolidate global protection for the human right to nationality. This section is intended to communicate the persistent tension in the international regulation of nationality, and thereby acknowledge the perspective of states that view such regulation as an unwarranted incursion into internal affairs.

A. The Evolution of Nationality as an Individual Right

The twentieth century witnessed the rapid increase in the number of nation states, from fifty-five states in 1914 to 192 states by 2002.[32] This increase was in large part the result of decolonization, when new states around the globe established their independence from European occupiers.[33] In this context, the ability of nation states to define their national membership was an important aspect of their efforts to consolidate their sovereign authority. This resonated with the general notion under international law that nationality was a matter of internal law not subject to limitations by other sovereigns.[34]

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29. *See* Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 34 (1996) (opining that "[t]he international law of human rights penetrated the state monolith beyond repair"); *see also* William J. Aceves, *Relative Normativity: Challenging the Sovereignty Norm through Human Rights Litigation*, 25 HASTINGS INT'L & COMP. L. REV. 261, 264-69 (2002) (tracking normative developments, such as human rights law, that have pushed back and conflicted with sovereignty norms).

30. *See* HANNAH ARENDT, ORIGINS OF TOTALITARIANISM 278 (Harcourt, Brace & World, Inc. 1966) (1951) (explaining that "[s]overeignty is nowhere more absolute than in matters of 'emigration, naturalization, nationality, and expulsion.").

31. *See* Spiro, *supra* note 7, at 283-86.

32. ROBERT ROTBERG, WHEN STATES FAIL: CAUSES AND CONSEQUENCES 2 (2003).

33. *Id.*

34. *See* Spiro, *supra* note 7, at 281.

While states were not limited in how they regulated nationality, two regimes for nationality acquisition became prevalent.[35] States often had rules by which their nationals could pass nationality to their children, known as *jus sanguinis* nationality acquisition.[36] Some states also provided a right to nationality for persons born in the national territory, or *jus soli* nationality acquisition.[37] States codified laws about nationality that incorporated elements of these two regimes, as well as rules about loss of nationality, and viewed themselves as completely unencumbered by international law in their efforts to create these legal orders.[38]

Nevertheless, in the early part of the twentieth century, it became evident to the international community that international law regulation of nationality acquisition would facilitate amicable interactions between states. Once the international community had identified the goal of providing guidance to nation states on nationality, it took a first step towards this achievement with the promulgation of the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930 Convention).[39] While the general provisions of that early Convention were clear that nationality was a matter to be regulated by internal law,[40] the Convention set forth rules about nationality with the goal of eliminating conflicts arising from various state practices.[41] Even with this concerted effort to leave sovereign discretion over nationality unencumbered, this attempt to provide loose international regulation of nationality was not widely adopted and the Convention garnered only a few ratifications.[42]

Nationality continued to be a source of conflict between states, particularly in the sphere of diplomatic protection. There is no better example than the *Nottebohm Case*, which involved an attempt by Liechtenstein to vindicate the rights of a recently naturalized citizen against Guatemala before the International Court of Justice (ICJ).[43] Prior to the ICJ's decision in the *Nottebohm Case*, it was uncontroversial that a state would exercise diplomatic protection over one of its citizens in the face of a violation by another state of that citizen's internationally protected rights.[44]

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35. *Id.* at 282.
36. *Id.*
37. *Id.*
38. *Id.*
39. Convention on Certain Questions Relating to the Conflict of Nationality Law, *opened for signature* Apr. 13, 1930, 179 L.N.T.S. 4137.
40. *Id.* art. 1.
41. *See* Spiro, *supra* note 7, at 283.
42. *Id.*
43. Nottebohm Case (Liech. v. Guat.), Judgment, 1955 I.C.J. 4 (1955). The case involved a German citizen who moved to Guatemala in 1905 at the age of twenty-four to join his family business, and remained there without acquiring Guatemalan citizenship. *Id.* at 13. Early in the Second World War, Nottebohm traveled to Liechtenstein and acquired citizenship in that country, which led to the automatic relinquishment of his German citizenship. *Id.* at 14. In 1941, Guatemala declared war on Germany, rendered Nottebohm to the United States, and in 1949 expropriated his property as enemy alien property without compensation. *Id.* at 18. Nottebohm moved to Liechtenstein, which initiated proceedings before the ICJ to secure compensation for its citizen's expropriated property.
44. *See* Audrey Macklin, *Nottebohm Turns Sixty: Time to Retire?* (unpublished manuscript)

In its majority decision, the ICJ made citizenship a necessary but not sufficient condition for diplomatic protection, and introduced a genuine link requirement for recognition of nationality under international law.[45] The ICJ held that: "nationality is a legal bond having as its basis a social fact of attachment a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[46] The ICJ then used the rationale that Nottebohm was not "in fact more closely connected with the population of [Liechtenstein] than with that of [Guatemala]" to find his claim to Liechtenstein nationality ineffective, and Liechtenstein without standing to sue Guatemala for violations of Nottebohm's rights before the ICJ.[47]

On its face, *Nottebohm* appears to undercut the force of the norm that nations are free to establish rules of nationality acquisition. However, Peter Spiro has expressed a belief that the ICJ decision is "sovereignty reinforcing" for two important reasons.[48] First, the decision is sovereignty reinforcing because Liechtenstein was attempting to constrain Guatemala's discretion over national matters.[49] Upholding Liechtenstein's right to do so would mean that a state's right to assert itself within the sovereign territory of another was only as limited as its willingness to extend nationality.[50] Further, Spiro believes that *Nottebohm* protects sovereignty in the sense that it provides rules for the resolution of sovereign clashes *vis-à-vis* dual nationals with regard to diplomatic protection.[51] He emphasizes a reading of *Nottebohm* that limits its significance to the arena of diplomatic protection, and that the decision did not "negate his status as a national" in Liechtenstein, nor did it purport to govern his status as a member of that sovereign nation.[52]

Whatever forms the critiques and rationalizations of *Nottebohm* may take, none dispute that the ICJ decision is a basic point of reference for the discourse on the evolution of nationality in the twentieth century. The decision should be read in the historical context of the post-war world and in conjunction with the simultaneous evolution of human rights doctrine.

In 1948, the UDHR heralded a new era in the global consciousness with regard to individual rights.[53] UDHR Article 15 declared that "[e]veryone has the right to a nationality," and that "no one shall be arbitrarily deprived

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(on file with author).

45. *Nottebohm Case*, 1955 I.C.J. at 26.
46. *Id.* at 23.
47. *Id.* at 23, 25-26.
48. Spiro, *supra* note 7, at 284.
49. *Id.*
50. *Id.*
51. *Id.* at 284-85.
52. *Id.* at 284.
53. *See* U.N. Office of the High Comm'r for Human Rights, Statement by the UN High Commissioner for Human Rights Navi Pillay on the Occasion of the 60th Anniversary of the Universal Declaration of Human Rights (Dec. 10, 2008), http://www.ohchr.org/EN/NewsEvents/HRDay2007-2008/Pages/60UDHRHCStatement2008.aspx [https://perma.cc/8RK3-VZ3A].

of his nationality."[54] The decision by states to recognize nationality as an inalienable right represented a shift from the traditional conception of nationality as a matter exclusively for state discretion. While the UDHR is non-binding in character, it arguably changed the discourse around nationality, and influenced the development of a number of influential and widely ratified human rights treaties.

Often cited in this regard are the provisions of half a dozen major human rights instruments consolidating norms of civil and political rights, anti-discrimination protections, women's rights, and children's rights. First, the International Covenant on Civil and Political Rights (ICCPR) codified the UDHR protection for children, establishing in 1966 that "every child has the right to acquire a nationality,"[55] thereby recognizing the fundamental importance of being a national in order to enjoy the protections of a state. Notably, the Human Rights Committee has stated that "the rights set forth in the Covenant apply to everyone . . . irrespective of his or her nationality or statelessness."[56] A subsequent General Comment by the Human Rights Committee provides that "States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born."[57] These developments are significant because the ICCPR is one of the most widely ratified human rights treaties.[58]

Building on these children's rights guarantees set forth in the UDHR and the ICCPR, the Convention on the Rights of the Child (CRC) guarantees a child's right to acquire a nationality and includes an obligation on states to utilize their laws in order to avoid statelessness among children.[59] Notably, like the ICCPR, the CRC enjoys near-universal ratification.[60] While the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families has far fewer signatories, it is significant that it reiterates these protections for children

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54. *See* Universal Declaration of Human Rights, *supra* note 8, art. 15.

55. International Covenant on Civil and Political Rights art. 24(3), *opened for signature* Dec. 16, 1966, 1916 U.S.T. 521, 999 U.N.T.S. 171 [hereinafter ICCPR].

56. Human Rights Comm., General Comment No. 15: The Position of Aliens Under the ICCPR, 27th sess., ¶ 1 (1986).

57. Human Rights Comm., General Comment No. 17: Article 24 (Rights of the Child), ¶ 8 (1989). The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) also requires states parties to ensure equality between men and women in terms of conveying nationality to one's children. *See* Convention on the Elimination of All Forms of Discrimination Against Women art. 9(2), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13.

58. There are 169 states parties to the ICCPR. *See* U.N. Treaty Collection [UNTC], Multilateral Treaties Deposited with the Secretary-General, Chapter IV: Human Rights, 4. International Covenant on Civil and Political Rights, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf [https://perma.cc/XAG5-75GM].

59. Convention on the Rights of the Child art. 7, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

60. There are 196 states parties to the CRC. *See* UNTC, Multilateral Treaties Deposited with the Secretary-General, Chapter IV: Human Rights, 11. Convention on the Rights of the Child, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf [https://perma.cc/82LG-K5HN].

codified in the ICCPR and CRC in the specific case of migrant children.[61]

At the same time that the international community has consolidated the right to acquire a nationality at birth though international conventions, it has also further articulated the related protection against the arbitrary deprivation of nationality.[62] Specifically with regard to racial discrimination in the right to a nationality, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) established that "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone . . . to nationality."[63] A General Comment to the ICERD clarified that the scope of this protection included the recognition "that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States Parties' obligations to ensure non-discriminatory enjoyment of the right to nationality."[64]

These developments in major human rights treaties demonstrate the shift from nationality as a matter exclusively in the purview of the state to an individual human right. Moreover, many of these treaties have been widely ratified, which indicates some measure of acceptance by the global community. This development has been tracked in the body of international law to protect stateless persons and reduce statelessness, which has gained some momentum in recent years.

B. International Protection for Stateless Persons

The early efforts to create a body of international law to regulate nationality at the 1930 Hague Conference incorporated an understanding that every person should have a nationality, and that statelessness was to be avoided.[65] This sentiment was present in the preamble of the 1930 Convention, and it was reflected in the articles of the Convention itself, which required that a person acquire another nationality before an

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61. Int'l Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 29, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 93.

62. After only years after this protection was inscribed in the UDHR, the Convention on the Nationality of Married Women reiterated the protection when it called on states to prohibit the deprivation of the nationality of women through the formation or dissolution of marriage. Convention on the Nationality of Married Women art. 1, *opened for signature* Feb. 20, 1957, 309 U.N.T.S. 65.

63. International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(iii), 21 Dec. 1965, 660 U.N.T.S. 195.

64. Comm. on the Elimination of Racial Discrimination, General Recommendation XXX on Discrimination Against Non-Citizens, ¶ 14, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Aug. 19, 2004). This protection is also explicitly extended to persons with disabilities in the Convention on the Rights of Persons with Disabilities, which clearly prohibits the deprivation of nationality on the basis of disability. *See* Convention on the Rights of Persons with Disabilities art. 18(1)(a), *opened for signature* Dec. 13, 2006, 2515 U.N.T.S. 3.

65. *See* Convention on Certain Questions Relating to the Conflict of Nationality Law pmbl., *opened for signature* Apr. 12, 1930, 179 L.N.T.S. 89 (stating "that it is in the general interest of the international community to secure that all its members should recognise that every person should have a nationality and should have one nationality only.").

expatriation was completed and that an expatriated woman not lose her nationality when married unless she acquired that of her husband.[66] In fact, concerns about statelessness were so significant that the 1930 Hague Conference promulgated two additional protocols on the subject. The first was the *Protocol Relating to a Certain Case of Statelessness*, which provided that a child should acquire the nationality of the state of birth if her mother was a national of the state of birth and her father was of unknown nationality.[67] The second was the Special Protocol Concerning Statelessness, which would require a state to readmit an expatriated person who had failed to acquire another nationality and had become indigent or engaged in criminal activity in another state.[68] Regardless, like the 1930 Convention itself, these protocols had little practical effect due to their limited ratification.[69]

When statelessness emerged again as a matter of international concern after the Second World War, that concern had become more humanitarian in nature. Indeed, early work by the U.N. General Assembly, Economic and Social Council, Commission on Human Rights, and International Refugee Organization forged the understanding of nationality as a fundamental right at the same time that the protection of stateless persons was joined with the global conversation about the need for refugee protection.[70] There was an evident concern for the legal situation of "persons who do not enjoy the protection of any government,"[71] and while efforts focused more on providing assistance to refugees, stateless persons were also viewed as "unprotected" and in need of a comparable legal solution.[72]

In 1950, the U.N. General Assembly convened a Conference of Plenipotentiaries for a draft convention on the status of refugees and a draft

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66. *Id.* arts. 7-11.

67. Protocol Relating to a Certain Case of Statelessness art. 1, *opened for signature* Apr. 12, 1930, 179 L.N.T.S. 115.

68. Special Protocol Concerning Statelessness art. 1, Apr. 12, 1930, 2252 L.N.T.S. 1435.

69. *See* Spiro, *supra* note 7, at 283.

