The nationality and statelessness of nomads under international law

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The Nationality and Statelessness of Nomads under International Law

With a Comprehensive Examination of the Nationality and Statelessness of Former Bedouin in Kuwait, Tuareg in Mali and Sama Dilaut (Bajau Laut) in Malaysia

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Drukkerij Studio

What is a country? A country is a piece of land surrounded on all sides by boundaries, usually unnatural.[1]

History is written from the perspective of the settled.[2]

Contents

[1] J. Heller, *Catch-22* (Simon and Schuster 1994) 257.

[2] D. Chatty, 'Negotiating Authenticity and Translocality in Oman: The 'Desertscapes' of the Harasiis Tribe' in Wippel Steen (ed.), *Regionalizing Oman: Political, Economic and Social Dynamics* (Springer 2013) 129.

Introduction

> What, however, of the case of those who have resided all their lives in a specific country, who have perhaps been in that country as a distinct group for generations, who never had or who no longer have effective links with another country, who are not the subjects of a transfer of territory but who have, nonetheless, failed to acquire the nationality of the State in which they reside? What of those who have never had the nationality of the country in which they have all ties... A similar question may be put for those who, in the context of State succession, fail to acquire nationality in the place where they have permanently resided because they are deemed to have links elsewhere.[3]

The twentieth and twenty-first centuries have been ones of enormous stress for many nomadic peoples. Taken as a whole, research on nomads points to a deep and enduring marginalization of nomads by governments around the world. Historians and anthropologists often attribute this stress to colonization, modernization, and globalization, including the shift to a wage economy, the growing dominance of large-scale agriculture and resource extraction, centralized government, increased urbanization, armed conflict, and the resulting destruction of natural ecosystems.[4]

This dissertation will explore nomad marginalization through a particular lens - that of nationality and statelessness. Much is already known about nomad statelessness in individual countries. In particular, the United Nations has identified certain nomadic and mobile groups as stateless or at-risk of statelessness.[5] But the question of nomad nationality and civic inclusion has yet to be addressed in depth.

Identifying the causes of statelessness and, in particular, the modes by which nomads become stateless is crucial to any analysis of solutions. There has not yet been a review of

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[3] C. Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' 10 *Int'l J. of Refugee L.* 156 (1998) (hereinafter Batchelor, 1998) 177.

[4] This dissertation adopts the word 'stress' to describe the current situation of many nomads, rather than speaking of a decline or disappearance, as many nomadic and mobile communities continue to cycle in and out of a mobile lifestyle as they adapt to new circumstances. A. Manderscheid, 'The Decline and Re-emergence of Nomadism' 53 *GeoJournal* 173 (2002) 173. See also T. Arkell, 'The Decline of Pastoral Nomadism in the Western Sahara' 76 Geography 162 (1991) 163; A. Fisher, 'Research and Nomads in the Age of Globalization' in A. Fisher and I. Kohl, (eds.) *Tuareg Society Within a Globalized World: Saharan Life in Transition* (Tauris 2010) 13-14.

[5] UNHCR, 'Global Action Plan to End Statelessness 2014-2024' Division of International Protection (2014) 18 (hereinafter Global Action Plan, 2014). The Global Action Plan lists nomads as one of the key groups who may be at risk of statelessness. This dissertation hopes to add to the study of the problem.

the commonalities and differences faced by different nomadic groups when it comes to the causes of their nationality and/or statelessness. Nor has there been a systematic examination of possible solutions to the statelessness of nomads.

This dissertation is divided into three parts. Part 1 contains the introduction and methodology sections. Part 2 looks at three examples of nomad statelessness to identify the root causes of the problem and to examine why nomad statelessness persists. These examples are drawn from nomadic populations whom the United Nations has identified as being stateless or at risk of statelessness, according to existing research.[6]

Part 2 is primarily a legal analysis, tracing the extent to which nomads have qualified under the law and identifying the points at which they either gained a nationality or became stateless. Part 2 also, however, will contain an analysis of the social, historical and political forces that have shaped the evolution of nationality law to help explain why nomads have been included or excluded at various points in history through the present day. As Matthew Gibney puts it, "(a)s a political issue statelessness challenges one to understand the dynamics behind the exclusion from national membership of substantial numbers of people."[7] Writing of Tuareg nomads in West Africa, anthropologist Baz Lecocq observes that, "...it is hard to underpin exactly why nomad existence is found so disturbing by those who are not nomads."[8]

Part 3 is devoted to looking at possible solutions to the gaps identified in Part 2. Over the last hundred years, states have established within international law a right to a nationality for all. Part 3 will look at the solutions offered by states in international law and, in particular, the right to a nationality. To do so, it will apply international law to the gaps identified in Part 2. In examining the usefulness of international law as a solution to nomad statelessness, Part 3 will look at the international legal regime, focusing primarily on treaty law and general principles of law, but also other sources, including draft treaties, declarations, statements by treaty bodies and case law.[9]

Beyond a strictly legal analysis, this dissertation will also seek to provide a more in-depth analysis of the relationship between nomads and nationality. As Tendayi Bloom puts it, speaking of indigenous peoples, "(e)xamining the political realities of the claims of members of Indigenous groups can help uncover deeper problems in the nature of

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[6] Global Action Plan, 2014, 18.

[7] M. J. Gibney, 'Statelessness and Citizenship in Ethical and Political Perspective' in A. Edwards and L. van Waas (eds.), *Nationality and Statelessness Under International Law* (Cambridge University Press 2014) 44-45 (hereinafter Gibney, 2014).

[8] B. Lecocq, *Disputed Desert: Decolonisation, Competing Nationalisms and Tuareg Rebellions in Northern Mali* (Brill 2010) 132 (hereinafter Lecocq, Desert, 2010). See also B. Lecocq, *That Desert is Our Country: Tuareg Rebellions and Competing Nationalisms in Contemporary Mali (1946-1996)* (PhD thesis, AISSR 2002) 82 (hereinafter Lecocq, Desert, 2002).

[9] For a full list of sources of international law, see M. Shaw, *International Law* (6th ed. Cambridge UP 2008) 23-24 (hereinafter Shaw, 2008) 69-128.

dominant State citizenships."[10] Laura van Waas and Amal de Chickera point to statelessness as "a deeply personal problem" for individuals, but also one with deep ramifications for the nation-state system as a whole.[11] To explore issues that go beyond technical fixes to nationality laws, this dissertation also looks at the law in context, exploring deeper conflicts between nomadism as a way of life and the rules and requirements of the nation-state system.

Part 1: Research Statement, Methodology and Research Questions

1.1 The Choice of Topic

Why Statelessness?

This dissertation is analysis of the causes of nomad statelessness and the possible solutions offered by states in international law. Arguably, statelessness should be an eminently solvable problem, because in most countries it is the direct result of government laws and procedures over which governments have a great deal of control. Everyone on earth has links to at least one state, both through birth and connections established during their lives like residence, education, family ties, military service and many others. Resolving statelessness by formalizing these links through the medium of nationality laws and procedures is clearly within the ambit of governments and is, in fact, one of their primary functions. Yet statelessness persists.

It is impossible to overstate the devastating effects of statelessness.[12] Without a nationality, stateless persons often cannot access their civil or human rights under the law.[13] Nationality status has always been intimately entwined with civil and political rights, as well as internationally recognized human rights.[14] While today, basic human

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[10] T. Bloom, 'Members of Colonized Groups, Statelessness and the Right to Have Rights' in T. Bloom (ed.) *Understanding Statelessness* (Routledge 2017) 158 (hereinafter Bloom, Members, 2017).

[11] L. van Waas and A. de Chickera, 'Forward' in Institute on Statelessness and Inclusion, *The World's Stateless: Children* (2017) 1 (hereinafter Van Waas and De Chickera, Forward, 2017).

[12] Van Waas and De Chickera, Forward, 2017 1.

[13] J. C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (Yale 2009) (hereinafter Scott, 2009); E. Fouberg, A. Murphy and H.J. de Blij, *Human Geography: People, Place and Culture* (9th ed., Wiley 2009) (hereinafter Fouberg, Murphy and de Blij). "The right to a nationality (is) a 'gateway' to the recognition of a plurality of other rights." W. van Genugten, A. Meijknecht, B. Rombouts, 'Stateless Indigenous People(s): The Right to a Nationality, Including Their Own' 19 *Tilburg LR* 98 (2014) 98 (hereinafter Van Genugten et al.).

[14] Hannah Arendt famously claimed that the nation-state system somewhat uncomfortably "combined the declaration of the Rights of Man with national sovereignty," and anyone who was without a nationality was therefore also "deprived of human rights." H. Arendt, *The Origins of Totalitarianism* (Harcourt 1976) 272

rights are assured by states in international law regardless of nationality status,[15] it remains true that many vital civil rights, such as the power to petition one's government, to access the courts and to vote, are tied to nationality. Many mechanisms to advocate for human rights protections are reserved for nationals. Critically, many ethnic, religious and cultural minorities struggle to assert their rights without a nationality and indigenous peoples often cannot access their lands or support their cultures without nationality in a state.