70. Guy S. Goodwin-Gill (Senior Research Fellow), Convention Relating to the Status of Stateless Persons: Introductory Note for the U.N. Audiovisual Libr. of Law, at 1 (2010), http://legal.un.org/avl/pdf/ha/cssp/cssp_e.pdf [https://perma.cc/EM7T-3J9K].

71. *Id.* (quoting Comm'n on Human Rights, *Rep. of the Commission on Human Rights on the Second Session*, ¶ 46, U.N. Doc. E/600 (1947)).

72. *Id.* at 1-2. In his recounting of the 1950 summary records of the Ad Hoc Committee on Statelessness and Related Problems, Goodwin-Gill explains that the representatives that formed the Ad Hoc Committee disagreed about the relationship between protection for refugees and stateless persons. For example, French and U.S. representatives pushed for an immediate solution to the pressing refugee problem, but the former believed that statelessness was a less urgent "continuing concern of the world community," *id. at* 2 (quoting U.N. Econ. & Soc. Council, Ad Hoc Comm. on Statelessness & Related Problems, Summary Record of the Second Meeting, ¶8, U.N. Doc. E/AC.32/SR.2 (Jan. 26, 1950)), and the latter suggested that some non-refugee stateless persons may not even require protection of the UN, *id.* Other representatives were concerned about similar gaps in protection suffered by each group and the need for comparable legal solutions. *Id.* at 3. The resulting recommendation was to create a convention for the protection of refugees and an additional protocol whereby states may agree to apply the convention to stateless persons who may not otherwise qualify as refugees. *Id.* at 3.

protocol on stateless persons.[73] The Conference adopted and opened for signature the 1951 Convention Relating to the Status of Refugees (1951 Convention), but recommended that the question of a draft protocol be referred back to the U.N. for further study.[74] Ultimately, after reconsideration of the statelessness problem, a U.N. Conference resolved to adopt a separate Convention Relating to the Status of Stateless Persons in 1954 (1954 Convention).[75]

The 1954 Convention spoke of statelessness in terms of human rights, utilizing the Preamble to contextualize the Convention not only as a companion to the Refugee Convention but also as an upshot of human rights protection envisioned in the UDHR.[76] Like the 1951 Convention, the 1954 Convention included a framework to assist states in defining the juridical status of stateless persons, as well as establishing criteria for access to employment and public services.[77] In essence, these two Conventions provided the means to settle the vast "unprotected" population that had been displaced by the Second World War and was seeking legal stability.

Perhaps the most notable contribution of the Convention was to provide an international law definition of "stateless person" as one who is "not considered as a national by any State under the operation of its law."[78] However, the 1954 Convention did envision the group of stateless persons protected as somewhat limited. Specifically, only those who are not nationals under the operation of the nationality laws of any country are stateless persons protected under the Convention.[79] As commentators have observed, this leaves out any number of "unprotected" people who suffer severe and sustained rights deprivation but cannot demonstrate the negative proposition that no country's law operates to provide them with nationality.[80]

Perhaps more significant than the limitations on the definition were the limitations in application that arose from a low level of ratification. By 1961, when the 1951 Convention had twenty-five parties, the 1954 Convention had just seven.[81] The practical effect of this was that many more countries took on the international legal obligation to protect refugees than those that

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73. *Id.* at 3 (citing G.A. Res. 429(V) (Dec. 19, 1950)).

74. *Id.*; Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

75. *See* Goodwin-Gill, *supra* note 70, at 4.

76. 1954 Convention, *supra* note 10, pmbl.

77. *See id.* arts. 12-24.

78. UNHCR, Introductory Note to the 1954 Convention Relating to the Status of Stateless Persons, at 3, http://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf [https://perma.cc/BZ3J-4PHP] (quoting 1954 Convention, *supra* note 10, art. 1(1)).

79. 1954 Convention, *supra* note 10, art. 1(1).

80. *See, e.g.*, LAURA VAN WAAS, NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW 19-27 (2008).

81. *See* UNTC, Multilateral Treaties Deposited with the Secretary-General, Chapter V: Refugees and Stateless Persons, 3. Convention Relating to the Status of Stateless Persons, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-3.en.pdf [https://perma.cc/ERR4-7AG4] [hereinafter Status of the 1954 Convention].

committed to protect stateless persons. This may have been a reflection of the perception of the international community that statelessness was not as pressing a problem as refugee protection. It may also have been a reflection of the disinclination of states to regulate matters concerning nationality with international law, even in the context of international protection.

Regardless, by the time the international community returned to the work of statelessness with the 1961 Convention on the Reduction of Statelessness (1961 Convention), few states had demonstrated their willingness to combat statelessness by ratifying the 1954 Convention. Nonetheless, the 1961 Convention picked up where the 1954 Convention left off and provided an international framework for states to coordinate domestic nationality laws to prevent persons from becoming stateless. The object and purpose of the 1961 Convention is for states to develop their nationality laws in a manner consistent with the "international norms relating to the protection of the right to nationality, including the principle that statelessness should be avoided."[82] The 1961 Convention aims to protect against statelessness in a variety of circumstances, and provides important rules for nationality acquisition, deprivation, and renunciation.[83] Perhaps the greatest focus of the 1961 Convention is to guarantee everyone's right to a nationality, and it gives particular emphasis to the rule that that all persons must acquire a nationality at birth.[84]

Together, the 1954 and 1961 Conventions set forth a framework of international obligations to provide status to stateless persons and prevent the problem from reproducing itself. However, like the 1930 Nationality Convention that preceded them, both conventions were plagued by low levels of ratification. By 1980, the 1954 Convention had garnered only thirty-one ratifications, and the 1961 Convention only ten.[85] As was the case with the 1930 Convention, low levels of ratification were likely expressive of the disinclination of states to cede their sovereign authority over matters relating to nationality.

There was a shift in the 1990s, at least in terms of the global awareness of the problem of statelessness, with the dissolution of the Soviet Union and the Yugoslav Republic. In many of the successor states that began to form, ethnic conflicts developed as ethnic majority groups used nationality as a

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82. UNCHR, Introductory Note to the Text of the 1961 Convention on the Reduction of Statelessness, at 3 (May 2014), http://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf [https://perma.cc/RM6K-FSB3].

83. 1961 Convention, *supra* note 16, arts. 4-7.

84. *Id.* art. 1. *See also* UNHCR, Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, U.N. Doc. HCR/GS/12/04 (Dec. 21, 2012) [hereinafter UNHCR Guidelines on Statelessness No. 4] ("Articles 1-4 of the 1961 Convention principally concern acquisition of nationality by children. The cornerstone of efforts to prevent statelessness among children is the safeguard contained in Article 1 of the 1961 Convention.").

85. *See* Status of the 1954 Convention, *supra* note 81; UNTC, Chapter V: Refugees and Stateless Persons, 4. Convention on the Reduction of Statelessness, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-4.en.pdf [https://perma.cc/95HB-FVMV] [hereinafter Status of the 1961 Convention].

weapon against more vulnerable minorities.[86] Statelessness was often the result, and this was a major factor that led to a reinvigorated global conversation about the protection against statelessness.[87] Notably, this concern was compounded by statelessness issues that were emerging in the context of forced migration flows and new multi-party democracies, where citizenship laws were being used to quash opposition.[88]

Concerns about statelessness gained steam at the turn of the century, a trend attributable in large part to the work of the UNHCR, the international body charged with protecting stateless persons under the 1954 and 1961 Convention frameworks.[89] National and international advocacy organizations have worked tirelessly to shed light on situations of statelessness around the globe, and in 2014, the UNHCR launched a global initiative to eradicate statelessness by 2024, known as the "#IBelong Campaign."[90] Growing concern about this problem has led to a steady increase in the rate of ratification of the statelessness conventions. Specifically, twenty-three states have ratified the 1954 Convention since 2010, which represents 25% of the total number of states parties and has brought the total number of ratifications to ninety.[91]

The increased awareness about statelessness that prompted the U.N. campaign, and that continues to motivate work in this area has increased the visibility of the problem of statelessness. Increased ratification of the statelessness instruments is likely a byproduct of this increased visibility. Nevertheless, challenges to state practices related to nationality acquisition and deprivation tend to be flash points for international controversy, and states often respond to allegations that their policies produce statelessness by citing their sovereign authority over matters pertaining to nationality. One of the most visible examples of this trend is the nationality crisis that has unfolded in the Dominican Republic over the last decade.

II. THE EMERGENCE OF THE "RISK OF STATELESSNESS" DOCTRINE IN HISPANIOLA

One of the most pressing situations of statelessness in the world today is that which has unfolded in the Dominican Republic, where the UNHCR has reported a population of more than 130,000 stateless persons.[92] This nationality rights crisis in that country has emerged against the backdrop of historic marginalization and mistreatment of Haitian migrants and their

86. *See* VAN WAAS, supra note 80, at 18.

87. *Id.*

88. *Id.* at 18-19.

89. *See* G.A. Res. 50/152, *supra* note 14, ¶¶ 14-15 (entrusting the UNHCR with responsibility for stateless persons); G.A. Res. 61/137, *supra* note 14, ¶¶ 1-4 (same).

90. *See* UNHCR, #IBelong Campaign to End Statelessness, http://www.unhcr.org/ibelong-campaign-to-end-statelessness.html [https://perma.cc/BX94-85Q6].

91. *See* Status of the 1954 Convention, *supra* note 81.

92. *See UNHCR Mid-Year Trends 2015*, *supra* note 22, at 14.

children.[93] This history has fed widespread prejudice, which has in turn been stoked by xenophobic extremists, and created the conditions necessary for the disenfranchisement of Dominican-born persons of Haitian descent.[94] In this environment, Dominican authorities have elaborated policies, promulgated laws, and even overseen a Constitutional reform that has resulted in the systematic denial and deprivation of Dominican nationality to Dominican-born persons of Haitian descent.[95]

The following section explores how the Dominican Republic has implemented measures of nationality discrimination over the last two decades, and looks at the role of the human right to nationality and statelessness protection in combating the consolidation of a system of institutionalized racism. This section will first set out the legal framework in which the nationality debate has unfolded in the Dominican Republic and highlight the abuses that have led to the situation of statelessness. Next, this section will track a debate between the Inter-American Court of Human Rights and the high courts of the Dominican Republic about the proper role for the law of statelessness in addressing the situation of persons denied Dominican nationality.

Finally, this section will present the Inter-American Court's decision in *Expelled Dominicans and Haitians vs. Dominican Republic*, in which the Court took a novel normative step to protect those who face a "risk of statelessness" in the Dominican Republic. Specifically, the Court expanded the well-established rule described in the previous section that a state must guarantee its nationality to a child born stateless in its territory. The Court found that the Dominican Republic had an obligation to determine whether children born in its territory were stateless, and in finding that it had failed to do so, required it to guarantee Dominican nationality to persons who faced a risk of statelessness. This discussion frames the critique presented in the final section of this paper.

A. Nationality Rights and Statelessness in Hispaniola

The history of Dominican and Haitian relations is long and complex.[96] An account of the common history of these two conjoined island nations often begins with the 1822 invasion by Haitian forces of the Dominican Republic directly after its independence from Spain in 1821.[97] The period of Haitian occupation lasted until 1844, and was followed by persistent conflicts that left scars that have marked Dominican-Haitian relations for

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93. *See* Edward Paulino, *Dominican Republic: Bearing Witness to a Modern Genocide*, BERKELEY REV. LATIN AM. STUD., Spring-Fall 2016, at 51, 55.

94. *See* Bridget Wooding, *Upholding Birthright Citizenship in the Dominican Republic*, 44 IBEROAMERICANA - NORDIC J. LATIN AM. CARIBBEAN STUD. 99, 99-101 (2014).

95. *See Amnesty Int'l Report on Stateless People in the Dominican Republic*, *supra* note 13, at 11-21.

96. *See* Blake, *supra* note 3, at 143-48; Hannam, *supra* note 12, at 1132-36.

97. D.J. Lecce, *International Law Regarding Pro-Democratic Intervention: A Study of the Dominican Republic and Haiti*, 45 NAVAL L. REV. 247, 248 (1998).

decades.[98] Notably, Dominican Independence Day celebrates independence from Haiti.[99]

The history of the right to Dominican nationality at birth reflects the history of the island itself. In 1844, when the Dominican Republic became independent from Haiti, it promulgated a protectionist Constitution that gave birthright citizenship only to children born to Dominicans.[100] In 1858, the Dominican Republic changed course and incorporated a broad rule of birthright nationality in a manner consistent with most other countries in the Americas, guaranteeing Dominican nationality to all persons born in the national territory.[101] In the decades that followed, there were slight adjustments to this absolute rule of birthright nationality.[102]

In 1929, a new formulation was included in the Constitution that would provide the rule of birthright nationality in the Dominican Republic for more than 80 years.[103] This provision pronounced that Dominican nationality would be granted to anyone born in the nation's territory, with the exception of those people born to foreigners in diplomatic service or "in transit."[104] Surprisingly, no clear definition of "in transit" was provided at the time, and no legislation directly addressed this constitutional language for 75 years.[105]

This is surprising in part because Haitian migration towards the Dominican Republic flowed nearly unencumbered through a clearly demarcated though porous border throughout the twentieth century.[106] This migration took place to supply labor in the agricultural, construction, and domestic service sectors, and led to notable contributions by Haitians to socio-cultural life in the Dominican Republic.[107] Hundreds of thousands of Haitian migrants made the Dominican Republic their home[108] and their children were considered Dominican under the prevailing interpretation of the Dominican Constitution.[109]

Discrimination and state-authored violence towards the Haitian

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98. *See* SAIS Int'l Human Rights Clinic, *Torn at the Seam: Migration, Deportations, and Humanitarian Concerns on the Island of Hispaniola*, JOHNS HOPKINS UNIV. SCH. OF ADV. INT'L STUD. (SAIS), 14-20 (2016), https://www.sais-jhu.edu/sites/default/files/torn-at-the-seam_sais-ilaw-hrc-2016.pdf [https://perma.cc/XE85-5ZEX].

99. *Id.* at 14.

100. PRIMERA CONSTITUCIÓN DOMINICANA [FIRST DOMINICAN CONSTITUTION], Nov. 6, 1844, art. 7 (Dom. Rep.).

101. TCRD, 25 septiembre 2013, Sentencia TC/0168/13, pp. 49-50.

102. *Id.* pp. 50-51.

103. *Id.* pp. 49-52.

104. REVISIÓN DE 20 DE JUNIO DE 1929 DE LA CONSTITUCIÓN DE LA REPUBLICA DOMINICANA [JUNE 20, 1929 REVISION TO THE CONSTITUTION OF THE DOMINICAN REPUBLIC], June 20, 1929, art. 8(2).

105. See *infra* note 117 and accompanying text.

106. *See* Hannam, *supra* note 12, at 1133.

107. *See id.*

108. *See* Case of Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 157 (Aug. 28, 2014).

109. *See id.* ¶¶ 289-91, 295 (explaining changes in interpretation of the Constitution and the view prevailing until at least 2004).

migrant population was common throughout this period,[110] and this ethnic tension influenced immigration and nationality policies. Memos recently opened to the public from the Dominican National Archive demonstrate this relationship. For example, a memo from the State Secretary of the Armed Forces to President Joaquin Balaguer and other members of his cabinet in 1976 proposed a reform to Dominican laws to address the problem of Haitian migration.[111] The specific proposal was to redefine the status of Haitian workers who arrived in the Dominican Republic to labor in the agricultural sector as foreigners "in transit," thereby creating a legal barrier to their children becoming Dominican nationals.[112] This memo emphasized that such a change would require "substantial" alterations to laws governing national identification documents and immigration.[113] This proposed legislative change was never made, but it helps to explain events that unfolded over the years that followed.

Throughout the 1990s, societal discrimination began to manifest more regularly in the civil registry, and Haitian migrants who sought to register their children as Dominican began to encounter problems.[114] Legal challenges became more common, and one appeals court published a decision in 2003 declaring that the "in transit" exception did not encompass the children of irregular migrants.[115] Nevertheless, stories of the children of Haitian migrants being denied birth certificates in civil registries became increasingly widespread, as did the stories of missed educational and other opportunities that accompanied these denials.[116]

Then, in 2004, the Dominican legislature passed a new immigration law in which it explicitly defined categories of "non-resident" migrants as "in transit" under the Constitution.[117] Among these categories of non-residents

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110. Perhaps the most troubling manifestation of this sentiment was the massacre of an estimated 15,000 Haitian migrants in 1937, an effort at ethnic cleansing initiated by the dictator, President Rafael Trujillo. *See* Richard Lee Turits, *A World Destroyed, A Nation Imposed: The 1937 Massacre in the Dominican Republic*, 82 HISP. AM. HIST. REV. 589, 589-91 (2002).

111. Comunicación 4411 del Secretario de Estado de las Fuerzas Armadas, Mayor General Juan Rene Beauchamp Javier al Presidente de la República, Joaquín Balaguer [Communication 4411 from the Secretary of State of the Armed Forces, Major General Juan Rene Beauchamp Javier, to the President of the Republic, Joaquín Balaguer] (Mar. 2, 1976) [hereinafter Communication 4411] (Dom. Rep.); *see also* Inter-Am. Comm. H.R., *Report on the Situation of Human Rights in the Dominican Republic*, ¶ 113, OEA/Ser.L/V/II, doc. 45/15 (Dec. 31, 2015), http://www.oas.org/en/iachr/reports/pdfs/DominicanRepublic-2015.pdf [https://perma.cc/96MB-KJJ4] [hereinafter *2015 IACHR Report on the Dominican Republic*] (discussing the content of Communication 4411).

112. Communication 4411, *supra* note 111.

113. *Id.*

114. *See Case of Expelled Dominicans and Haitians* ¶¶ 163-66.

115. *See* La Cámara Civil de Corte de Apelación del Distrito Nacional [The Civil Chamber of the Appeals Court of the National District], 16 octubre 2003, Sentencia No. 453 [Judgment No. 453] (Dom. Rep); *see also* Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 154 (Sept. 8, 2005) (discussing Judgment No. 453).

116. *See The Girls Yean and Bosico* ¶¶ 144-47.

117. Ley General de Migración, No. 285-04 [General Migration Law, No. 285-04], art. 36. (G.O. No. 10291) (Aug. 15, 2004) (Dom. Rep.). Note that this appeared to be the same legal proposal that had been made in the Balaguer-era memo, but that was never implemented.

defined under the law were irregular migrants, borderland populations, students, and temporary workers—categories that were generally considered to overlap with the majority of the Haitian migrant population in the Dominican Republic.[118]

The international human rights community became increasingly engaged in the plight of Haitian migrants and their children throughout this period.[119] The most concrete intervention to address discriminatory practices related to nationality came with *The Girls Yean and Bosico v. Dominican Republic*, a case decided by the Inter-American Court in 2005.[120]

The case of Dilcia Yean and Violeta Bosico was emblematic of the plight of the children of Haitian descent.[121] These two girls had Dominican mothers and Haitian fathers, and were born in or around *bateyes*—communities of agricultural workers who labored on sugar plantations—rather than in hospitals.[122] When their mothers traveled to the civil registry to request late issued birth certificates, they were told that they did not qualify because they could not meet onerous documentary requirements.[123] Unable to secure a birth certificate, Violeta was forced to leave fourth grade and had to study in night school with adults.[124] Moreover, the children suffered psychologically as a result of the marginalization and discrimination they suffered.[125] Theirs was the experience of many children of Haitian descent in the Dominican Republic at that time, who were similarly denied birth certificates despite their apparent right to Dominican nationality under the Constitution.[126]

The Inter-American Court set forth an international law framework which limited the discretion of the Dominican Republic in matters of nationality: "on the one hand, by their obligation to provide individuals with the equal and effective protection of the law and, on the other hand, by their obligation to prevent, avoid and reduce statelessness."[127] The Court found that Dominican authorities had arbitrarily applied overly strict documentary requirements to the girls' requests for late registration, and refused to register their births when they failed to meet those requirements.[128] The Court considered the actions of the civil registry in the

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118. *Id.*

119. *See* Inter-Am. Comm'n H.R., *Report on the Situation of Human Rights in the Dominican Republic*, Chap. IX, OEA/Ser.L/V/II.104, doc. 49 rev. 1 (Oct. 7, 1999), http://www.cidh.org/countryrep/DominicanRep99/Chapter9.htm [https://perma.cc/M5J4-GCLS].

120. *The Girls Yean and Bosico* at 85 (indicating the date of the judgment).

121. *See* Joshua Armstrong, *Dark Skin and 'Strange' Name Lead to Landmark Ruling*, CRONKITE BORDERLANDS INITIATIVE, http://cronkite.asu.edu/buffett/dr/landmark_ruling.html [https://perma.cc/SX28-GDUJ].

122. *The Girls Yean and Bosico* ¶¶ 109(6)-109(8).

123. *Id.* ¶¶ 109(14)-109(17).

124. *Id.* ¶¶ 109(34)-109(37).

125. *Id.* ¶ 86(c)(1) (summarizing an Expert Report by Débora E. Soler Munczek, psychologist).

126. *Id.* ¶ 85(b)(1) (summarizing an Expert Report by Samuel Martínez, anthropologist).

127. *Id.* ¶ 140.

128. *Id.* ¶ 166.

context of the history of anti-Haitian sentiment in the Dominican Republic, and referred to reports of systematic discriminatory refusals to register the births of children born to Haitian parents.[129] The Court then concluded that the arbitrary denial of birth registration deprived the two girls of their human right to nationality and left them stateless.[130]

In finding that the girls were stateless, the Court did not specifically analyze or address Haitian law regarding nationality; rather, it focused on the wrongful actions of the Dominican authorities in denying them Dominican nationality.[131] This determination by the Inter-American Court that these girls who were born in the Dominican Republic to a Haitian parent became stateless when they were denied Dominican nationality set off a statelessness debate that still rages today.

B. A Clash Over the Meaning of Statelessness

The decision of the Inter-American Court in *The Girls Yean and Bosico* came on the heels of the 2004 immigration law, which declared that the children of non-residents would not be considered Dominican nationals because their parents were "in transit" under the Constitution.[132] A broad coalition of Dominican civil society actors challenged the law as unconstitutional, arguing that this interpretation of "in transit" was both contrary to the evident meaning of the Constitution and discriminatory in purpose and effect.[133]

The Dominican Supreme Court of Justice (SCJ), sitting in its capacity as a constitutional court, held the 2004 immigration law to be constitutional just months after the Inter-American Court decided *The Girls Yean and Bosico*.[134] The SCJ set forth a very different analysis of the state's international obligations. First, it addressed the argument that the law was discriminatory, finding that it was not because it treated all foreigners equally.[135] Then it addressed the argument that the law perpetuated statelessness, but found that there was no basis for this concern because the children of migrants would derive Haitian citizenship from their Haitian parents.[136] The SCJ specifically referenced the Constitution of Haiti, which provided that all persons born to Haitians in foreign territory would be considered nationals of Haiti.[137]

While the decision of the SCJ did not refer specifically to the Inter-

129. *Id.* ¶¶ 168-70.
130. *Id.* ¶¶ 166, 172, 174.
131. *Id.* ¶¶ 152-172.
132. General Migration Law, No. 285-04, *supra* note 117, art. 36 (Dom. Rep.).
133. Demanda en Declatoria de Inconstitucionalidad de la Ley General de Migración 285-04 [Complaint for a Declaratory Judgment on the Unconstitutionality of the General Law of Migration No. 285-04] (Jun. 23, 2005) (on file with author).
134. The SCJ made its ruling on December 14, 2005. *See* SCJ, 14 diciembre 2005, B.J. No. 1141, p. 1 (Dom. Rep.).
135. *Id.* at 7-8.
136. *See id.* at 8-9.
137. *See id.* at 9.

American Court decision, there was little question that it was responding to the regional tribunal in both the form and substance of its analysis. First, it issued its decision only months after the Inter-American ruling, and after very public pronouncements of high-level Dominican officials denouncing the regional tribunal.[138] Second, the SCJ followed the framework that the Inter-American Court had set forth in *The Girls Yean and Bosico*, analyzing possible limitations on the interpretation of the nationality provision of the Dominican Constitution set by state obligations not to discriminate and to reduce statelessness.[139] The SCJ purported to apply the American Convention on Human Rights and other key human rights instruments,[140] and provided a specific analysis of the obligations of the Dominican Republic under the 1961 Convention on the Reduction of Statelessness.[141]

This exchange between the Inter-American Court and the SCJ elevated the issue of statelessness in the debate about nationality in the Dominican Republic. The political and legal significance of statelessness was made evident by the reasoning of each court, and each side of the nationality debate began to view the statelessness question as important to its ability to prevail. Both national and international actors took this cue and began to refine their positions as to the statelessness of persons born in the Dominican Republic to Haitian parents.

Meanwhile, the situation deteriorated in the Dominican Republic. Once the 2004 law had been sustained as constitutional, the Central Electoral Board (*Junta Central Electoral*, "JCE"), which was the entity responsible for birth registration and national identification documents in the Dominican Republic, began to apply its nationality framework retroactively.[142] In 2007, an internal memo of the JCE known as "Circular 017" directed civil registry offices to review birth certificates before issuing copies of identity documents.[143] The JCE then issued "Resolution 12," which provided that

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138. *See* David C. Baluarte, *Inter-American Justice Comes to the Dominican Republic: An Island Shakes as Human Rights and Sovereignty Clash*, 13 HUM. RTS. BRIEF 25, 28 (2006) (discussing multiple officials' reactions to the Inter-American Court's decision in *The Girls Yean and Bosico*).

139. *See supra* notes 134-35 and accompanying text.

140. *See* SCJ, 14 diciembre 2005, B.J. No. 1141, p. 3 (Dom. Rep.) (listing human rights instruments the SCJ took into account); *id.* at 5 (listing relevant portions of the Universal Declaration of Human Rights and the International Covenant on Social, Economic and Cultural Rights).

141. *Id.* at 8-9. The Dominican Republic signed the 1961 Convention in 1961. *See* Status of the 1961 Convention, *supra* note 85.

142. *See* SAIS Int'l Human Rights Clinic, *Justice Derailed: The Uncertain Fate of Haitian Migrants and Dominicans of Haitian Descent in the Dominican Republic*, JOHNS HOPKINS UNIV. SCH. OF ADVANCED INT'L STUD. 22 (2015), https://www.sais-jhu.edu/sites/default/files/Final-Report-Justice-Derailed-The-Uncertain-Fate-2015-v1.pdf [https://perma.cc/ZZ6H-HQPT].

143. Junta Central Electoral [JCE] [Central Elections Board], Circular No. 017 del 29 de marzo de 2007, que consigna el estricto cumplimiento a la Ley No. 659 sobre Actos del Estado Civil y sus modificaciones al firmar las Actas de Nacimiento o cualquier documento [Circular No. 017 of Mar. 29, 2007, pronouncing strict compliance with Act No. 659 governing Civil Status Acts and its amendments when signing Birth Certificates or any document] (Mar. 29, 2007) (Dom. Rep.); *see also 2015 IACHR Report on the Dominican Republic*, *supra* note 111, ¶ 166 (discussing the issuance and effects of Circular No. 017); Open Soc'y Justice Initiative,

civil registry offices should suspend birth certificates with irregularities, and that the JCE would initiate proceedings for the nullification of these documents in appropriate cases.[144]

Many people whose nationality documents were deemed to contain irregularities pursuant to Circular 017 had been registered by Haitian parents with a work permit. Persons registered in this manner had understood themselves to be Dominican, and many had been documented as such their entire lives. These people were at once told that they had been issued documentation under an erroneous interpretation of the Constitution, and that they were not Dominican. This campaign of denationalization began perhaps the most troubling chapter in recent history of the treatment by the Dominican State of this national ethnic minority.