In some cases, stateless persons may be expelled from the countries in which they live, refused re-entry into their former countries of residence, deprived of their lands or placed in detention.[16] In many states, access to a residency permit is not possible for stateless people due to the inability to provide documents.[17] Some of the vital rights that are frequently reliant on nationality include the right to own land, civil rights such as voting and political participation, the right to access services like health care, the right to work and attend school, the right to own land and many others. All of these rights are crucial to individuals, but cultural, religious, linguistic and ethnic groups also require nationality on a group basis in order to, for example, vote for political autonomy, for culturally appropriate education, for preservation of their languages and culture, and for a host of other collective rights.

Statelessness is also bad for states as it increases instability and political tensions, can make it more difficult for states to address crime, poverty and other social problems and may raise tensions with neighbouring states. Arendt rightly called statelessness an "element of (state) disintegration."[18] Yet statelessness persists, despite its negative effects on states, individuals and communities. As a result, research is needed to understand the modes by which statelessness occurs and the solutions by which it may be solved.

(hereinafter Arendt, 1976). See also B. K. Blitz, 'The state and the stateless: The legacy of Hannah Arendt reconsidered' in T. Bloom (ed.), *Understanding Statelessness* (Routledge 2017) 70.

[15] Importantly, since Arendt's time, many vital human rights have been decoupled from nationality. For example, the International Covenant on Social, Economic and Cultural rights mandates access to work, education and health care without references to nationality status, reasserting the principle that many basic human rights are available to all. This issue will be discussed in more detail in Part 3, below.

[16] UNHCR Handbook on the Protection of Stateless Persons (2014) 7 (hereinafter Handbook, 2014). See also the European Network on Statelessness, 'Protecting Stateless Persons from Arbitrary Detention: An Agenda for Change' (April 2017); R. M. Razali, R. Nordin and T. J. Duraisingam 'Migration and Statelessness: Turning the Spotlight on Malaysia' 23 Pertanika *J. Soc. Sci. and Hum.* 19 (2015) 8-9; J. Tucker, 'Questioning de facto Statelessness' 19 *Tilburg Law Review* 276 (2014); Batchelor, 1998 158; The Equal Rights Trust, 'Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons' (2010) 53, 74; Fripp, 2016, 10.

[17] Handbook, 2014, 47-49, 52-53.

[18] Arendt, 1976, 269. It is important to note that Arendt did not distinguish between de facto stateless people (refugees) and de jure stateless people.

Why nomad statelessness?

As stated above, the marginalization of nomadic and mobile peoples has been widely noted by experts. Nomads "are almost by definition marginal in most countries, especially where the state has risen and is based primarily in settled agricultural population."[19] As nomad rights expert Jérémy Gilbert puts it, "(m)any nomadic peoples are invisible citizens of their own states."[20] Bronwen Manby notes that, "(t)hose communities within Africa whose members have found that their legal right to belong to the national community is contested (include) ethnic groups whose pre-colonial boundaries cross modern borders, so those speaking the same language now find themselves in two (or more) different States. Among these groups are pastoralists whose nomadic lifestyle takes them across multiple borders."[21] Yet there is a need for a deeper analysis of how the marginalization and exclusion of nomads is linked to their nationality, statelessness and civic participation. While UNHCR has frequently noted that nomads may be at risk of statelessness, to date, what limited research exists has primarily focused on individual groups.[22]

Due to a lack of research into nomad statelessness, the current state of knowledge about the issue is limited, though experts have noted a high risk of statelessness for nomadic groups. The former head of the Statelessness Unit at the United Nations High Commissioner for Refugees noted four categories at high risk of statelessness: (1) persons living in border regions, (2) minorities and "persons who have perceived or actual ties with foreign states," (3) nomads and (4) migrant populations.[23] As UNHCR, the UN agency mandated to address statelessness, put it in 2017,

> (m)ore than 75% of the world's known stateless populations belong to minority groups. These populations include the descendants of migrants, many of whom arrived or who were displaced to a territory before it gained independence; *nomadic populations* with links to two or more countries; and groups that have

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[19] D. Aronson, 'Must Nomads Settle? Some Notes Toward Policy on the Future of Pastoralism,' in P. Salzman (ed.) *When Nomads Settle: Processes of Sedentarization as Adaptation and Defens*e (Praeger 1980) 180.

[20] J. Gilbert, 'Nomadic Peoples and Human Rights' (Routledge 2014) 160 (hereinafter Gilbert, Nomadic, 2014).

[21] B. Manby, *Citizenship in Africa: The Law of Belonging* (Hart 2018) 313.

[22] Van Genugten et al., 2014, 99. The authors point to the experiences of the "Hill tribes" of Thailand as an example of the consequences of statelessness for minority, indigenous, nomadic peoples. Van Genugten et al., 2014, 100. It should be noted that new studies and information about stateless nomads continues to be published as part of this emerging field of study. For example, see this article about the Jogi in Afghanistan: L. Hadi, N. Shayan, A. Siddique 'Jogis: Afghanistan's Tiny Stateless Minority Strives to Survive Without Rights, Services' *Gandhara* (October 14, 2019).

[23] M. Manly, 'UNHCR's mandate and activities to address statelessness' in A. Edwards and L. van Waas (eds.) *Nationality and Statelessness under International Law* (Cambridge UP 2014) 108 (hereinafter Manly, 2014), citing UNHCR, 'Action to Address Statelessness: A Strategy Note' March 2010, para 35.

> experienced ongoing discrimination despite having lived for generations in the place that they consider to be home.[24]

Besides UNHCR, other organizations have noted the risk of statelessness for nomads. As far back as 1983, the Council of Europe, speaking of nomads in Europe, stated that "many nomads experience problems with their legal status...because they lack a sufficient link of nationality or residence with a given state."[25] In more recent years, an emerging body of research by anthropologists, sociologists and legal experts shows the problems in accessing nationality faced by nomadic groups in specific countries. This dissertation will provide a synthesis of existing research on three nomadic groups in an attempt to identify some of the underlying causes of nomad statelessness.

As stated above, the question of nomad statelessness is fundamentally a question of law and the implementation of law, but such questions inevitably touch on the perceptions about nomads held by governments and non-nomadic groups, the perceptions of nationality and its benefits and costs held by nomads, the ongoing question of nomad political independence in many parts of the world, nomad land use and ownership and the history of nomad-government relations more generally. This dissertation will explore not only how the laws of nationality have been applied to nomads and the extent to which international law can offer solutions, but also how wider political and sociological trends have affected the exclusion of nomads and may impact possible solutions.

Why International Law?

In Part 3, this dissertation explores solutions for nomad statelessness available under international law. International agencies and governments often promote international law as a solution for statelessness. Yet, as stated above, the root causes of nomad statelessness are poorly understood, so the extent to which international law can offer a solution to nomads is also unclear.

International law is frequently invoked as a solution by major actors, including both state governments and the United Nations. International law has recently been actively promoted as a solution to statelessness by important state actors like the United States.[26] UNHCR has frequently cited to international law as a solution for statelessness and adherence to international law and norms is a major goal of the IBelong campaign to end statelessness.[27] In some case, international human rights law has already been applied as a

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[24] UNHCR, 'This is Our Home: Stateless Minorities and Their Search for Citizenship: #IBelong' (2017) (my italics).

[25] Council of Europe, Committee of Ministers, 'Recommendation No. R (83) 1 of the Committee of Ministers to Member States on Statelessness Nomads and Nomads of Undetermined Nationality' (22 February 1983) 1.

[26] The United States Department of State, for example, has engaged with the Human Rights Council process in order to resolve statelessness. U.S. Dept. of State website, archived content, accessed 10/12/2020 at https://2009-2017.state.gov/j/prm/policyissues/issues/c50242.htm

[27] UNHCR Global Action Plan, 2014, 18.

potential solution to statelessness, and Part 2 will see if such solutions could work for nomads.

The Universal Declaration of Human Rights affirms that everyone has the right to a nationality.[28] This right has since been enshrined, in different iterations, in a multitude of international and regional treaties, many of which will be discussed below. It has also been invoked by individuals and communities, and its substance further developed and defined through an expansive body of 'soft law,' including the authoritative guidance of UN bodies whose mandate encompasses the issue, non-binding declarations and draft conventions that signal the direction in which the further evolution of these standards may progress, and the doctrinal work of international legal scholars whose analysis helps to further unpack the content of the norms. This soft law will also form part of the legal analysis in Part 3, below.

In the last five years, there has been an enormous push to end statelessness worldwide, spearheaded by UNHCR's global campaign, and based on the right to a nationality in international law.[29] UNHCR, which has the global mandate to end statelessness, is currently the global leader in solutions to address statelessness and has, in particular, been pushing a specific package of solutions based on international law. The solutions offered by UNHCR are based on international human rights principles, such as the right to a nationality, the prohibitions against statelessness and the right to be registered at birth.[30] Central to the campaign by UNHCR to end statelessness has been the push to encourage more and more countries to accede to the Statelessness Conventions.[31]

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[28] UN General Assembly, Universal Declaration of Human Rights, 217 (III) A (Paris 1948) Art. 15.