In 2010, the Dominican Republic took steps to definitively end the nationality debate by amending the nationality provision of its Constitution to guarantee nationality to all persons born in the Dominican national territory, excluding the children of "foreigners in transit or residing illegally in the Dominican territory."[145] Article 18 of the 2010 Constitution further provides that "[a]ny foreigner defined as such in the Dominican laws is considered a person in transit."[146] The effect of this provision was to provide clarity about who would have birthright nationality in the Dominican Republic, and to ensure the constitutionality of the framework set forth in the 2004 law. Nevertheless, this change did not resolve the situation of persons who had been born under the previous constitutional framework and believed themselves to be Dominican.

Persons affected by the policy of denationalization began to raise legal challenges against the decisions of the JCE to seize nationality documents.[147] There was a split in resolution of these cases, with some lower court judges finding that denationalization constituted a violation of the Constitution, which clearly extended birthright nationality to the children of long-term, irregular migrants.[148] Other judges agreed with the

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Dominicans of Haitian Descent and the Compromised Right of Nationality, OPEN SOC'Y FOUNDS. 11-13 (Oct. 2010), https://www.opensocietyfoundations.org/sites/default/files/Dominican-Republic-Nationality-Report-ENG-20110805.pdf [https://perma.cc/D66U-FHSP] [hereinafter *Open Society Report on the Compromised Right of Nationality*] (same).

144. JCE, Resolución No. 12/2007 de fecha 10/12/07, sobre procedimiento de suspensión provisional de la expedición de Actas del Estado Civil viciadas o instrumentadas de manera irregular. [Resolution No. 12/2007 of Dec. 10, 2007, which establishes the procedure for provisionally suspending issuance of birth, marriage and death certificates that are defective or were issued improperly] (Dec. 10, 2007) (Dom. Rep.); *see also 2015 IACHR Report on the Dominican Republic, supra* note 111, ¶¶ 166-67 (discussing the issuance and effects of Resolution No. 12/2007); *Open Society Report on the Compromised Right of Nationality*, supra note supra note 143, at 13 (same).

145. 2010 CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [2010 CONSTITUTION OF THE DOMINICAN REPUBLIC], Jan. 26, 2010, art. 18.

146. *Id.*

147. *See, e.g.*, TCRD, 25 septiembre 2013, Sentencia TC/0168/13.

148. *See* TCRD, 26 diciembre 2013, Sentencia TC/0275/13 [Judgment TC/0275/13], pp. 2-8, https://www.tribunalconstitucional.gob.do/sites/default/files//documentos/Sentencia%20

JCE interpretation that had been framed in the 2004 immigration law, specifically finding that "non-residents," as redefined in that law, were "in transit" under the Constitution and therefore their children were not Dominican citizens.[149] These cases were appealed, and they ultimately arrived at a new Constitutional Court, which had been established by the 2010 Constitution.[150]

In 2013, the Dominican Constitutional Court elaborated on positions taken by the SCJ with regard to the scope of "in transit" exception to birthright nationality[151] and retroactively interpreted the nationality provisions of every Dominican Constitution since 1929.[152] The case was that of Julianna Deguis Pierre, a woman whose birth certificate had been confiscated by the JCE.[153] The central issue was whether her registration as Dominican at birth was improper due to the fact that her parents were agricultural workers from Haiti.[154] The Constitutional Court found that her identity documents had been properly seized and that nullification proceedings against her Dominican nationality had been appropriately initiated under the Constitution.[155]

In finding that these actions were appropriate and consistent with the Dominican Constitution, the Constitutional Court provided an analysis under the title: "The appellant does not derive Dominican nationality because she is the child of foreigners in transit *unless she would otherwise be stateless*."[156] The Court provided a four-part analysis in support of its conclusion that Ms. Deguis had acquired Haitian nationality and would not be left stateless if she was deprived of her Dominican nationality.[157] Notably, the Court dedicated a substantial part of its analysis to refuting the Inter-American Court's interpretation of Dominican laws in *The Girls Yean and Bosico*.[158] The Constitutional Court then provided a statelessness

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TC%200275-13%20C.pdf [https://perma.cc/NVQ3-385A] (summarizing the findings in and grounds of the decision under appeal, Civil y Comercial del Juzgado de Primera Instancia del Distrito Judicial de San Pedro de Macorís [Civil and Commercial Chamber of the First Instance of the Judicial District of San Pedro de Macoris], Sentencia Núm. 708-2012 (Nov. 30, 2012)).

149. *See* TCRD, 25 septiembre 2013, Sentencia TC/0168/13, pp. 2-4 (summarizing the findings in the decision under appeal, Cámara Civil, Comercial y de Trabajo del Juzgado de Primera Instancia del Distrito Judicial de Monte Plata [Civil, Commercial, and Labor Chamber of the First Instance of the Judicial District of Monte Plata], Sentencia Núm. 473/2012 [Judgment No. 473/2012] (2012)).

150. 2010 CONSTITUTION OF THE DOMINICAN REPUBLIC, Jan. 26, 2010, arts. 184-89.

151. *See* TCRD, 25 septiembre 2013, Sentencia TC/0168/13, pp. 53-68 (elaborating on the meaning of "in transit" under the laws of the Dominican Republic as part of a broader discussion about the meaning of this exception in the 1966 Constitution).

152. *Id.* at pp. 99-100 (ordering the JCE to review and revise the birth registry since 1929 to give effect to the TCRD's interpretation of the "in transit" exception in TC/0168/13).

153. *Id.* at 3.

154. *See id.* at 35-36 (describing her parents' status as agricultural workers who registered her with "fichas," which were the documents provided to such laborers).

155. *Id.* at 98.

156. *Id.* at 43 (emphasis added) (author's translation).

157. *Id.*

158. *See id.* at 68-75 (concluding, in a section titled *The Position of the Inter-American Court of Human Rights*, that the Inter-American Court committed a "flagrant error of interpretation" when it relied on a Dominican law from 1939 to suggest that the Dominican Republic should

analysis, which included reference to the Haitian legal framework, and concluded that "the appellant d[id] not face a risk of statelessness."[159]

The Constitutional Court acknowledged that the 1961 Convention, the CRC, and the ICCPR each required that the Dominican Republic guarantee nationality to a child born in its territory that would otherwise be left stateless.[160] However, the Constitutional Court found that this protection was not triggered in the case of Ms. Deguis. The Court cited the Constitution of Haiti, which provides that "Haitians of origin are: . . . 2. Everyone born in foreign territory to a Haitian father or mother."[161] The Court went on to reiterate that this guarantee of *jus sanguinis* nationality was present in Haitian Constitutions spanning more than a century.[162] The Constitutional Court concluded that Ms. Deguis had acquired Haitian nationality under the Haitian Constitution, and that the international protection against statelessness therefore did not apply.[163] The Constitutional Court went on to highlight that the right to Haitian nationality was guaranteed through mechanisms for consular birth registry, and that Ms. Deguis' parents should have registered her birth though the established process.[164]

The decision of the Constitutional Court caused international outcry, and its order requiring Dominican authorities to review the birth registry and identify persons who had received Dominican nationality in error was widely viewed as the culmination of the campaign of denationalization.[165] The Inter-American Court responded in 2014, in the context of a case that had been pending against the Dominican Republic before the Inter-American system for nearly fifteen years.[166]

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limit the "in transit" concept to 10 days).

159. *Id.* at 75.

160. *Id.* at 76-77.

161. *Id.* at 77.

162. *See id.* at 78 (finding similar provisions in the Constitutions of Haiti from 1843, 1846, 1849, 1867, 1874, 1879, 1888, 1889, 1946, 1957, 1964, 1971, 1983, 1987, and 2011).

163. *Id.* at 78; *see also id.* at 79-80 (highlighting that the same logic had been applied by a Spanish court, which had found that a child born to Dominican parents could not acquire Spanish nationality under a theory of statelessness protection because the Dominican Constitution provided for Dominican nationality *jus sanguinis*).

164. *Id.* at 81.

165. *See, e.g.*, *Amnesty Int'l Report on Stateless People in the Dominican Republic*, *supra* note 13, at 11-21; *Human Rights Watch Report on Arbitrary Deprivation of Nationality in the Dominican Republic*, *supra* note 5; Open Soc'y Justice Initiative, *Dominican Republic Court Ruling Raises Mass Statelessness Threat*, OPEN SOC'Y FOUNDS. (Oct. 2, 2013), https://www.opensocietyfoundations.org/press-releases/dominican-republic-court-ruling-raises-mass-statelessness-threat [https://perma.cc/T3ZK-N3KT].

166. Case of Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶¶ 3-6 (Aug. 28, 2014) (explaining the procedural background of the case against the Dominican Republic).

C. *Expelled Dominicans and Haitians vs. Dominican Republic*

In *Expelled Dominicans and Haitians vs. Dominican Republic,* the Inter-American Court responded to the arguments of the Supreme Court of Justice and the Constitutional Court that Dominican-born persons of Haitian descent were not stateless because they derived Haitian nationality *jus sanguinis* under the Haitian Constitution. In this instance, the Court retreated from its earlier position expressed in *The Girls Yean and Bosico* that the Dominican Republic left Dominican-born persons of Haitian descent stateless when it refused to register them as Dominican nationals. In *Expelled Dominicans and Haitians,* by contrast, the Inter-American Court found that the Dominican State had an obligation to resolve the "risk of statelessness" faced by children of Haitian descent born in its territory,[167] and moreover that its failure to do so triggered the obligation to guarantee Dominican nationality to those persons.[168] In this way, the Court extended the well-established rule that a state must grant its nationality to stateless children born in its territory, and required protection of children who face a risk of statelessness. The following discussion closely examines the reasoning of the Inter-American Court.

Expelled Dominicans and Haitians concerned the practice of collective expulsion from the Dominican Republic, characterized by the mass deportation of persons to Haiti without process, based largely on their physical appearance.[169] The victims in the case included two individuals and four families, some of whom were Dominicans with nationality documents and others who were Dominican-born but who did not have nationality documents.[170] The victims made a range of allegations relating to their right to nationality, including claims that Dominican officials deported them without consideration of either their national identity documents[171] or the fact that they had been born in the Dominican Republic.[172] The Inter-American Court then analyzed these allegations' compatibility with the Dominican Republic's obligation to respect the right to nationality in conjunction with related rights, in particular the principles of equality and non-discrimination.[173]

In its decision, the Inter-American Court set forth the legal standards it

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167. *Id.* ¶ 298.

168. *Id.* ¶ 458.

169. *Id.* ¶¶ 167-171.

170. *Id.* ¶¶ 65-76 (describing the circumstances of the Medina family, the Fils-Aimé family, Bersson Gelin, Sensión Family, Rafaelito Pérez Charles, and the Jean family).

171. *See id.* ¶¶ 201, 221 (citing testimony of Wilian Medina and Rafaelito Pérez Charles).

172. *See id.* ¶¶ 209-12 (citing testimony of Jeanty Fils-Aimé); *id.* ¶¶ 213-15 (citing testimony of Bersson Gelin); *id.* ¶¶ 222-24 (citing testimony of Victor, Miguel, Victoria, and Natalie Jean).

173. The Inter-American Court commonly analyzes certain human rights obligations in conjunction with one another, as it did in this case where it considered violations of the rights to juridical personality, to a name, to nationality, and to identity, in relation to the rights of the child, to equal protection, and the obligations to respect rights without discrimination and to adopt domestic legal provisions. *See id.* at ¶¶ 225, 343.

would use to analyze the alleged violations of the right to nationality.[174] The Inter-American Court spoke of nationality as a "natural condition of the human being," which serves as a basis for both political and civil status.[175] The Court acknowledged that, while the power to grant nationality is within the sovereign purview of a state, states must exercise that power in accordance with well-established rules of international law.[176] The Court then recalled its framework for analysis in *The Girls Yean and Bosico*, where it established that states must abide by "their obligation to prevent, to avoid and to reduce statelessness," and "their obligation to provide each individual with the equal and effective protection of the law without discrimination."[177]

With regard to the obligation to avoid statelessness, the Court recalled that states may not adopt practices or laws that tend to create statelessness, and that this obligation should be assessed at the moment of birth.[178] The Inter-American Court cited the ICCPR and highlighted the Human Rights Committee's reiteration of the well-established norm that states are required to take every "appropriate measure" to ensure that children acquire nationality at birth.[179] It further referenced the CRC in emphasizing this obligation, using it as guidance on the scope and meaning of the right to nationality guaranteed under the American Convention.[180] The Court recalled its own application of these norms in *The Girls Yean and Bosico*, and reiterated that

> the condition of being born in the territory of a State is the only one that needs to be proved in order to acquire nationality, in the case of those who would not have the right to another nationality if they did not acquire that of the State where they were born.[181]

The Court then took a novel jurisprudential step in elaborating the circumstances that trigger this legal right to nationality in the place of birth. The Court established that

> if the State cannot be certain that a child born in its territory can obtain the nationality of another State, for example the nationality of a parent by *ius sanguinis*, that State has the obligation to grant it nationality (*ex*

174. *Id.* ¶¶ 253-64.