[29] See generally the 'Ibelong campaign' at http://www.unhcr.org/ibelong/. See also UNHCR, 'I am Here, I Belong: The Urgent Need to End Childhood Statelessness' (2015). The Global Campaign is also being reinforced at the regional level through networks and activism, all based on the human rights framework. See for example A. Leas, 'Creating a regional network on statelessness in Central Asia and lessons from Europe' (2016) at http://www.statelessness.eu/blog/creating-regional-network-statelessness-central-asia-and-lessons-europe. The UNHCR Ibelong campaign, with the DHRRA (Development of Rural Resources in Rural Areas), recently hosted a photo exhibit on stateless people in Malaysia to raise awareness. A. M. Khalib, 'I Belong Here Too' 30 Dec. 2015 at http://www.themalaymailonline.com/opinion/azrul-mohd-khalib/article/i-belong-here-too.

[30] See the UNHCR Ibelong campaign website at https://www.unhcr.org/ibelong/. See also the UNHCR Global Action Plan 2014.

[31] Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, with 146 states parties (hereinafter 1951 Convention). Convention on the Reduction of Statelessness, New York, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, with 75 states parties. (hereinafter 1961 Convention or, when grouped with the 1954 Convention, Statelessness Conventions). See for example the recent accession of Belize at http://www.unhcr.org/55d6fa176.html. See also L. van Waas, *Nationality Matters: Statelessness Under International Law* (Intersentia 2008) 40 (hereinafter Van Waas, Nationality, 2008). See also E. Simperingham, 'The International Protection of Stateless Individuals: A Call for Change' (U. of Auckland 2003).

In conjunction with this campaign to end statelessness by UNHCR, the wider international human rights system has worked to identify, prevent and resolve statelessness through a variety of human rights and humanitarian mechanisms, including international treaties and treaty bodies, courts and lobbying for domestic legal changes and best practices. Meanwhile, UNICEF, the World Bank and other actors have pushed for the expansion of birth and civil registration, in part to end statelessness. Implied in all of these initiatives is the idea that international law can provide a solution for nomad statelessness, or if it currently does not, future developments can potentially fill any gaps. These assumptions will be interrogated by this dissertation.

International law may be an important mechanism for resolving statelessness, yet it is crucial to remember that international law is itself a product of agreement by states. The fact that international law was created by states that have also created statelessness means that it is important to interrogate the extent to which international law solves statelessness, even were states to apply international law perfectly or to adopt all developments. It is also important to examine international law with a critical eye, as solutions that may work for other populations may not be applicable to nomads or may even be harmful.[32]

This dissertation will therefore look at the solutions to statelessness currently offered by states in international law to see if these solutions work for nomads by applying international law to the gaps uncovered in Part 2. Once the modes by which nomads commonly become stateless are understood, the solutions proposed by states in international law writ large can be analysed to see if they provide a solution that is effective for nomads, and if not, why not.

Part 3 will focus in particular on the international law frameworks currently being promoted by key actors such as the United States, UNHCR, UNICEF and the World Bank: (1) the right to a nationality under international law, (2) the laws to identify, prevent and reduce statelessness, including through registration and the issuance of birth certificates (3) the prohibitions against discrimination in the granting of nationality and (4) the prevention of statelessness during the succession of states.[33] Other relevant human rights treaties and frameworks will be discussed where appropriate.

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[32] For an example of a critique of international law as a solution for statelessness, see C. Allerton 'Statelessness and the lives of the children of migrants in Sabah, East Malaysia' 19 *Tilburg Law Review: Journal of International and European Law* 26 (2014) 27, 250 (hereinafter Allerton, Lives, 2014).

[33] UNHCR's Global Action Plan, 2014 stresses ending discrimination, assuring birth registration and access to identity documents and preventing statelessness during state succession among other solutions. See the ten actions to end statelessness at https://www.unhcr.org/ibelong/global-action-plan-2014-2024/

Methodology

This thesis offers an in-depth critique of the substance of the right to a nationality under international law as it pertains to nomads. The thesis first undertakes an evaluation of the root causes of nomad statelessness through a rigorous exploration of three case studies, focusing on the laws and policies of governments over time. Having identified some of the reasons why nomads became stateless and the factors that have contributed to the endurance of this plight over time, the thesis analyses to what extent international law provides solutions to nomad statelessness.

In doing so, the thesis goes beyond a superficial reading of international law as out-of-step with the reality of nomadism to expose which norms are useful and which fall short in offering solutions to nomad statelessness. Based on the lessons learned from the case studies, what gaps exist in the "hard" treaty standards that provide binding obligations to state parties? To what extent have jurisprudence and soft law evolved to fill these gaps? Even if states were to approach the right to a nationality for nomads from the perspective of the most protective standards that current and emerging international (soft) law has to offer, would this be sufficient to resolve and prevent nomad statelessness? In so doing, this dissertation focuses almost exclusively on the policies and legal frameworks developed by states and by the systems they use internationally to see to what extent states live up to their obligations. The views of nomads and nomadic communities will be touched upon throughout.

To identify some of the root causes of nomad statelessness, Part 2 of this dissertation will look at the development of nomad nationality and/or statelessness from the pre-colonial period to the present day. As this is a law dissertation, it will primarily focus on legal analysis and an exploration of how the law has been applied, relying on sources of legal analysis.

Decisions over nationality, however, are often made for political reasons. As stated above, politics and history are vital to understanding how and why nationality laws came into being and were applied, or not applied, to various groups like nomads. This dissertation will also explore the historical and political context that surrounded the adoption and implementation of nationality. This dissertation will look beyond the legal question of qualifying for nationality under the law at broader historical and sociological causes of nomad statelessness, providing the context within which the law operates. These historical sections are not meant to be exhaustive, but are a summary of what is known about the development of nomad nationality in the context of wider sociological and political trends. These historical sections rely primarily on academic research, but where this is lacking, other sources such as non-governmental reports and media sources will be used. Non-academic sources will be noted.

A full analysis of the nationality and statelessness of nomads would not be complete without an exploration of solutions. Part 3, as stated above, will focus on to what extent solutions for nomad statelessness currently exist under the international human rights framework, if properly applied. Part 3 will rely on international legal analysis.

This dissertation therefore seeks to make a contribution towards answering the following questions: (1) What are some of the root causes of nomad statelessness? (2) Why does nomad statelessness persist? (3) Does international law provide solutions to nomad statelessness? (4) Are these solutions consistent with the human rights of nomads?

1.2 The selection of three nomadic groups used as examples

It is not possible to analyse all of the diverse peoples worldwide that either self-identify as nomads or have been labelled as such. This dissertation has therefore selected as examples three groups who are nomadic and/or historically associated with nomadism by their governments and who have been identified as stateless or at risk of statelessness by experts. These three examples are not taken as representative of all nomads, but are selected for their diversity of location, background and type of nomadism. This dissertation will look for commonalities in how nationality has, or has not, been applied to these nomads, while also highlighting the differences experienced by these very different groups.

All three selected groups are either currently or recently associated with nomadism and a mobile lifestyle, including both pastoralism and hunter-gatherer lifestyles. As well, the groups represent geographic diversity. Geographic diversity and diversity of lifestyle allows these examples to capture a range of nomad types and experiences. As well, consideration was given to the strengths of the researcher, including languages (French and English), regional familiarity and the availability of existing information on nomad statelessness.

The first example selected for this dissertation is the Bedouin of the Gulf region in what is now Kuwait. The Bedouin are a nomadic group practicing pastoralism and long-distance trade. While nomadism is no longer practiced in Kuwait, many people living in the Gulf region, including in Kuwait, are descendants of Bedouin.[34] For the Bedouin example, this dissertation has chosen to focus on Kuwait because of the wealth of information that already exists on the problem of statelessness for former Bedouin in that country.[35] As this dissertation will discuss in detail, in Kuwait, the descendants of certain Bedouin groups make up the majority of stateless people known as *bidoon*, or "those without status." Though the vast majority of former Bedouin in Kuwait are now settled, many as part of government-sponsored settlement plans, they continue to be associated in Kuwaiti society with nomadism.

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[34] The region that is now Kuwait is seen as having been traditionally occupied by Bedouin in the desert, settled, urban Hathar living in towns, and semi-settled *arib dar* living on the outskirts of those towns and near oases. C. Beaugrand, *Stateless in the Gulf: Migration, Nationality and Society in Kuwait* (Tauris 2018) 22 (hereinafter Beaugrand, Stateless, 2018); C. Beaugrand, *Statelessness and Transnationalism in Northern Arabia: Biduns and State Building in Kuwait, 1959-2009* (London School of Economics, PhD dissertation 2010) 88 (hereinafter Beaugrand, Transnationalism, 2010).

[35] Bedu/Bedouin groups are stateless in a number of Arabian countries. While this case study focuses on Kuwait, many of the points made apply to other countries in the region. D. Chatty, 'The Persistence of Bedouin Identity and Increasing Political Self-Representation in Lebanon and Syria' 18 *Nomadic Peoples* 16 (2014) (hereinafter Chatty, Persistence, 2014) 16.