175. *Id.* ¶ 255 (citing Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 32 (Jan. 19, 1984)).

176. *Id.* ¶ 256.

177. *Id.* (citing Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 140 (Sept. 8, 2005)).

178. *Id.* ¶ 257-58.

179. *Id.* ¶ 258.

180. *Id.* ¶ 258-61.

181. *Id.* ¶ 260 (quoting Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 156 (Sept. 8, 2005)).

> *lege,* automatically), to avoid a situation of statelessness at birth, pursuant to Article 20(2) of the American Convention. This obligation also applies in the hypothesis that the parents cannot (owing to the existence of [*de*] *facto* obstacles) register their children in the State of their nationality.[182]

By taking this step, the Court asserted two new potential violations of the right to nationality under the Convention. First, the Court introduced the idea that a state must be sure that a child born in its territory has access to another nationality before it is relieved of the obligation to extend its own, but failed to provide clarity concerning the degree of certainty required for such relief. Second, the Court established that a person could be a national under the law of another jurisdiction at birth while not being able to access that right in fact, a factor which would inform the foregoing certainty calculation. Notably, in articulating these standards, the Court relied on a set of UNHCR statelessness guidelines on state obligations under the 1961 Convention to ensure a child would not be stateless at birth.[183]

With regard to the equal protection of the law, the Court noted that both direct and indirect practices of discrimination are impermissible under international human rights law. Violations of this obligation may arise in cases of "indirect discrimination reflected in the disproportionate impact of laws, actions, policies or other measures that, even though their wording is or appears to be neutral, or has a general and undifferentiated scope, have negative effects on certain vulnerable groups."[184] The Court emphasized that states must "abstain from establishing discriminatory regulations or regulations that have discriminatory effects on different groups" when devising the mechanisms for granting nationality.[185] Furthermore, the Court reiterated its prior conclusion that the obligation not to discriminate binds states "irrespective of a person's migratory status, and this obligation extends to the sphere of the right to nationality."[186]

In applying these standards to the victims in *Expelled Dominicans and Haitians*, the Court considered the situation of persons who were born in the Dominican Republic but who had never been registered as Dominican.[187] Among others, the Court reviewed the situation of Victor Jean and his three children, Victoria, Natalie, and Miguel, all of whom were born in Dominican territory but were never registered or issued nationality documents and were subsequently expelled from the country.[188] The Court

182. *Id.* ¶ 261 (emphasis in original).

183. *Id.* (citing UNCHR Guidelines on Statelessness No. 4, *supra* note 84, ¶ 26).

184. *Id.* ¶ 263 (citing Case of Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 234 (Oct. 24, 2012)).

185. *Id.* ¶ 264.

186. *Id.* (citing Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶¶ 155-56 (Sept. 8, 2005)).

187. *See id.* ¶ 126.

188. *Id.* ¶ 277.

approached their lack of documentation as an "omission" by the Dominican Republic, and examined whether such an omission constituted a violation of the state's human rights obligations.[189]

The Dominican state had argued to the Court that Victor Jean and his children were not entitled to Dominican nationality or documentation, and that they would not become stateless because they were entitled to Haitian nationality.[190] The Inter-American Court considered that the state's posture made it unnecessary "to verify factual aspects relating to the alleged obstacles to obtain documents, or the alleged 'refusal' of the authorities to grant these."[191] Indeed, the Jeans had made factual allegations that they were denied their right to register their children's births and obtain identity documents.[192] However, the Dominican State argued that they had no right to those documents, thereby implicitly affirming the alleged abusive actions of unnamed civil registry officials. Accordingly, the Court cut directly to the legality of the state's position.[193]

The Inter-American Court began this analysis by considering the Jeans' right to Dominican nationality under the 1955 Dominican Constitution, which was in place when Victor Jean was born, and under the 1994 Dominican Constitution, which governed at the time of his three children's births.[194] The Court acknowledged that the two constitutions included the same "in transit" exception,[195] and recalled that the 2003 appeals court decision that found this exception did not encompass irregular migrants.[196] The Court observed, however, that the 2004 immigration law had included irregular migrants within the "in transit" exception,[197] and that this legislation had been subsequently upheld in 2005 by the Dominican Supreme Court of Justice.[198] The Court noted that the Dominican Constitution itself was amended in 2010 to exclude the children of unauthorized migrants as nationals,[199] and that the Constitutional Court in 2013 interpreted the provisions of every constitution dating back to 1929 in a manner consistent with the standard set forth in the 2010 Constitution.[200]

The Court noted that the state's argument with regard to the alleged discriminatory effects of the broadened and retroactively applied "in transit" exception was consistent with the 2005 Supreme Court decision and the 2013 Constitutional Court decision.[201] It further acknowledged that such legal developments were not discriminatory per se.[202] The Court then

189. *Id.* ¶ 278.
190. *Id.* ¶ 279.
191. *Id.*
192. *Id.* at 74 n.258.
193. *Id.* ¶ 279.
194. *Id.* ¶¶ 280, 297.
195. *Id.* ¶ 280
196. *Id.* ¶ 281.
197. *Id.* ¶ 282.
198. *Id.* ¶ 283.
199. *Id.* ¶ 284.
200. *Id.* ¶¶ 285-88.
201. *Id.* ¶ 293.
202. *Id.* ¶¶ 289-92.

recalled its own decision in *The Girls Yean and Bosico*, and suggested that the overly broad interpretation of "in transit" was not reasonable, and that the state needed to apply a more limited time frame in order to comply with its human rights obligations.[203] In an important analytical turn, the Inter-American Court then disengaged with its anti-discrimination analysis and focused on whether the state's refusal to register the Jean family and to grant them nationality documents violated their right to nationality under the law of statelessness.[204]

The Court indicated that the Dominican Republic had recognized that it would be required under international law to grant Dominican nationality to the Jeans if they were stateless.[205] It then examined the state's argument that the Jeans were not stateless because they had the right to obtain Haitian nationality.[206] In its discussion, the Court emphasized that the mere claim by the Dominican Republic that the Jeans could acquire Haitian nationality under the Haitian Constitution *jus sanguinis* was insufficient to demonstrate that they were not stateless. According to the Court, this claim was insufficient because "the State has not proved that the presumed victims who never obtained Dominican nationality are, in fact, able to obtain Haitian nationality."[207] Notably, the Court considered the state to have the burden of proving that the Jeans would be able to exercise any right to nationality in Haiti.

The Inter-American Court never specifically explained its decision to place this burden on the Dominican Republic, but the Court did provide some clues in the framing of its analysis. First, the Court stated at the outset that it would be analyzing the "omission" of the Dominican Republic in declining to document the Jeans.[208] While the Court did not cite any specific authority to support the idea that the state should bear the burden in justifying such an omission, this framing provides some insight. Second, the Court introduced the notion that a state has the obligation to be sure that a child born in its territory can acquire another nationality, and that the state must consider de facto barriers to acquiring the other nationality.[209] Together, the omission by the state to issue documentation, combined with its obligation to confirm that the Jeans had acquired another nationality, presumably justified placing the burden on the state to demonstrate that the Jeans were not stateless.

In support of the position that the state had not met its burden, the Court referred to "certain well-known public information" about the

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203. *Id.* ¶ 294.

204. *See* ¶¶ 295-301; *see also* ¶¶ 302-25 (finding separately that the Dominican Republic had discriminatorily deprived the Jeans of their right to nationality with the succession of laws, policies, and judicial rulings, under Article 2 of the American Convention, and left them without Dominican nationality, in violation of Article 20, without making explicit reference to the law of statelessness).

205. *Id.* ¶ 296.

206. *Id.* ¶ 297.

207. *Id.*

208. *Id.* ¶ 278.

209. *Id.* ¶ 261.

Haitian legal framework.[210] The Court reviewed the 1957 Haitian Constitution, effective at the time of Victor Jean's birth, and noted that it provided for nationality *jus sanguinis* to the child of a Haitian father born abroad.[211] However, because filiation had not been established for Victor Jean, the Court found that there existed the possibility that Haiti would not consider him a Haitian national.[212] The 1987 Haitian Constitution, in effect at the time of the Jean children's births, provided *jus sanguinis* nationality to a child born abroad to either a Haitian father or mother.[213] At the same time, the Court pointed out a 1984 law that prevented children born abroad to a Haitian mother and foreign father from acquiring Haitian nationality until the age of 18.[214] The Court indicated that the effect of the 1984 law on the 1987 Constitution had not been established, and that Victor Jean could have been considered "foreign" under the Haitian Constitution because the nationality of his father had never been established.[215]

The Court acknowledged that it was not in a position to make a pronouncement on the operation of Haitian law;[216] rather, it was "merely demonstrating, based on certain public information, that the State's argument that the presumed victims could acquire Haitian nationality would have required greater substantiation to support it."[217] On this basis, the Court concluded that "this would entail the *risk of statelessness* for the presumed victims, because the State has not proved sufficiently that these persons would obtain another nationality."[218] The Court concluded that the Dominican Republic had retroactively applied norms concerning the legal certainty of the Jeans' right to nationality, that they faced a risk of statelessness when it did so, and that the Dominican state had therefore arbitrarily violated their right to nationality.[219]

Three points warrant particular emphasis with regard to this most recent iteration of the statelessness debate between the Inter-American Court and the Dominican justice system. First, the Inter-American Court did not declare the Jeans stateless. This is particularly important, because it represents a shift in its position in *The Girls Yean and Bosico*, where it found that the two girls had been left stateless after Dominican authorities had denied them birth certificates. Second, the Court placed the burden on the Dominican Republic to demonstrate that the Jeans were not stateless at birth. Finally, the Court considered some possible interpretations of Haitian law in concluding that the Jeans faced a risk of statelessness, triggering the rule of law that a person must acquire the nationality of the place of birth if

210. *Id.* ¶ 297.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *See id.* ("[I]t should be clarified that this does not mean that the Court, in the context of this case, is examining the laws of Haiti.").
217. *Id.*
218. *Id.* ¶ 298 (emphasis added).
219. *Id.*

she does not have a right to any other nationality.

When understood in these terms, the decision of the Inter-American Court in *Expelled Dominicans and Haitians* expands statelessness protection through a mandatory grant of nationality in the place of birth to persons who face a "risk of statelessness." Indeed, the Inter-American Court did not find that the Jeans were stateless, but rather that under a possible interpretation of Haitian law, they faced a risk of statelessness. By requiring the Dominican Republic to extend Dominican nationality whenever it had not adequately addressed such a risk, the Court effectively extended statelessness protection to persons that had not been declared stateless.

The decision of the Inter-American Court to expand the right to nationality in the place of birth under the American Convention to persons who face a risk of statelessness is a notable normative development. The next section provides a critique of this rule, arguing that it unnecessarily extended a well-established rule of protection, and that policy implications of this extension may cause the Court's well-intentioned progressive development of norms to backfire.

III. CONSIDERING RISK WITHIN THE STATELESSNESS DETERMINATION PROCESS

When the Inter-American Court extended protection under the international law of statelessness to persons who face a risk of statelessness, it expanded the scope of a well-established rule limited to the protection of stateless persons.[220] Gerald L. Neuman has criticized the Inter-American Court for "undervalu[ing] the consent of the relevant community of states as a factor in the interpretation of a human rights treaty" when it utilizes international human rights norms to interpret the American Convention.[221] Neuman has suggested that this "neglect" both distorts human rights norms and potentially undermines the effectiveness of the regional human rights system.[222] Neuman's critique can be applied to the Inter-American Court's interpretation of international obligations under the law of statelessness in *Expelled Dominicans and Haitians*. Arguably, the Inter-American Court's decision distorts norms of statelessness protection, and potentially undermines the effectiveness of the Inter-American system in its effort to combat statelessness. These deleterious consequences can be avoided by the Inter-American Court and other international authorities if they remain anchored to the well-established rule of protection for stateless persons, while incorporating a risk assessment into the determination of statelessness.

The first sub-section below describes the exact nature of the normative distortion in *Expelled Dominicans and Haitians*, and provides the reasoned solution of including a risk assessment as part of a statelessness

220. *See supra* Section II.C.

221. Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 102 (2008).

222. *Id.*

determination. It argues that the Inter-American Court's "risk of statelessness" is analogous to de facto statelessness, which is a status unprotected under the international law of statelessness. A protracted debate in the current campaign to eradicate statelessness has recently concluded with broad acceptance that de jure—rather than de facto—statelessness is the appropriate trigger for protection under the law of statelessness. Backsliding on the commitment to de jure statelessness could chill the steadily increasing support among states for legal protection for stateless persons, which is the principal aim of the campaign described in the first section of this Article.

The next sub-section outlines the steps in determining statelessness and considers the challenges inherent in this determination in the Dominican-Haitian context. Highlighting the appropriate legal and factual inquiries, it lays out the ambiguities in Haitian *jus sanguinis* nationality law as well as the challenges faced by persons who seek nationality solutions from Haitian public authorities. Recognizing that the concerns regarding the risk of statelessness are valid, this section demonstrates how the legal and factual challenges raised by the Inter-American Court in *Expelled Haitians and Dominicans* can be addressed in a statelessness determination process.

Finally, the last part of this Article discusses the challenge of identifying the appropriate level of risk that should trigger a finding of statelessness. In the absence of any law on point, and minimal guidance, this Article argues that a person who is more likely than not stateless should be considered a stateless person under the 1954 Convention, and thus should be protected with a grant of nationality in the place of birth as envisioned by the 1961 Convention. This recommendation accounts for important policy considerations such as the history of sovereign control over nationality as well as the tentative start to the campaign to eradicate global statelessness. Ultimately, it is animated by the universal and fundamental nature of the human right to nationality and the drastic consequences of a rule that would permit a greater chance of statelessness before the protection of nationality in the place of birth would apply.