The second group is the Tuareg, or *Kel Tamasheq*, a pastoral nomadic group living in the Sahel region of Africa, primarily in Niger, Mali, and Algeria.[36] Today, there are more than a million Tuareg in the Sahel spread out across five countries, divided by contested borders.[37] Though the extent to which the Tuareg are stateless in unknown due in part to a lack of data on registration,[38] Tuareg political marginalization has been well-documented in Mali, where a civil war and refugee crisis has greatly heightened the risk of statelessness. Expert interviews conducted for this dissertation have noted that many Tuareg in northern Mali lack identity documents.

The third group is the Sama Dilaut/Bajau Laut[39] living in the Sulu Sea, which lies between what are now Malaysia, Indonesia and the Philippines, a zone of contested borders. The Sama Dilaut are one of a number of "sea nomad" groups who used to live primarily on boats and practice a hunter/gatherer lifestyle, though a large percentage of Sama Dilaut are now settled.[40] Sabah, Malaysia was chosen as the country of consideration due to the well-documented problem of statelessness in Sabah by UNHCR and other experts.[41] In addition to these three groups, this dissertation will occasionally mention other nomadic groups where appropriate to provide context or to help with the analysis.

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[36] P. Boilley, *Les Touaregs Kel Adagh : dépendances et révoltes : du Soudan français au Mali contemporain* (Karthala 1999) 10 (hereinafter Boilley, Les Touaregs, 1999). It should be noted that while the Tuareg experience in Niger is similar to that of Mali, the Tuareg experience in Algeria is very different. Keenan notes that the Algerian Tuareg are much better integrated into their states, where they have "equal rights and political representation," though they remain marginalized minorities. J. Keenan, *The Lesser Gods of the Sahara: Social Change and Contested Terrain amongst the Tuareg of Algeria* (Routledge 2004) 10 (hereinafter Keenan, Lesser Gods, 2004). Keenan is another noted anthropologist working with the Tuareg.

[37] A. Gaudio, *Le Mali* (2nd ed., Karthala 1988) 183 (hereinafter Gaudio, 1988).

[38] Based on expert interviews.

[39] The Sama Dilaut are also sometimes called the Bajau Laut. This dissertation will refer to them as Sama Dilaut on the advice of expert anthropologist Helen Brunt.

[40] Sama Dilaut have much in common with other "sea nomad" ethnic groups including the Moken in Thailand and the Orang Suku Laut in Indonesia. See generally Human Rights Watch, 'Stateless at Sea: The Moken of Burma and Thailand' 25 June 2015 at https://www.hrw.org/report/2015/06/25/stateless-sea/moken-burma-and-thailand, on the Moken; W. White, *Sea Gypsies of Malaysia* (Ams Pri 1922, 1981) (hereinafter White, 1981). See also C. Chou, *Indonesian Sea Nomads; Money Magic and fear of the Orang Suku Laut* (Routledge 2003) (hereinafter Chou, Indonesian, 2003), on the Orang Suku Laut. Due to their similar experiences, this dissertation will also refer from time to time to the parallel experiences of the Moken and Orang Suku Laut.

[41] For example, see the research of anthropologist Helen Blunt.

1.3 Definition of Terms

Nationality and Citizenship

First, this dissertation accepts as a given that the study of nomad statelessness must be accompanied by a study of nationality law.[42] Some nomads are stateless under the laws of their countries, but others are of undetermined, or contested, nationality. Others are at risk of statelessness due to a lack of identity documents, even though they qualify as nationals under the law. As a result, this dissertation will look at the nationality and the statelessness of nomads, but also at cases of contested or unknown nationality. Cases of contested and unknown nationality will be noted where necessary.

This dissertation looks at nationality under the law. Despite being a legal concept, it is not easy to formulate a clear definition of nationality. As some experts have pointed out, attempts to define nationality usually "fall short" given the complexity of the concept and the many ways nationality has evolved over the centuries.[43] Some experts point out that nationality is too limited to fully explain the relationship between individuals and states.[44] Some experts argue that nationality must have some minimum content.[45] Others view nationality as first and foremost a legal status, or identifier.[46] Hirsch Ballin defines nationality as "a status that entitles persons to citizens' rights, the status that is fleshed out in the legal relationships between the

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[42] M. Manly and L. van Waas, 'The State of Statelessness Research' *19 Tilburg Law Review* 3 (2014) 5 (hereinafter Manly and Van Waas, 2014).

[43] E. Isin and P. Nyers, 'Introduction' in E. Isin and P. Nyers, *Routledge Handbook of Global Citizenship Studies* (Routledge 2014) 1 (hereinafter Isin and Nyers, 2014). The authors define nationality as "a negotiated and dynamic institution mediating rights between political subjects and their polities..." 2. See also R. Slone, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' 50 *Har. Int'l L. J.* 1 (2009) 3 (hereinafter Slone 2009).

[44] T. Bloom, 'Citizenship and Colonization: Liberal concepts of citizenship are not adequate for understanding contemporary individual-state relationships' 67 *Soundings* 114 (2018) (hereinafter Bloom, Citizenship, 2018) 115.

[45] L. N. Kingston, 'Stateless as a Lack of Functioning Citizenship' 19 *Tilburg Law Review* 127 (2014) (hereinafter Kingston, Stateless, 2014). See also L. Kingston, 'Worthy of rights: Statelessness as a cause and symptom of marginalisation' in T. Bloom, *Understanding Statelessness* 17-18 (hereinafter Kingston, Worthy); E. Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart 2016) 10 (hereinafter Fripp, 2016). "The right to an education is more than simply the right to attend school," but also includes the right to advocate for culturally appropriate schooling." H. Alexander, 'The Open Sky or a Brick and Mortar School? Statelessness, Education and Nomadic Children' in Institute on Statelessness and Inclusion (ed.) *The World's Stateless Children* (January 2017).

[46] F. Jault-Seseke, *Droit de la nationalité et des étrangers* (Presses universitaires de France 2015) 21 (hereinafter Jault-Seseke, 2015). See also H. Gulalp, 'Introduction: Citizenship vs. Nationality?' in H. Gulalp (ed.), *Citizenship and Ethnic Conflict: Challenging the nation-state* (Routledge 2009) 1.

state and the citizen."[47] Edwards argues that nationality must, at a minimum, provide diplomatic protection and the right to enter and reside.[48] Lindsey Kingston also questions the idea of "functioning citizenship," or nationality that ensures the full spectrum of rights.[49] This dissertation looks both at the extent to which nomads have a status of any kind under the laws of their countries and the extent to which this status protects and ensures their rights.

As noted above, this dissertation will primarily look at nationality as a matter of law. It will, however, also look beyond nationality as a legal status to important historical and sociological considerations that provide context for why and how nationality laws have been applied, or not applied, to nomads. As Tendayi Bloom puts it, "the core ideals of liberal citizenship are compelling, but they are often lost in the real-world systems ostensibly built upon them."[50] Discrimination is often closely related to statelessness[51] and nationality can be used as a tool of assimilation for minorities.[52] The cultural and political forces that shape nationality law are therefore vital to understanding the evolution of the law itself.

As a result, this dissertation will also look at nationality as a sociological and cultural identity. Nationality can signify membership not only in a political state, but also in a cultural nation, or a community of people sharing a common way of life and a shared history of living in a particular place or homeland.[53] Nationality law also contains moral

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[47] E. M. H. Hirsch Ballin, *Citizen's Rights and the Right to be a Citizen* (Brill Nijhoff, 2014) 65 (hereinafter Hirsch Ballin, 2014).

[48] A. Edwards, 'The meaning of nationality in international law in an era of human rights: procedural and substantive aspects' in A. Edwards and L. van Waas (eds.) *Nationality and Statelessness under International Law* Cambridge UP 2014) (hereinafter Edwards, 2014) 30-38. See also H. Alexander and J. Simon, 'No Port, No Passport: Why Submerged States Can Have No Nationals' 26 *Wash. Int'l L. J.* 307 (2016); P. Lagarde, *La nationalité français* (2nd ed., Dalloz 1989) 8; G. R. de Groot and O. W. Vonk, *International Standards on Nationality Law: Texts, Cases and Materials* (Wolf LP 2016) 36 (hereinafter de Groot and Vonk).

[49] Kingston, Stateless, 2014, 127.

[50] Bloom, Citizenship, 2018, 114.

[51] As UNHCR has noted, "discrimination and lack of documents can be both causes and consequences of statelessness." UNHCR, 'This is Our Home: Stateless Minorities and Their Search for Citizenship' (2017) 2.

[52] For more on how nationality can be a tool of assimilation, see H. Alexander, 'The Open Sky or a Brick and Mortar School? Nomad Children and Education' The World's Stateless Children (Institute on Statelessness and Inclusion 2017). See also Interim report of the Special Rapporteur on the right to food, O. De Schutter, submitted in accordance with General Assembly resolution 64/15, UN General Assembly 11 Aug. 2010 7. See also K. Staples, 'Recognition, nationality, and statelessness: State-based challenges for UNHCR's plan to end statelessness' in T. Bloom, (ed.) *Understanding Statelessness* (Routledge 2017) 173 (hereinafter Staples, 2017).

[53] D. Miller, *On Nationality* (Oxford UP 1995) 27 (hereinafter Miller, 1995). Miller sees a connection to a particular territory as a constituent part of nationality in the cultural sense. Fripp, quoting Weis, calls this the "sociological" aspect of nationality. Fripp, 2016, 4-5, quoting P. Weis, *Nationality and Statelessness in International Law* (Brill 1979) (hereinafter Weis, 1979). See also J. H. J. Verzijl, *International Law in Historical Perspective* (Martinus Nijhoff 1998) 6 (hereinafter Verzijl, 1998); I. Brownlie, 'Relations of Nationality in International Law' 39 *British Yearbook of Int'l L*. 284 (1963) 344-345; M. Koessler, 'Subject, Citizen, National

elements. It formalizes the claims of some people to live in a particular territory and to participate in a particular government, while excluding others.[54] As a result, this dissertation will explore nationality as a legal status, but also give context to the development and application of the laws by looking at the ways in which sociological concerns effect the law.

This dissertation will use the term nationality rather than citizenship throughout because nationality is the generally preferred term in international law.[55] This dissertation will use "citizenship" where it occurs in original quotes or documents. It is important to here note here that the term citizenship is sometimes used by experts to express distinct concepts or meanings.[56] Fransman, for example, differentiates between the two terms in British law:

> Citizenship...defines one's place and conduct in society, such as voting, standing for election, jury service, military service, eligibility for appointment to the civil service, state financial assistance and health care and state-sponsored education...(whereas nationality is) one's international identity as belonging to a sovereign state and may be evidence by a passport...In the case of citizenship, the relationship is more concerned with the individual within the state, in the case of nationality, it is more concerned with the individual and the state in the international context.[57]

For the purposes of clarity and simplicity in this dissertation, however, the word nationality will be used to define both the municipal and the international aspects of nationality.

Statelessness and Risk of Statelessness

This dissertation adopts a broad, inclusive definition of statelessness as advocated by UNHCR and many experts. According to the 1954 Convention Relating to the Status of Stateless Persons, Art. 1, a stateless person, or *apatride*, is a "person who is not considered as a national by any state under the operation of its law."[58] Statelessness occurs for many

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and Permanent Allegiance' *56 Yale Law Journal 58* (1946) (hereinafter Koessler, 1946); E. Ehrlich, 'Fundamental Principles of the Sociology of Law' (Transaction Publishers 1936) 55; Jault-Seseke, 17.

[54] Miller, 18-19.

[55] De Groot and Vonk, 3. See also Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart 2016) 3 (hereinafter Fripp, 2016).

[56] I am indebted to Bronwen Manby for her comments on this point. See also Edwards, 13-14.

[57] L. Fransman QC (ed.), *Fransman's British Nationality Law* (3rd edn., Bloomsbury 2011) 3-4 (hereinafter Fransman, 2011).

[58] Convention Relating to the Status of Stateless Persons (1954), United Nations, Treaty Series, vol. 360, 117, art. 1 (hereinafter 1954 Convention, or, when grouped with the 1961 Convention, Statelessness Conventions). Though many states have not ratified the Convention, this definition is arguably a matter of customary law. Handbook, 2014 9. See also L. Pilgram, 'International Law and European Nationality Laws' (EUDO Citizenship Observatory 2011) 2 (hereinafter Pilgram, 2011), 8; L. van Waas, 'The U.N. Statelessness Conventions' in A.

reasons, including via expressly discriminatory nationality laws, discrimination in how nationality laws are applied, gaps between otherwise neutral nationality regimes within states and gaps between the nationality laws of different states. Statelessness is also a common result of the breakup of states, including during the decolonization process and the creation of new states in the middle of the 20th century. Statelessness may also be caused by denationalization or by the renunciation of nationality.

It is important to understand what is meant by "under operation of its law" in the definition of statelessness.[59] The operation of law is made up of many different aspects, including court decisions, statutes, administrative rules, procedural rules, and treaties and custom. Sources of law may vary depending on the legal system used in a country. Sources of law in the common law system, for example, include case law and statutes, as well as customary law and "conventional law", or law by agreement.[60] As a procedural matter, nationality can either be conferred automatically, when the requirements of the law are met, or following a formal procedure.[61] As a result, the registration of nationality and the issuance of documentation may play a determinative role in establishing nationality, or may be important evidence of nationality. Operation of law also includes the actions of tribunals and administrative bodies who apply the law.

When determining statelessness, therefore, it is necessary to look at all points at which nationality is determined, from the procedures used at local registration offices in issuing documents to relevant court cases to changes made to the laws by legislatures, to the actions of embassies.[62] As the UNHCR Handbook on Protection of Stateless Persons puts it, "(t)he reference to 'law' in Article 1(1) should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice."[63] In so doing, this dissertation adopts an expansive definition of statelessness. As Gabor Gyulai puts it, "(e)stablishing statelessness is often a cumbersome exercise and if the evidentiary rules

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Edwards and L. van Waas, *Nationality and Statelessness Under International Law* (Cambridge UP 2014) 78 (hereinafter Van Waas, Statelessness Conventions, 2014).

[59] 1954 Convention.

[60] J. Salmond, *Jurisprudence, or the Theory of Law* (7th edn, Sweet & Maxwell 1924) 168 (hereinafter Salmond, 1924).

[61] While the acquisition of nationality is automatic in some cases where certain conditions are met, such as birth within the territory of the state, the failure to obtain an ID or register a birth can result in undetermined nationality, even where the individual qualifies as a national under the law. Handbook ,2014, 13.

[62] Van Waas, Statelessness Conventions, 80-81 (discussing the meaning of "under the operation of law"). See also Salmond, 182. For example, an individual may qualify as a national under the nationality law of a state, but be denied nationality by a court or embassy. See S. Jaghai, 'Statelessness at Home: The Story of a Stateless Student at Tilburg Law School' 19 Tilburg L. Rev. 108 (2014).

[63] Handbook, 2014, 12.

are too strict, this can easily undermine the protection objective of the 1954 Convention."[64] As UNHCR has pointed out, the manner in which the law is applied, the practice of the state, is key.[65] "Widespread discrimination" against certain groups in the granting of nationality and the issuance of documents "should give rise to a presumption of *de jure* statelessness..."[66] This dissertation will therefore look not only at the letter of the law, but also how it is applied, including the absence or presence of identity documents.

At the same time, this dissertation remains sensitive to the problems with applying the term "stateless" to nomads. The term "stateless" may impose a negative label on persons who view themselves as rightfully the nationals of their state. Calling some nomads "stateless" risks doing them harm or reinforcing negative government stereotypes. The use of the term "stateless" should be seen as referencing a legal category defined by states in international law, not making a value judgment. Nevertheless, in recognition of the sensitivity of the issue, the term "stateless" is therefore used with caution.[67]

Some nomads may qualify for a nationality under the law, but have no identity documents to prove their nationality. The mere fact that an individual lacks identity documents does not mean that person is stateless.[68] As Mark Manly points out, "(l)ack of birth registration is not sufficient to render a person stateless."[69] Persons who have no identity documents and whose parents have no identity documents, however, may be at-risk of statelessness.[70] Lack of registration can have many of the same affects as refusing to grant nationality, such as making it impossible for children to attend school or for an individual to return home

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[64] G. Gyulai, 'The Determination of Statelessness and the Establishment of a Statelessness-specific Protection Regime' in A. Edwards and L. van Waas, *Nationality and Statelessness under International Law* (Cambridge UP 2014) 137 (hereinafter Gyulai). See also Van Waas, Statelessness Conventions, 79; *R (on the application of Semeda) v Secretary of State for the Home Department* (statelessness; Pham (2015) UKSC 19 applied) IJR (2015) UKUT 658 (IAC).

[65] Handbook, 2014, 13.

[66] L. Bingham, J. H. Reddy and S. Kohn, '*De Jure* Statelessness in the Real World: Applying the Prato Summary Conclusion' (Open Society Justice Initiative 2011) 5-6 (hereinafter Bingham, Reddy and Kohn).

[67] H. Massey, 'UNHCR and de facto Statelessness' UNHCR Legal and Protection Policy Research Series (2010) (hereinafter Massey) 53. See also Batchelor, 1998, 158.

[68] "Failing to distinguish between the stateless and those who lack documentation, and the failure to distinguish stateless persons who lack documentation, can lead to the wrong solutions and frameworks being pursued, with little or even negative gain." A. de Chickera and L. van Waas, 'Unpacking Statelessness' in T Bloom (ed.), *Understanding Statelessness* (Routledge 2017) 65. As Mark Manly points out, "the definition of a stateless person in the 1954 Convention is more complex than it appears at first glance and has been interpreted in wildly diverging manners," so this section opts here for the most inclusive interpretation. Manly 2014 95. See also Van Waas, Nationality, 2008, 20.