A. Avoiding the De Facto Statelessness Dilemma

As the first section of this Article illustrated, the 1954 Convention defines a "stateless person" as one who is "not considered as a national by any state under the operation of its law."[223] This definition is also referred to as de jure statelessness, and it stands in contrast to de facto statelessness, which generally refers to persons who are nationals under the operation of laws of some country, but who do not receive the rights and privileges of such legal status. The consensus is that states are compelled to assist de jure stateless persons under the law of statelessness, and they are merely

223. 1954 Convention, *supra* note 10, art. 1.

encouraged to assist those who are de facto stateless.[224] The likeness between de facto statelessness and the Inter-American Court's "risk of statelessness" doctrine compels further examination, with important implications for statelessness protection.

The historical context in which the 1954 Convention was ultimately promulgated is an important starting point for this presentation of the de facto statelessness dilemma. As discussed above, the international community was animated by a concern for "unprotected" persons when it convened to deliberate about legal protection for refugees and stateless persons after the Second World War. Refugees were unprotected as a matter of fact, while stateless persons were unprotected as a matter of law. Notably, the refugee definition set forth in the 1951 Convention did not encompass all people who were factually unprotected; rather, it was aimed at protecting only those who feared persecution in their country because of some protected characteristic.[225] The 1954 Convention, on the other hand, extended protection to all persons who were legally unprotected by virtue of their lack of a nationality link to any country.

In arriving at the definition of "stateless person," the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons discussed the de facto statelessness concept at length.[226] There was a suggestion that an expansive idea of de facto statelessness should be incorporated into the definition of stateless person. Specifically, the United Kingdom argued for a broad understanding of de facto statelessness, which would include persons who were "refused" or "deprived" of protection by their state of nationality.[227] The Conference did not take up this suggestion. Ultimately, while the precise term "de facto stateless" does not appear anywhere in the body of the Convention,[228] the Final Act encouraged each state party to provide the protection of the Convention in cases "when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national."[229] Notably, this provision only covered persons who had renounced the protection of their country of nationality, and the instrument did not create any obligation to protect such persons.

A Conference that convened in 1959, and then again in 1961 to finish its work on the Convention on the Reduction of Statelessness, also demonstrated some concern about de facto statelessness.[230] Again, that Conference declined to include any binding legal obligations for state parties to protect de facto stateless persons.[231] Rather, it included a recommendation in its Final Act that "persons who are stateless *de facto*

224. *See, e.g.*, VAN WAAS, *supra* note 79, at 19-27; Massey, *supra* note 28, at 17, 23; Jason E. Tucker, *Questioning De Facto Statelessness by Looking at De Facto Citizenship*, 19 TILBURG L. REV. 277, 277-78 (2014).

225. *See* 1951 Convention, *supra* note 73, art. 1(A).

226. Massey, *supra* note 28, at 17.

227. *Id.* at 18.

228. *Id.*

229. *Id.* at 17.

230. *Id.* at 23.

231. *Id.*

should as far as possible be treated as stateless *de jure* to enable them to acquire effective nationality."[232] This suggested that states could—but were not required to—develop rules on nationality acquisition and deprivation that would reduce the likelihood that persons would become de facto stateless.[233]

In the context of the Final Act of the 1961 Convention, de facto statelessness appeared to have taken on a different meaning than de facto statelessness in the Final Act of the 1954 Convention. While no definition was provided, commentary by the UNHCR at the Conference suggested that de facto statelessness meant ineffective nationality, or that one had a nationality link but did not enjoy all of the rights associated with citizenship.[234] Even so, there was some recognition of the difficulty in distinguishing between de jure and de facto statelessness. Paul Weis, who represented the UNHCR at the Conference, highlighted the existence of "many cases where a person's nationality status cannot be established, where it is doubtful, undetermined or unknown," making the distinction between legal and factual statelessness "difficult to draw."[235]

Indeed, while some cases of statelessness are clear, namely where there is simply no domestic nationality law regime that could be interpreted to extend nationality to an individual, there are other cases in which a determination of legal versus factual statelessness requires closer examination. Laura van Waas has surveyed the many uses of de facto statelessness, and suggested that this term is generally used to describe one of three situations: 1) where a person is generally deprived of the rights associated with nationality, 2) "where a person's nationality is contested or disputed," and 3) where a person is "unable to . . . prove his or her nationality."[236]

Van Waas notes that the first category has historically been referred to as "ineffective nationality," which she defines as "not enjoy[ing] the rights of citizenship enjoyed by other non-criminal citizens of the same state."[237] Van Waas suggests that this category of de facto statelessness is amorphous, inasmuch as it could reasonably encompass anyone whose human rights have been violated, and argues that the human rights machinery is better suited to address issues of ineffective nationality.[238]

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232. *Id.* (quoting U.N. Conference on the Elimination or Reduction of Future Statelessness, *Final Act of the United Nations Conference on the Elimination or Reduction of Future Statelessness*, Res. 1, A/CONF.9/14/Add.l (Aug. 29, 1961)).

233. *Id.*

234. *Id.* at 24.

235. Statement by Paul Weis to the United Nations Conference on the Elimination or Reduction of Future Statelessness (Aug. 25, 1961) (as quoted in Carol A. Batchelor, *Stateless Persons: Some Gaps in International Protection*, 7 INT'L J. REFUGEE L. 232, 252 (1995)); *see also* U.N. Conference on the Elimination or Reduction of Future Statelessness, Summary Record of the Twenty-Third Plenary Meeting: Held at Headquarters, New York on Friday, 25 August 1961, at 10:30 a.m., A/CONF.9/SR.23, at 13-14 (Oct. 11, 1961) (summarizing the statement by Paul Weis).

236. VAN WAAS, *supra* note 80, at 24.

237. *Id.*

238. *Id.* at 24-25. This position, set forth by van Waas, is also supported by Hugh Massey,

Generally, the literature on statelessness has accepted van Waas's contention that statelessness protection is inappropriate in cases of ineffective nationality, and that this challenge is better raised with the country of nationality as a violation of human rights.[239]

Meanwhile, the other two de facto statelessness scenarios where citizenship is disputed or cannot be established echo the "risk of statelessness" that triggered statelessness protection in the Inter-American Court decision. In that case, the Inter-American Court highlighted the ambiguity in how different rules under Haitian constitutions and decrees would be resolved, raising concerns about the need to establish filiation in order to qualify for nationality.[240] This is clearly a case of disputed nationality, which falls into the second category of de facto statelessness described by van Waas. According to van Waas, the appropriate next step would be a statelessness determination to decide whether international protection under the law of statelessness is appropriate.[241] Similarly, the charge in the cases of "risk of statelessness" would be to complete a statelessness determination.

When the Inter-American Court extended statelessness protection to persons who were arguably de facto stateless, it extended the protection of that body of law beyond its well-settled limits. The next step for the Inter-American Court after identifying the Jeans' "risk of statelessness" should have been to make a determination of statelessness. If it had found the Jeans to be stateless at birth, then the Dominican Republic—by its own admission—would have been obliged to provide them with nationality documents. As an explanation for why it did not take this course of action, the Inter-American Court only noted that the Dominican Republic had the burden to prove that the Jeans could acquire Haitian nationality, and had failed to meet this burden due to potentially conflicting, or ambiguous, Haitian laws.[242] The Court thus fell short of disproving Haitian nationality, or explicitly demonstrating statelessness. As such, it lacked the proper basis under the international law of statelessness to compel Dominican nationality.

The next section provides a framework for considering the statelessness determination that the Inter-American Court failed to make. The goal of this section is both to advance the argument that a statelessness determination is necessary in order to extend statelessness protection to Dominican-born persons of Haitian descent, and to recognize the potential

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Senior Legal Advisor at UNHCR Geneva, who writes that "there is no need for a special statelessness regime to address the problem of denial of rights attached to nationality as such problems are already covered by the international human rights regime." Massey, *supra* note 28, at 39.

239. *See e.g.*, Tucker, supra note 224, at 277-278; Massey, *supra* note 28, at 39-40.

240. Case of Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 297 (Aug. 28, 2014).

241. VAN WAAS, supra note 80, at 25-26.

242. *Expelled Dominicans and Haitians* ¶ 297 (finding that the Dominican Republic had not proven that the Jeans were able to obtain Haitian nationality as a matter of fact).

significance of the risk assessment suggested by the Inter-American Court in making that determination.

B. Returning to the Statelessness Determination

A statelessness determination is a complex matter that may involve scrutinizing evidence from multiple jurisdictions and assessing that evidence under different legal frameworks.[243] While a statelessness determination should be necessary to extend the protection of the international law of statelessness to Dominicans of Haitian descent, there are substantial challenges. First, determining whether a person is "not considered as a national of any state under the operation of its laws" requires 1) identification of the appropriate legal framework of each jurisdiction;[244] and 2) a determination of how state authorities apply that law in practice. Inasmuch as one of the central critiques of this Article is that the Inter-American Court extended statelessness protection in *Expelled Dominicans and Haitians* without completing such a determination,[245] the following discussion will explore some of the challenges that may have deterred the Court.

With regard to the inquiry into the relevant law of each jurisdiction, UNHCR guidance provides that "laws" include not just legislation, but also "ministerial decrees, regulations, [and] orders," as well as case law and customary practice where appropriate.[246] Of particular importance in this regard is that some laws operate automatically, while others do not. In essence, automatic nationality acquisition is triggered by the mere presence of a circumstance or event, "such as birth on a territory or birth to nationals of a state," whereas non-automatic modes of acquisition require an additional act of an individual or the state.[247]

While the analysis of both the Inter-American Court and Dominican courts into Dominican law has been quite detailed, the analysis of Haitian law by these courts has been superficial. However, a detailed review of Haitian nationality law is absolutely necessary if there is to be any clarity

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243. UNHCR, Handbook on Protection of Stateless Persons, ¶¶ 18, 23 (June 30, 2014), http://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf [https://perma.cc/6S5L-W2FK] [hereinafter UNHCR Handbook on Protection of Stateless Persons].

244. A preliminary step, not addressed here in detail, is to identify all those States with which an individual has a "relevant link, in particular by birth on the territory, descent, marriage, adoption or habitual residence." *Id.* ¶ 18. Guidance by the UNHCR does not elaborate on what constitutes a "relevant link," but the clear implication is that "relevant" is a fairly low standard, such that a country should be considered if there is some articulable connection between that jurisdiction and the individual seeking a determination of statelessness.

245. *See Expelled Dominicans and Haitians* ¶ 297 (noting that the Court was not, "in this context, examining the laws of Haiti"); *id.* ¶ 279 (finding it unnecessary "to verify factual aspects relating to the alleged obstacles to obtain documents, or the alleged 'refusal' of the authorities to grant these").

246. UNHCR Handbook on Protection of Stateless Persons, *supra* note 243, ¶ 22.

247. *Id.* ¶ 26.

about the situation of statelessness in Hispaniola. A review of Haitian nationality law between 1929 and 2010—the period during which birthright nationality in the Dominican Republic was qualified by the "in transit" exception—reveals three distinct legal regimes whose potentially overlapping operation creates some level of uncertainty.[248]

First, as the Inter-American Court noted in its brief review of Victor Jean's nationality claim, there are certain constitutions that reserve the right to *jus sanguinis* nationality acquisition for those born to Haitian fathers.[249] The 1946 Constitution provided that a Haitian father could pass on his Haitian nationality to a child born in foreign territory, and that a Haitian mother could pass on her Haitian nationality to a child if the father did not recognize the child.[250] By its terms, this rule would prevent a Haitian mother from transferring her Haitian nationality to a child born in foreign territory if her foreign partner recognized the child.[251] This same rule was reasserted in the 1957 Constitution,[252] and that regime remained in place until the 1964 Constitution provided a basis for *jus sanguinis* nationality acquisition for children born to a Haitian father or mother, regardless of whether the father recognized the child.[253] The gender distinction in the 1946 and 1957 Constitutions was once again made law by a 1974 Decree,[254]

248. While not appropriately considered a legal regime, it is important to note that prior to 1946 there is virtually no guidance on *jus sanguinis* rules of Haitian nationality acquisition. The Haitian Constitution of 1918 only mentions citizenship or nationality requirements on one occasion: "The rules governing nationality shall be determined by law." 1918 CONSTITUTION DE LA REPUBLIQUE D'HAITI [1918 CONSTITUTION OF THE REPUBLIC OF HAITI], June 19, 1918, art. 3, *translated in* U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1918, at 487 (1918). However, no nationality laws are publically available from this period, so there is very little clarity about what it meant to hold nationality under the law. Further, the 1928 constitutional amendments did not address nationality. *See generally* CONSTITUTION DE 1918 DE LA REPUBLIQUE D'HAITI AMENDÉE PAR LE PLÉBISCITE DES 10 ET 11 JANVIER 1928 [1928 AMENDMENTS TO THE 1918 CONSTITUTION OF THE REPUBLIC OF HAITI], Jan. 10-11, 1928, art. 3. While the 1935 Constitution made an important distinction between "Haitians by origin" and "Haitians by naturalization," *see* 1935 CONSTITUTION DE LA REPUBLIQUE D'HAITI [1935 CONSTITUTION OF THE REPUBLIC OF HAITI], June 2, 1935, art. 6 (translation on file with author), neither the text of that Constitution nor constitutional amendments in 1944 defined these terms.

249. *Expelled Dominicans and Haitians* ¶ 297.

250. 1946 CONSTITUTION DE LA REPUBLIQUE D'HAITI [1946 CONSTITUTION OF THE REPUBLIC OF HAITI], Nov. 22, 1946, art. 4.