[69] Manly, 2014, 107.

[70] UNICEF, 'Every Child's Birth Right: Inequalities and Trends in Birth Registration' (2013) at https://www.un.org/ruleoflaw/files/Embargoed_11_Dec_Birth_Registration_report_low_res.pdf.

from abroad.[71] As UNHCR has noted, failure to register and obtain an ID or paperwork can lead to a cycle of exclusion that is compounded by discrimination and marginalization,[72] placing people at risk of statelessness.[73] The line between statelessness and at-risk of statelessness can be fluid and blurry.[74] As the Institute on Statelessness and Inclusion has noted, persons lacking in documentation may be at risk of statelessness and "some of them are likely to already be stateless."[75] This dissertation will also use the term "at risk of statelessness" where appropriate.

As well, this dissertation will also look beyond the narrow interpretations of the law to explore the wider context of discrimination and exclusion that makes up a large part of statelessness. Laws and their implementation are not the only factors relevant to an analysis of statelessness. Government attitudes and policy goals are crucial in understanding why nationality laws are drafted and applied in certain ways. An overly narrow focus on laws and their implementation in isolation risks missing the larger context of why and how statelessness occurs. This dissertation therefore follows the advice of the UNHCR Handbook in applying a broad and flexible approach to discuss the nationality status of nomads, looking at the totality of the circumstances and history of each group.[76]

Nomad

"Nomad" is not a legal term and has no definition in law, but it is frequently employed by anthropologists, governments and settled peoples[77] to define the shrinking minority of people who do not rely on agriculture and the cultivation of plants as the primary source of

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[71] Van Waas cites to the 1997 issue of UNHCR's 'The State of the World's Refugees' as the beginning of UNHCR's push to highlight the importance of registration to establishing nationality and preventing statelessness. Van Waas, Nationality, 2008, 151-152, citing to UNHCR, 'Statelessness and Citizenship' in UNHCR, *The State of the World's Refugees - A Humanitarian Agenda*, (Oxford 1997) 226. Registration may also be used in an international setting to establish "functional nationality", or nationality for the purposes of settling an international disputes and determining the subjects of international treaties. I. Brownlie, 'Relations of Nationality in Public International Law' 39 British Yearbook of Int'l L. 284 (1963) 347-349 (hereinafter Brownlie, Nationality).

[72] For example, see UN High Commissioner for Refugees (UNHCR), Persons at Risk of Statelessness in Serbia, June 2011. See also Van Waas, Nationality, 2008, 153-157; B. Manby, 'Legal Identity for All' and Childhood Statelessness' in Institute on Statelessness and Inclusion (ed.), *The World's Stateless Children* (January 2017) 320-321 (hereinafter Manby, Legal).

[73] See generally the Institute on Statelessness and Inclusion, *The World's Stateless* (December 2014) at http://www.institutesi.org/worldsstateless.pdf (hereinafter Institute, Stateless).

[74] Batchelor, 1998, 172. See also Massey; Handbook, 2014 5; Fripp, 2016, 102.

[75] Institute on Statelessness and Inclusion, *The World's Stateless* (Wolf 2014) 43. See also Manly, 2014, 103.

[76] Handbook, 2014, 12-14.

[77] In anthropology, "sedentism", or what I will call "settlement," is defined as "the settled, immobile location of the household during the annual round of productive activities." P. Salzman, 'Introduction' in P. Salzman (ed.) *When Nomads Settle* (Praeger 1980) (hereinafter Salzman, Introduction) 10.

their food.[78] There is no established and agreed upon definition for the word nomad and, as a result, this dissertation will take an inclusive approach, looking not only at currently mobile and nomadic groups, but recently nomadic groups who are still strongly associated with mobility by their governments and other outsiders.

While there is no definition in law for the term nomad, several organizations have made an attempt to define it. The Council of Europe defined nomads as; "persons who, for traditional reasons, are accustomed to follow an itinerant way of life."[79] This definition arguably fails to capture the diversity of nomadic lifestyles, however. A joint report by the International Organization on Migration, ECOWAS, the European Union defines nomadism as, "(c)ontinuous movement of people with their herds. Very mobile production system, opportunistic movements according to pasture availability, often without own fields and annual return to a fixed base."[80] Once again, this definition fails to take into account mobile traders and artists and is therefore too limited. The ECOWAS report also distinguishes nomadism from pastoralism and transhumance. This dissertation will adopt an expansive view of the term nomad to include all forms of mobile lifestyle, including pastoralism, mobile fishing, trade, mobile arts and transhumance.

Self-identification is often a key factor in nomad identification. This is in part because colonial attitudes have coloured and distorted the historical record in ways which are still being uncovered and discussed.[81] Nomadism is a diverse, mutable and changeable characteristic, with many nomadic populations moving in and out of nomadism over time.[82] Nomads move in and out of nomadism. They may have relatives who are sedentary and/or close contractual relationships with settled communities. As such, it can be difficult to speak of nomads as separate, distinct groups. For example, Youssouf Diallo prefers not to classify cattle herders as nomads, but rather as herders who have gone through periods of nomadism.[83]

Defining nomadism is also difficult because nomadism is not simply an economic activity, but also a social and cultural way of life. Nomads may also be defined as a separate

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[78] For a discussion of the origins of the word "nomad," see Y. Diallo, *Nomades des espaces interstitiels: Pastoralisme, identité, migrations (Burkina Faso - Cote d'Ivoire)* (Rudiger Koppe Verlag 2008) (hereinafter Diallo) 23-28.

[79] Council of Europe Recommendation No. R (83) 1 of the Committee of Ministeres to Member States on Stateless Nomads and Nomads of Undetermined Nationality (Adopted by the Committee of Ministers on 22 February 1983 at the 356th meeting of the Ministers' Deputies).

[80] Regional Policies and Response to Manage Pastoral Movements within the ECOWAS Region, International Organization on Migration, ECOWAS, the European Union and ECOWAS 'Support to Free Movement of Persons and Migration in West Africa' (FMM West Africa) (September 2017) vii.

[81] Recent studies of Australian aboriginals highlight the dangers of labeling groups as nomadic. B. McMahon, 'Scientist debunks nomadic Aborigine "myth"' *The Guardian* (9 Oct. 2007).

[82] D. Chatty, *Mobile Pastoralists* (Columbia UP 1996) (hereinafter Chatty, Pastoralists) 82.

[83] Diallo, 27- 33.

ethnicity or as a class of people within an ethnicity. Many nomads practice different religions or speak unique languages from nearby, settled communities, but in other cases, it is cultural or economic practices that form the primary point of difference with agricultural or urban groups. As a result of the difficulties in defining nomadism and classifying nomadic and mobile peoples, this dissertation will apply a broad approach.

Many groups that were historically associated with nomadism during the colonial period are now semi-settled or settled, a fact which will be explored at length in this dissertation. Many nomads have close family or patronage relations with settled, urban or agricultural peoples and live in a state of economic and social inter-dependence with settled communities, forming part of complex societies where the line between nomad, farmer and urbanite was frequently blurred. The distinction between nomadic and settled groups is therefore often not clear nor is it always politically or socially relevant. While nomadism was frequently a feature drawn out and much commented upon by the colonial administrators who often created important historical records, recent scholarship has done much to correct the record on nomad land use and the extent of nomad land ownership, their relations to settled and urban communities and the extent and limits of their mobility.[84]

The term nomad is also fraught with problems due to its negative connotations.[85] Anthropologist Dawn Chatty promotes the term "mobile peoples" in response to the imprecise and often negative connotations of the term nomad. Her use of "mobile peoples" is in line with the Dana Declaration on Mobile Peoples and Conservation.[86]

This dissertation will use the term nomads rather than mobile peoples because nomads is the term most used by governments and other outsiders to describe historically mobile peoples and others associated, rightly or not, with a nomadic lifestyle. The bias and negative perceptions associated with the term nomad are very much a factor in nomad statelessness. In some cases, the term nomad continues to be applied to settled, former nomads in tandem with their continued exclusion. In this context, the context of outsider perceptions and biases, the term nomad is appropriate.

In particular, as this dissertation will explore, the term nomad imposes an imagined ideology, a world-view, on otherwise dispirit groups coming from different cultures and living in vastly different circumstances, creating a dichotomy between nomads and the rest of society. It is inherently a loaded and exclusionary term and this dissertation will explore they ways in which its negative connotations, and tendency to isolate and exclude the groups to whom it is applied, are very much relevant to nomad statelessness. For example, nomadism has sometimes been negatively associated with illiteracy and, as a result, a poor

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[84] See for example Diallo, 28-32.

[85] Diallo, 27-28.