251. Article 4 of 1946 Constitution of the Republic of Haiti provides that "[o]ne is a Haitian by origin if he is born to a father who was himself born Haitian. Or, one is a Haitian by origin if he is not recognized by his father but he was born to a mother who herself was born Haitian." *Id.* (translation on file with author).

252. 1957 CONSTITUTION DE LA REPUBLIQUE D'HAITI [1957 CONSTITUTION OF THE REPUBLIC OF HAITI], June 14, 1957, art. 4.

253. 1964 CONSTITUTION DE LA REPUBLIQUE D'HAITI [1964 CONSTITUTION OF THE REPUBLIC OF HAITI], May 25, 1964, art. 4.

254. Décret du 27 Février 1974 sur la Nationalité et la Naturalisation [Feb. 27, 1974 Decree on Nationality and Naturalization], art. 2, Le Moniteur No. 20, Mar. 14, 1974 (Haiti). The legal force of this Decree is uncertain, inasmuch as it contradicts the Constitution in force at the time, even though there is no public guidance available on this apparent inconsistency in the law. The 1974 Decree also introduced, for the first time, rules for loss of Haitian nationality. Most important, Article 17 states that Haitian nationality is incompatible with all other nationalities and no one may hold a double nationality where one of the nationalities is

and that rule remained in force at least until the passage of the 1983 Constitution.

Second, from 1983 until 1987, Haitian nationality would only pass *jus sanguinis* if both parents were Haitian.[255] Notably, from 1984 until at least 1987, the child of a Haitian mother and a foreign father born abroad could only acquire Haitian nationality at the age of eighteen if the child returned to Haiti.[256] Nevertheless, worth noting is that this slightly more permissive rule would not necessarily guarantee the right to acquire Haitian nationality at birth.[257]

Third, from 1974 until 2010 there was a ban on dual nationality.[258] Under this rule, a person who "opted for another nationality" was not considered Haitian. This raises questions about when a person born in the Dominican Republic to Haitian parents may have "opted for another nationality." Most likely, a person would be considered to have opted for another nationality in the Dominican Republic if that person had acquired a Dominican birth certificate or other national identity document from Dominican authorities. It is also possible that a person born in the Dominican Republic who attempted to acquire such documents thereby sought to exercise his or her right to birthright nationality and opted for another nationality.

Accordingly, there are at least three distinct regimes for *jus sanguinis* nationality acquisition throughout the period from 1929-2010, and at least two scenarios for how these three regimes could operate as a matter of law. Under one scenario, newer constitutions could trump older constitutions,

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Haitian. *Id.* art. 17.

255. *See* CONSTITUTION DE 1983 DE DE LA REPUBLIQUE D'HAITI [1983 CONSTITUTION OF THE REPUBLIC OF HAITI], art. 11. Article 11 states that a Haitian is "1) [a]nyone born in Haiti to [a] Haitian father or Haitian mother; 2) [a]nyone born in a foreign country to a Haitian father *and* a Haitian mother; [and] 3) [a]nyone born in Haiti to a foreign father or, if the father does not recognize the child, to a foreign mother, as long as he is of the black race, is Haitian." *Id.* (translation on file with author) (emphasis added).

256. *See* Décret du 6 Novembre 1984 sur la Nationalité Haitienne [Nov. 6, 1984 Decree on Haitian Nationality], arts. 7 & 8, Le Moniteur No. 78, Nov. 8, 1984 (Haiti).

257. Specifically, Articles 7 and 8 of the 1984 Decree state that a child born abroad to a foreign father and a Haitian mother will keep the foreign nationality until their age of majority, at which time the child can return to Haiti and claim Haitian nationality by making a declaration before the civil court of his residence. *Id.*

258. *See* Feb. 27, 1974 Decree on Nationality and Naturalization, *supra* note 254, art. 17 (stating that Haitian nationality is incompatible with all other nationalities and no one may hold a double nationality where one of the nationalities is Haitian); *see also* 1983 CONSTITUTION OF THE REPUBLIC OF HAITI, Aug. 27, 1983, art. 18 (proclaiming that "[d]ouble nationality can be recognized by bilateral or multilateral convention but is reserved to Haitians who have never opted for another nationality") (translation on file with author); 1987 CONSTITUTION DE LA REPUBLIQUE D'HAITI [1987 CONSTITUTION OF THE REPUBLIC OF HAITI], Mar. 29, 1987, art. 15. The 2012 amendment to the 1987 Constitution created the current law that applies to all Haitian people: "Every Haitian is subject to the rights, privileges, and duties attached to Haitian nationality, except for those privileges reserved to Haitians by origin. No Haitian can uphold a foreign nationality on Haitian territory." CONSTITUTION DE LA REPUBLIQUE D'HAITI [CONSTITUTION OF THE REPUBLIC OF HAITI] June 19, 2012, art. 12 (translation on file with author), *amended by* LOI CONSTITUTIONNELLE PORTANT AMENDEMENT DE LA CONSTITUTION DE 1987 [CONSTITUTIONAL LAW ON THE AMENDMENT OF THE 1987 HAITIAN CONSTITUTION].

such that the only relevant rule is that provided by the 1987 Constitution. Alternatively, the constitution in effect at the time of an individual's birth could govern that individual's claim to Haitian nationality.[259] Notably, the constitutions themselves are not clear on the question of how they relate to one another, and public guidance is scarce.

Regardless, demonstrating eligibility under the relevant legal framework likely requires both a legal showing as well as evidence of the parents' nationality. This is particularly important if the date of one's birth determines which constitutional framework for *jus sanguinis* nationality acquisition applies, because it matters at different points which parent had Haitian nationality. Such uncertainty makes it difficult to determine which children of Haitian migrants might be nationals "under the operation of [Haitian] law," and therefore complicates a determination of statelessness. Moreover, this uncertainty is compounded by challenges related to the capacity of Haitian officials and institutions to effectively interpret and apply these laws.

Indeed, the next step in determining whether a person is "considered" a national is to conduct a "careful analysis of how a state applies its nationality laws."[260] Accordingly, a statelessness determination requires not only reading laws and considering how they operate, but also understanding how the laws are applied in practice.[261] UNHCR guidance acknowledges that competent authorities are often charged with assessing evidence and making a determination of whether to grant an individual automatic nationality.[262] Such competent authorities may interpret certain evidence as insufficient, regardless of an apparent automatic right to nationality under the law. UNHCR guidance suggests that, in such cases, the conclusion of the competent authority, rather than the black letter law itself, should be considered determinative on the question of whether a person is "considered as a national" of the state.[263]

To the extent that Haitian officials are called upon to "consider" the claims to nationality of persons born in the Dominican Republic, there is evidence that limitations in the capacity of public institutions may also contribute to a risk of statelessness. Official recognition of Haitian nationals born abroad suffers from challenges related to Haiti's institutional fragility, especially after the 2010 earthquake.[264] A foreign birth must be documented

259. This was assumed by the Inter-American Court in its "risk of statelessness" analysis in *Expelled Dominicans and Haitians* where it applied different constitutional regimes in analyzing Victor Jean's case and those of his children. *See* Case of Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 297 (Aug. 28, 2014).

260. UNHCR Handbook on Protection of Stateless Persons, *supra* note 243, ¶ 23.

261. *Id.* ¶ 24.

262. *Id.* ¶ 36.

263. *Id.* ¶ 37.

264. Catherine A. Tobin, *No Child is an Island: The Predicament of Statelessness for Children in the Caribbean*, 1 DEPAUL INT'L HUM. RTS. L.J. 1, 6 n. 32 (2015); UNHCR, Div. of Int'l Prot, Human Rights Liaison Unit, Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Haiti, at 3 & n.3 (Mar. 2011) [hereinafter 2011 UNHCR Submission

by Haitian authorities, and this official act relies in part on the documentation of that child's parents in Haiti.[265] Once the parents' nationalities have been confirmed, a consular officer is charged with registering the foreign birth for purposes of nationality.[266] However, problems can arise at many points in this process.

In addition, during Haiti's Universal Periodic Review in 2011, the Office of the United Nations High Commissioner for Refugees submitted testimony regarding the dysfuncion of the civil registry system and the ability of civil authorities to verify the identity of Haitian nationals abroad.[267] Haiti's civil registry suffers from limited financial resources and a lack of clarity in applicable regulatory frameworks.[268] The result has been a failure on the part of the Haitian state to register the births of generations of Haitians, and this failure has compounded problems associated with registering births abroad.[269]

Haitian consular officials, to the extent that they must verify claims to Haitian nationality abroad, inherit the problems of the civil registry in Haiti.[270] Moreover, Haitian consular officials face an additional problem of needing to interpret and apply Haiti's nationality law, with all the accompanying uncertainties outlined above. As evidence of the challenges these officials face, the UNHCR has reported inconsistent responses in a survey of four Haitian consulates in countries with the highest Haitian migrant populations.[271] The exact implications of such arbitrary application of the law are yet to be studied, but the unpredictability of the process is evident.

The very nature of these ambiguities in the law, coupled with the

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for Haiti's Universal Periodic Review], http://www.refworld.org/pdfid/4d8869932.pdf [https://perma.cc/JDV6-M7RC].

265. *See 2010 Open Society Report on Dominicans of Haitian Descent*, *supra* note 143, at 7-8; *see also* TCRD, 25 septiembre 2013, Sentencia TC/0168/13, pp. 80-82 (explaining processes of registration for Haitian births abroad, as dictated by Décret du 27 Février 1974 sur la Nationalité et la Naturalisation [Feb. 27, 1974 Decree on Nationality and Naturalization], art. 2, Le Moniteur No. 20, Mar. 14, 1974 (Haiti). Législation du 14 September 1958 sur les Attributions du Consul [Sept. 14, 1958 Legislation on Attributions of Consular Service], Le Moniteur No. 78-141 (Dec. 29, 1958) (Haiti)).

266. *See 2010 Open Society Report on Dominicans of Haitian Descent*, *supra* note 143, at 8; *see also* TCRD, 25 septiembre 2013, Sentencia TC/0168/13, pp. 95-96 (Dom. Rep.) (explaining the foreign birth registration process in the Dominican Republic). For further discussion of these processes and their problems, see chapter III of *Human Rights Watch Report on Arbitrary Deprivation of Nationality in the Dominican Republic*, *supra* note 5.

267. *See* 2011 UNHCR Submission for Haiti's Universal Periodic Review, *supra* note 264, at 2-3.

268. Tobin, *supra* note 264, at 6 & n.32, 11.

269. *Id.* at 6.

270. *Id.* at 11.

271. *See* 2011 UNHCR Submission for Haiti's Universal Periodic Review, *supra* note 264, at 3 (noting that a 2008 UNHCR survey showed disagreement among Haitian consular officials in "how far . . . lineage rights could extend to grant nationality"). Difficulties with the implementation of a 2014 Haitian government initiative that attempted to resolve document requests for some "300,000 irregular migrants living in the Dominican Republic" further demonstrated "the ongoing disorganization of the Haitian civil registration system." Tobin, *supra* note 264, at 6.

institutional uncertainty in applying rules of law, suggests that a statelessness determination may not yield a clear response. However, the fundamental nature of the right to nationality and the need for resolution of such matters may require a determination of statelessness whether the inquiry into statelessness gives a clear answer or not. In these circumstances, the risk of statelessness might be so manifest as to require a finding that a person is stateless for purposes of protection under international law.

C. A Role for the Risk of Statelessness

As the previous section elaborated, there are at least two ways in which a risk of statelessness might influence the outcome of a statelessness determination at birth. First, when laws from multiple jurisdictions operate at the moment of a child's birth and questions arise as to the applicability of related laws or regulations, the child may face a risk of statelessness. Second, even if there is clarity about how each legal regime operates, wide discretion afforded to the authorities competent to make a nationality determination, or a record of arbitrary application of the law, may create a risk of statelessness. Practically speaking, complex questions of fact and law may be impossible to resolve in a timely manner when a child is born and needs the security of a nationality. In complex cases where component authorities are responsive and apply the law in a predictable manner, the risk of statelessness may be negligible. In other cases, complexity combined with unresponsive officials who apply murky rules of law inconsistently may result in a high risk of statelessness. This final section argues that a person who is more likely than not stateless should qualify as a "stateless person" under international law.

The UNHCR has recognized that the importance of guaranteeing the right of everyone to a nationality balanced against the difficulty of proving nationality in some circumstances requires that the standard for establishing statelessness be less than certainty. Specifically, the *UNHCR Statelessness Handbook* provides that the standard of proof for a statelessness determination is to establish to a "reasonable degree" that an individual would be stateless.[272] The UNHCR has further suggested that the "reasonable degree" standard is the same standard that it utilizes in making refugee status determinations.[273] The UNHCR does not, however, explain why the standard for a refugee status determination and a statelessness determination should be the same.

There are a number of compelling reasons for applying a shared standard. For example, the shared history of the protection regimes for refugees and stateless persons supports the use of a common standard of proof. Indeed, if the concern that prompted the two protection regimes was

272. *See* UNHCR Handbook on Protection of Stateless Persons, *supra* note 243, ¶ 91; UNHCR Guidelines on Statelessness No. 4, *supra* note 84, ¶ 21.

273. UNHCR Handbook on Protection of Stateless Persons, *supra* note 243, ¶ 91 (2014).

that persons were "unprotected," then a similar risk of being either factually unprotected (refugee) or legally unprotected (stateless) would trigger protected status. Moreover, there is an efficiency consideration, inasmuch as a shared standard would capitalize on the already extensive experience of states with refugee protection,[274] as well as that of international and national tribunals in adjudicating refugee relief.[275]

From a practical point of view, a shared standard would mean that a person seeking statelessness protection would need to demonstrate a risk of statelessness in the same manner that a refugee needs to demonstrate a risk of persecution. A sufficient risk of statelessness would lead to a conclusion that a person is stateless, just as a sufficient risk of persecution results in refugee status. While the shared standard is attractive for the reasons provided, this approach poses both legal and policy challenges that must be reconciled.