[86] D. Chatty, 'Nomadic Peoples, Migration and Biodiversity' *SGI Quarterly* (October 2003) (hereinafter Chatty, Nomadic Peoples). See also the Dana Declaration on Mobile Peoples and Conservation, Fifth World Parks Conference, Durban, South Africa (September 2003) (hereinafter Dana Declaration).

understanding of religion. Max Weber, for example, believed that "urban life in contrast with rural or desert life provides an individual with greater facilities for becoming literate, for becoming acquainted with the written, authentic version of his or her faith..."[87]

There are also difficulties and ethical issues associated with labelling marginalized peoples like nomads, where a clear classification does not exist for the group in question and there are negative associations with the term.[88] As a result, it is difficult to say how many mobile, nomadic and non-settled peoples remain in the world, nor is it the purpose of this dissertation to uncover the number. As with statelessness, discussed above, it may not be possible or desirable to quantify the practice of nomadism. Therefore, this dissertation will not enter into a detailed discussion of different types of nomadism or evaluate the extent to which modern populations continue to practice nomadism. For the purposes at hand, this dissertation selected three groups as examples which are commonly and historically associated with nomadism by others, including governments, and have members who self-identify as nomads or mobile peoples or who identify with a nomadic lifestyle or culture as part of their identity, even though they may not practice a mobile lifestyle themselves.

Despite the enormous diversity of nomad lifestyles and societies and the dangers associated with a term that has frequently been used pejoratively, there are some general points to help frame the populations that are the subject of this dissertation, beyond the simple fact of self-labelling or having been labelled as nomads by outsiders. According to the Dana Declaration on Mobile Peoples and Conservation, cited above, mobile peoples may be defined as,

> a subset of indigenous and traditional peoples whose livelihoods depend on extensive common property use of natural resources over an area, who use mobility as a management strategy for dealing with sustainable use and conservation, and who possess a distinctive cultural identity and natural resource management system.[89]

According to the 2007 Segovia Declaration of Nomadic and Transhumant Pastoralists,

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[87] P. Clarke (ed.) *The Oxford Handbook of the sociology of religion* (Oxford 2009) 127, quoting R. Bendix, *Max Weber: An Intellectual Portrait* (London 1966), (hereinafter Clarke) 114.

[88] For examples of some of the ethical and practical concerns in counting and quantifying indigenous and nomadic peoples, see B. Elias, K. Busby and P. Martins, 'One little, too little: Counting Canada's indigenous people for improved health reporting' 138 Social Science and Medicine 179 (August 2015). The authors describe some of the problems with classifying and labeling indigenous populations, including self-identification, gender discrimination and mixed-race individuals, problems with record keeping and defining family relationships. See also L. Heikkilä, 'Welfare services in enhancing good life for the Sámi: A reflection on conducting ethically responsible research and developing an improved sense of culture' 59 International Social Work 653 (2016) for reflections on the ethical challenges of field research of the Sami people, an indigenous, mobile nomadic group, including the role of subjectivity, the challenges of participatory approaches and carrying out research applying indigenous concepts and theory.

[89] Dana Declaration.

> Pastoral livelihoods are based on seasonal mobility and common property of natural resources (particularly rangelands), regulated by customary law and practices, customary institutions and leadership, all making use of local and indigenous knowledge.[90]

Seasonal, patterned mobility is one of the common features that many anthropologists use to categorize nomads.[91] Drawing on this definition, the groups chosen as subjects of this dissertation all use, or have used in the past, mobility as a strategy to manage natural resources. All have a distinct cultural identity from the majority populations of what are now the nation-states in which they live.

Finally, some, but not all, nomadic peoples may also self-identify as indigenous peoples. Many indigenous peoples are also nomadic and mobile, or were nomadic or mobile in the past. Some indigenous peoples were labelled nomadic by colonizing governments, though the extent to which this is true is now debated.[92] The intersection between nomadism and indigenous status will be referenced in this dissertation where appropriate.

Sources

This dissertation does not employ any original field research. Instead, this dissertation aims to be a synthesis and an analysis of what is already known about government laws, attitudes and policies towards the three selected nomadic groups, an analysis which is then used as grounds to explore and critique possible solutions under international law. As this is a law dissertation, it will focus on nationality law, both in the municipal and international

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[90] Segovia Declaration of Nomadic and Transhumant Pastoralists, La Granja, Segovia, Spain (14 September 2007).

[91] Nomadism may be defined as "movement of the household during the annual round of productive activities." P. C. Salman, *When Nomads Settle: Processes of Sedentarization as Adaptation and Response* (Praeger 1980) 11. Keenan points out that nomads live in areas where "natural resources are not only scarce, but also insecure from year to year," so movement is required. Keenan, Lesser Gods, 2004, 165. See also F. Hole, 'Pastoral Mobility as an Adaptation' in J. Szuchman, *Nomads, Tribes and the State in the Ancient Near East* (U Chicago 2009) 269-270, where he says, "I see pastoralism in its various forms as examples of adaptation to environmental and social conditions within a mixed agro-pastoral economy."

According to Bourgeot, nomadism may be defined as "regular and periodic migration for the purpose of pastoral industry" or "a mode of herding or raising livestock over long distances." A. Bourgeot, *Les sociétés touarègues; Nomadisme, identité, résistances* (Karthala 1995) 155 (hereinafter Bourgeot, Résistances) (my translation), citing to the definitions of A. Bernard, N. Lacroit and R. Capot-Rey. Nomadism, however, should not be treated as synonymous with pastoralism as it also encompasses wandering traders, peripatetic minorities and hunter-gatherers. Some anthropologists argue the term nomad should be reserved for pastoralists. "In my view, wandering hunters and gatherers on the one hand, and mobile pastoralists, on the other, have too little in common to unite them under a single label." A. Khazanov, *Nomads and the Outside World*, (2nd edn U Wisconsin P 1983) (hereinafter Khazanov, Outside) 15-16. Khazanov's work focuses on the interrelation and inter-dependence between nomadic and settled peoples.

[92] See generally J. Castellino and C. Doyle, 'Who are Indigenous Peoples: An Examination of Concepts Concerning Group Membership in the UNDRIP' in J. Hohmann and M. Weller, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford 2018) (hereinafter Castellino and Doyle).

spheres. To do so, it will look both at nationality laws and how they are implemented, including the implementation of nationality at the local level.

This examination is multi-faceted, looking not only at nationality laws, but also at the issuance of identity documents by registration departments, the courts and other organs of the state. It will also explore access to nationality rights and proof of nationality by looking at voting records, school attendance, land ownership and other areas where nomads interact with the organs of the state. Reference will therefore be made both to laws and their implementation, as well as secondary scholarship documenting voting histories, access to education, health care and official work, taxes, the census and other official registries.

But the problem of nomad statelessness should not be examined only through legal analysis. This dissertation will draw on a diverse wealth of sources to explore why certain nomads became stateless by examining key state goals that affected and intersected with the status of nomads. Manly and Van Waas cite the "need to explore statelessness from an interdisciplinary perspective..."[93] Statelessness as government policy is influenced by negative perceptions held by governments, government officials and society at large. Matters of perception and what is sometimes referred to as "public opinion," including the presentation of nomadic groups by media and outside scholars, are of relevance. This dissertation will look beyond the fact of the law to explore the rationale behind how the law has been applied, or not applied, to nomads and the wider political context, looking at history, philosophy, geography, politics and sociology.

Perhaps most crucially, this dissertation includes an analysis of the political theories and philosophies that have influenced nomad-state relations from the colonial period through the modern age, including the philosophies underpinning the nation-state system and the use of nationality to govern citizen-state relationships. It will also look at how nomad inclusion and exclusion relate to the control and use of land, including theories of private property ownership and state control. To do so, this dissertation will draw from other disciplines including history, sociology, geography, anthropology and others to inform its legal analysis.

This dissertation does not seek to do any quantitative analysis of nomad statelessness because reliable data does not exist for either stateless persons or nomads in most countries.[94] Quantifying statelessness in many contexts may not be possible or desirable due to the ways in which stateless people are often invisible to state structures and

[93] Manly and Van Waas, 2014, 6.

[94] There are currently a number of statelessness mapping projects being undertaken in various countries. UNDP is currently undertaking a mapping exercise of statelessness for one of the three groups cited in this dissertation: the Sama Dilaut of Sabah, Malaysia. Future mapping projects may assist in quantifying statelessness, but at the time of writing, statistics on statelessness are usually not available.

bureaucracies and the ways in which official statistics may be manipulated and misused.[95] Likewise, the difficulties in defining nomadism and identifying nomads make quantitative studies of nomads extremely difficult.[96] Instead, this dissertation presents an in-depth analysis of the legal framework in the three selected states, as pertains to the three selected nomad groups. This academic research is fleshed out by an analysis of media, government and non-profit publications about nomads, documents which help to explain the attitudes and opinions of nomads held by many governments and international actors during different key historical moments in nomad-state relations.

Missing from this dissertation are the opinions and views of the nomads themselves, including how they see nationality. It is hoped also that this dissertation will serve as a jumping off point for further discussion of nationality from the nomadic perspective. Another limitation on this dissertation is the frequent lack of quality sources from the colonial period. Due to the lack of nomad sources from the colonial period, this dissertation must rely on colonial sources that may be inaccurate and biased. In fact, the topic of colonial bias against nomads is a major topic of this dissertation, so there is a certain irony in being forced to rely on biased sources for a dissertation about that very bias. The challenges in using colonial sources are acknowledged where appropriate.