The principal challenge posed by a shared standard is that the language of the relevant conventions is not analogous. The 1951 Refugee Convention protects a person as a refugee when she demonstrates a well-founded fear of persecution in her country of nationality.[276] The notion of a "well-founded fear" implicitly refers to a level of risk. Indeed, much has been written on this formulation, and some have advanced the position that this suggests a one in ten chance of persecution.[277] The question is whether a 10% risk of statelessness is similarly sustainable as a standard of proof to find someone to be a stateless person protected by international law.

The 1954 Convention protects a person as stateless if she is not "considered" a national under the "operation of laws" of any country. This language suggests, and the discussion above confirms, a degree of discretion in how officials "consider" requests and interpret the "operation of laws." While this may produce uncertainty, the balance of probabilities is not as implicit in the statelessness definition as it is in the refugee definition. However, the difficulties inherent in proving statelessness support the notion that statelessness to a certainty should not be the standard.[278] The question then is whether the same "reasonable degree" standard from refugee law should be applied in the statelessness context.

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274. UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 42, U.N. Doc. HCR/1P/4/ENG/REV.3 (Dec. 2011) (noting in the refugee status determination context, an individual can claim a well-founded fear of persecution by establishing "to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for reasons stated in the [refugee] definition").

275. *See* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (finding that a well-founded fear of persecution is a 10% likelihood, based in part on the writing of international refugee law scholars).

276. 1951 Convention, *supra* note 74, art. 1(A)(2).

277. The United States Supreme Court, for example, considered the writings of international refugee law scholars and found that "[t]here is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening." *Cardoza-Fonseca*, 480 U.S. at 440.

278. UNHCR Handbook on Protection of Stateless Persons, *supra* note 243, ¶ 91.

With no clear guidance on this point other than that provided by the UNHCR, one possible interpretation can be derived from the relationship between statelessness protection and the human right to nationality.

The most fundamental statement of the human right to nationality is that everyone must have one. Moreover, nationality under the law is binary in that a person either has a nationality or does not have a nationality, and is stateless. Despite insightful observations that some nationalities seem to have more heft than others,[279] legal statelessness is the only alternative to nationality under the law. Together, the declaration that everyone must have a nationality and the fact that without one a person is stateless, suggest that statelessness protection cannot tolerate a situation in which a person is more likely stateless than in possession of a nationality. The natural conclusion is that anything more than a 50% chance of statelessness would require a finding that a person is stateless for the purpose of international protection to ensure that they receive the protection of a nationality.

One rejoinder might be that a 10% threshold seems equally appropriate when one considers that statelessness is "a fate of ever increasing fear and distress . . . deplored by the international community of democracies."[280] With no clear legal guidance on this point, however, it is important to consider the historic struggle to establish the legal regime on statelessness and its relationship to the desire of states to retain control over the means of nationality acquisition. While the measured successes of the protection regime for stateless persons described in the first section are encouraging, there is certainly cause for caution in interpreting and applying norms of protection in this area. Requiring a state to grant its nationality to a child that demonstrates only a 10% chance of statelessness at birth is likely to have a chilling effect on the increasing disposition of states to embrace statelessness protection.

Some practical examples drawn from the Americas may help to highlight the need to set this standard of protection with states' sovereignty interests in mind. The Bahamas, a relatively small country that serves as home to a substantial number of Haitian migrants and their Bahamian-born children, has also struggled with the question of citizenship rights for this population.[281] The Bahamas is much less connected to the international legal frameworks that have driven these questions in the Dominican Republic, which has ratified the American Convention and the jurisdiction of the Inter-American Court,[282] and signed the 1961 Convention.[283]

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279. Audrey Macklin, *Who is the Citizen's Other? Considering the Heft of Citizenship*, 8 THEORETICAL INQUIRIES L. 333, 354 (2007).

280. *See* Trop v. Dulles, 356 U.S. 86, 102 (1958) (holding that denationalization of U.S. citizens who had abandoned their mandatory military service was cruel and unusual punishment prohibited by the 8th Amendment of the U.S. Constitution).

281. *See* Kristy A. Belton, *Dry Land Drowning or Rip Current Survival? Haitians Without Status in the Bahamas*, 34 ETHNIC & RACIAL STUD. 948, 948-51 (2011).

282. The Bahamas has not ratified the jurisdiction of the Inter-American Court, nor has it ratified the American Convention on Human Rights. *See* OAS, Dep't of Int'l Law, American Convention on Human Rights: "Pact of San Jose, Costa Rica" (B-32),

Nevertheless, human rights advocates have seized upon the statelessness discourse, and some have pressed statelessness protection as a solution for Bahamians of Haitian descent that have suffered discriminatory citizenship practices.[284] The campaign to extend international protection to Bahamians of Haitian descent faces an uphill battle considering the resistance of the Bahamas to international oversight. In this context, it seems sensible to advocate for rules and standards that balance individual rights against the interest of states to regulate nationality.

Another important regional example is that of Chile, where children born to indigenous migrants have faced challenges in accessing Chilean nationality.[285] Notably, the Chilean Constitution does not grant *jus soli* nationality to children born to foreigners "in transit,"[286] which makes the Inter-American jurisprudence arising from the Dominican context quite relevant. Chile has not ratified the 1954 or 1961 Conventions,[287] but it has ratified the American Convention and is under the jurisdiction of the Inter-American Court.[288] Moreover, Chile, like many countries in the Americas, has a mixed record of complying with Inter-American Court decisions, tending to implement those decisions that are less controversial, but being slow to implement those that have broader social or political implications.[289] Chile offers another example of why caution is appropriate in setting a standard for the level of risk that that will trigger statelessness protection.

Of course, one must consider the likely position of states that would prefer a higher degree of certainty that an individual is stateless before they are compelled to grant nationality at birth. One could easily imagine a state standing firmly by the proposition that certainty, or perhaps something just short of certainty, is the appropriate standard for statelessness

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http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm [https://perma.cc/7JNB-3XR7] (listing states that have signed, ratified, and/or acceded to the American Convention on Human Rights).

283. The Bahamas has failed to ratify both the 1954 Convention, *see* Status of the 1954 Convention, *supra* note 81, and the 1961 Convention, *see* Status of the 1961 Convention, *supra* note 85.

284. *See, e.g.*, Grand Bah. Human Rights Assoc., *Bahamas 'Risks Causing Statelessness,'* NASSAU GUARDIAN (July 15, 2015), http://www.thenassauguardian.com/news/57570-bahamas-risks-causing-statelessness [https://perma.cc/2M3T-RP98].

285. *See* Claudio Fuentes Maureira et al., *3.000 Niños Esperando su Nacionalidad. La Necesidad de Contar con Remedios Colectivos para Resolver Vulneraciones Individuales de Derechos* [*3,000 Children Waiting for Their Nationality. The Need for Collective Remedies to Resolve Violations of Individual Rights*], ANUARIO DE DERECHO PÚBLICO (UNIVERSIDAD DIEGO PORTALES) 549, 550 (2016). *See also Chile*, AMERICAN NETWORK ON NATIONALITY & STATELESSNESS, http://www.americasns.org/chile/ [https://perma.cc/FD5Y-VUYB].

286. *Chile*, *supra* note 285.

287. *See* Status of the 1954 Convention, *supra* note 81; UNTC, Status of the 1961 Convention, *supra* note 85.

288. *See* OAS, *supra* note 282.

289. David C. Baluarte & Christian M. De Vos, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*, OPEN SOC'Y FOUNDS. 74-76 (2010), https://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf [https://perma.cc/HT7T-L4LY].

determination. In response, it would be important to emphasize that the right to nationality is a universal human right, and the importance of deriving a nationality at birth has been emphasized in many of the major human rights conventions.[290] Here, the binary nature of nationality and the standard that a child should receive protection if she is more likely than not stateless may resonate. Statistically, a standard more onerous than "more likely than not" would accept on its face that a person who is more likely stateless than legally protected by nationality could be ineligible for international protection, which is an unacceptable outcome under the international regime of protection for stateless persons. Ultimately, a well-reasoned "more likely than not" standard may well be viewed as giving adequate consideration to states' legitimate interests in regulating nationality acquisition within their own borders, while extending appropriate protection for the human right to nationality.

These examples highlight the potential for blowback in response to the doctrinal expansion in the recent decision of the Inter-American Court in *Expelled Haitians and Dominicans*. The error of the Inter-American Court was to extend statelessness protection after it had identified a generalized risk of statelessness, but before it had decided whether that risk was sufficient to support a finding that the presumed victims were stateless persons. This Article urges a more cautious approach than that taken by the Inter-American Court, but it should not be read to undermine the importance of the risk assessment suggested by the Court. Rather, this Article provides a framework for the Court and other international authorities to specifically assess the risk of statelessness as a means of determining whether a person is stateless. Ultimately, international law guarantees statelessness protection only to those who have been deemed stateless persons, but it should qualify as such those persons who are more likely than not stateless.

CONCLUSION

The international law of statelessness and human rights requires states to grant nationality to stateless children born in their territory. As the global effort to combat statelessness has gained momentum in the last decade, more states have demonstrated a willingness to extend this protection to stateless children. However, the historic resistance of states to international regulation of nationality law makes it unlikely that they will adopt a rule that would require them to grant nationality to a child born in their territory because of an unquantified risk of statelessness. In applying this ambiguous rule in *Expelled Dominicans and Haitians*, the Inter-American Court has potentially distorted an important human rights norm and risked undermining the effectiveness of the regional system in its effort to combat statelessness.

The Court should endeavor to hew its jurisprudence on statelessness more carefully to the well-established international law rules extending

290. *See supra* notes 55-59 and accompanying text (discussing the ICCPR and the CRC).

protection to "stateless persons." At the same time, the Court's decision points to an area of the law of statelessness where there is significant room for interpretation, namely in the statelessness determination procedure itself. The UNHCR has issued guidelines for such determinations, and a number of states have begun to implement statelessness determination procedures at the national level. The UNHCR's *Handbook on the Protection of Stateless Persons* provides guidance on evidentiary considerations and suggests that the appropriate standard of proof for demonstrating that a person is stateless is a "reasonable degree" of certainty, as opposed to absolute certainty. This standard for demonstrating that a person is stateless for purposes of international law protection is still open to interpretation, and this is where the Inter-American Court should focus in order to advance its concern for those at risk of statelessness. It should do so by retaining well-understood rules of statelessness protection, and developing transparent and well-reasoned standards for protection.

A "reasonable degree" of certainty in the context of statelessness protection means that a person would be more likely than not stateless if she were left unprotected. This standard is drawn from the fundamental nature of the right to nationality, and the fact that a person has nationality or is stateless, and there is no status in between. Because everyone must have a nationality, the likelihood of statelessness should never be permitted to exceed the likelihood that one is a national. Accordingly, one should be a "stateless person" under international law if it is more likely than not that she will not be considered a national under the operation of the laws of any country.

Like all such standards, there are many evidentiary questions that must be resolved and much room for judicial interpretation. Such is the work that lies ahead for the international community and domestic jurisdictions around the globe. The Inter-American Court, however, did not engage with these pressing questions in its decision in *Expelled Dominicans and Haitians.* Rather, the Court declared that the state had the burden to demonstrate that Dominican-born persons of Haitian descent could derive Haitian nationality, and when the state did not resolve the Court's concerns about the risk of statelessness, it extended the protection of the international law of statelessness. Presumably, some large segment of Dominican-born persons of Haitian descent are covered by this ruling of the Inter-American Court, but the regional community has no way of knowing who these individuals are, or what the limits of this protection might be.

The need for clarity in this area is evident in the Dominican Republic and beyond. Inhabitants of the island of Hispaniola continue to reel from the latest decision of the Dominican Constitutional Court to reinterpret its Constitution and remove the basis for nationality of more than 130,000 people. Legislation that restored nationality for some, and opened a temporary path to naturalization for others, still left tens of thousands of people without Dominican nationality and at risk of statelessness.[291] If the

291. *See* SAIS Int'l Human Rights Clinic, *supra* note 142, at 35; *see also* Ley No. 169-14 que

law of statelessness is going to be a real tool in bringing about a resolution to this problem and others like it around the world, well-established rules of law must be applied, and international authorities should pursue the progressive development of standards in applying those rules.

Leadership on this issue will likely fall to the UNHCR, which is refining a model law on the protection of stateless persons that includes statelessness determination guidance.[292] The future success of such laws in the region depends in part on the clarity of commitments that states are required to take on. While this Article is critical of the Inter-American Court's most recent contribution to this process, the vulnerability of stateless persons will continue to be a topic of concern in the region, and the Inter-American Court is well-positioned to refine its contributions and advance the protection of the right to nationality.

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establece un régimen especial para personas nacidas en el territorio nacional inscritas irregularmente en el registro civil dominicano y sobre naturalización [Law 169-14 of 2014, establishing a special regimen for persons born in the national territory inscribed irregularly in the Dominican civil registry and on naturalization] (G.O. No. 10756) (May 26, 2014) (Dom. Rep.).

292. *See Observaciones a Ley Modelo del ACNUR para la Protección de las Personas Apátridas* [*Observations on the UNHCR Model Law for the Protection of Stateless Persons*], AMERICAS NETWORK ON NATIONALITY & STATELESSNESS, http://www.americasns.org/s/Red-ANA-Observaciones-a-Ley-Modelo-del-ACNUR-para-la-Proteccion-de-las-Personas-Apatridas.pdf [https://perma.cc/TA57-X93Q].