A good example of reliance on colonial sources is the use of J. Spencer Trimingham's *Islam in West Africa*.[97] While subsequent scholars have criticized Trimingham's book as being "outdated," it remains "the only survey of its kind,"[98] in that it is one of the few major works pulling together a broad array of scholarship into one place. Another example would be the contested history of the origins of Bedouin tribes in the Gulf region, where much of the scholarship is contradictory.[99] Another example is arguments between anthropologists on the extent to which the Sama Dilaut were a "pariah people" during the precolonial period given that many of the records of the Sama Dilaut are based on colonial European sources.[100] A number of more recent scholars have worked to place colonial era sources in their proper context and this dissertation will therefore also rely on the work of anthropologists like Dawn Chatty and historians like Bruce Hall to help interpret and situate colonial sources. It will also acknowledge disputed history where necessary.

Part 3 will look at a wide variety of sources, including treaties, customary international law and general principles of law, but also draft treaties, declarations, cases, treaty body

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[95] See Manly, 2014, 101 for a discussion of the difficulties of quantifying statelessness. For an example, see the discussion around collecting statistics on the *bidoon* of Kuwait in C. Beaugrand, Stateless, 2018, 33-38.

[96] See generally the work of Dawn Chatty and the Dana Declaration.

[97] J. Spencer Trimingham, *Islam in West Africa* (Clarendon 1959) (hereinafter Trimingham).

[98] R. S. O'Fahey, 'Islamic Hegemonies in the Sudan: Sufism, Mahdism and Islamism' in Louis Brenner (ed.), *Muslim Identity and Social Change in Subsaharan Africa* (Indiana 1993) 21. See Part 2, below.

[99] For more on this issue, see Part 2, below.

[100] For more on this issue, see Part 2, below.

reports and guidance issued by organs of the United Nations.[101] Soft law is particularly important in the case of nomads, where little treaty law exists beyond bilateral treaties on specific populations.[102] Soft law can assist in interpreting key terms and how key concepts in treaties may be applied to the specific circumstances faced by nomads. It is therefore necessary to explore international law writ large and draw on all available sources. This approach will also allow Part 3 to examine not only what states have bound themselves to do, but also where the law might develop in the future, particularly on emerging issues.

Regional instruments are particularly important because they are often supported by regional human rights courts or committees and can help to define key terms and concepts and show how the law might be applied to particular groups, like nomads.[103] Court cases often involve an in depth examination of particular terms and concepts. "The courts are often a valuable tool in vindicating the equal rights of stateless people, including their right to a nationality."[104] Where applicable, Part 3 will explore these regional instruments, including the dicta of courts and findings of relevant committees.

Draft conventions and declarations can give insight into the emerging consensus on the importance of the right to a nationality in the international sphere, even where they are not yet legally binding on states.[105] They can give a picture of possible reforms and future advancements in international law. They can also help guide the interpretation of existing treaties and commonly used terms in the law. As Brownlie puts it, "such instruments…may stand for a threshold of consensus and confront states in a significant way."[106]

Finally, this dissertation will look explicitly at guidance provided by organs of the United Nations, particularly UNHCR, which the UN General Assembly has given the global mandate to combat statelessness.[107] UN guidance can help define how treaties are to be applied in certain circumstances. Where applicable, this dissertation will also consider the opinions of noted international law scholars, in line with Article 38 of the Statute of the International Court of Justice. Such guidance can illuminate legal consensus on how treaties like the Statelessness Conventions should be applied to particular groups under particular

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[101] Shaw, 2008, 70.

[102] For an example, see the Jay Treaty, Standing Senate Committee on Aboriginal Peoples, 'Border Crossing Issues and the Jay Treaty' Senate of Canada (June 2016).

[103] See Shaw, 2008, 70. Shaw cites to Article 38(1) of the Statute of the International Court of Justice as the authority on international law sources. See also Brownlie, 2008, 3-29.

[104] A de Chickera and J. Whiteman, 'Addressing statelessness through the right to equality and non-discrimination' in L. van Waas and M. Khanna, *Solving Statelessness* (Wolf 2017) 119.

[105] See for example the Draft Articles, 24. See also Edwards, 38; de Groot and Vonk, 71-72.

[106] Brownlie, 2008, 4.

[107] UNGA Resolution A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995.

circumstances. For a list of sources organized by topic, see the section on Sources by Topic at the end of this dissertation.

Part 2: The Nationality and Statelessness of Nomads

2.1 Nomads and Empire

Introduction

> (T)he root causes of statelessness are complex and multifaceted including state succession, decolonization, conflicting laws between States, domestic changes to nationality laws, and discrimination.[108]

Part 2 will discuss the nationality and statelessness of the Bedouin, the Tuareg and the Sama Dilaut in Kuwait, Mali and Malaysia during the pre-colonial and colonial periods. It will explain how nomads went from being vital participants in pre-colonial states to marginalized minorities during the colonial period. It will also examine the types of status given to some nomads during the colonial period and the reasons why some nomads received no status at all. This history is crucial to understanding how and why some nomads became stateless and what types of status were available to nomads during the colonial period.

Part 2 begins by introducing the three nomadic groups examined in this dissertation, summarizing how belonging was defined in their societies in the decades before colonial conquest. This section is mainly a work of historical analysis. Next, Part 2 will discuss the colonial period, a time when the status and role played by nomads in society radically changed. The section on the colonial period begins with a historical analysis and concludes with a section on legal analysis.

[108] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya,* Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC) (22 March 2011) (hereinafter Nubian Children) para. 45.

Nomads Before Colonization

The Bedouin of the Persian Gulf

Possible Locations of Bedouin Tribes During the Colonial Period

For thousands of years, the Bedouin practiced nomadic pastoralism and trade across the Arabian peninsula, living alongside and intermingled with settled oasis and coastal communities.[109] The area today known as Kuwait has always been very dry, containing less than 1% arable land, making nomadic pastoralism an ideal use of land away from oasis and coastal areas.[110] As will be shown, the desert environment that made pastoralism so ideal would also prove to contain large quantities of oil and natural gas, but during the pre-colonial period, pastoralism, pearl fishing and trade formed the foundation of the desert economy.[111] Much of Kuwaiti history is disputed, particularly when it comes to the origins

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[109] Chatty, Pastoralists, 5-6. See also A. al-Ashker and R. Wilson, *Islamic Economics: A Short History* (Brill 2006) 4; F. F. Anscombe, *The Ottoman Gulf, the Creation of Kuwait, Saudi Arabia and Qatar* (Columbia U. Press 1997) 11-12 (hereinafter Anscombe). Anscombe is a historian who has published widely on Ottoman and Gulf history. This section relies on a blend of sources from anthropology, history and other social sciences. Where there are different opinions from scholars from different fields, these differences will be noted.

[110] M. Casey, *The History of Kuwait* (Greenwood Publishing Group 2007) (hereinafter Casey) 4-5.

[111] As Commins puts it, mobility was one of the "distinctive features" of Gulf society. D. Commins, *The Gulf States: A Modern History* (Tauris 2012) (hereinafter Commins) 6.

of certain Bedouin tribes. Nevertheless, this section will attempt to present an overview of what is known about Bedouin society prior to British Protectorate period.

Modern Kuwait is located on the Persian Gulf and is centred around Kuwait City, an ancient trading port. During the 1700s, a "wave" of Bedouin tribes migrated to the region.[112] Over time, the economies of the Gulf region and the area now known as Kuwait came to rely on regional trade both by sea and by camel caravan. Bedouin served as guides and protection for the caravan trade that drove the regional economy.[113] Bedouin society was hierarchical, with camel herding tribes at the top of the social structure.[114] The desert came to be dominated by noble Bedouin tribes, either nomadic or semi-settled and often practicing long distance trade, and semi-nomadic tribes employed in sheep, camel or goat pastoralism and centred around oasis or coastal towns.[115]

For much of its recent history, the Gulf was nominally controlled by various empires, including the Romans, Persians, and Ottomans. During this period, local Bedouin sheiks retained control over their domains, though they remained influenced, pressured and, to a certain extent, threatened by larger and stronger empires to their north and west.[116] Kuwait Town became rich off of trade, fishing and pearling and developed a wealthy merchant class.[117] During the early modern period, the town, ruled by the powerful Al-Sabah family[118], capitalized on its position at the edge of the Ottoman empire, where it could benefit from being somewhat independent from the Empire and attract non-Ottoman trade, including British trade.[119] Beyond the walls of Kuwait Town, Bedouin confederations controlled the desert, herding camels, sheep and goats and trading in caravans between the Mediterranean and the Gulf port cities, including Kuwait.[120] Tribes would trade over long distances between urban centres; such seasonal trade was called *musabila* and formed an

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[112] Commins, 9.

[113] Commins, 8.

[114] Beaugrand, Stateless, 2018, 68.

[115] Beaugrand, Stateless, 2018, 45-53.

[116] Casey, 18.

[117] B. J. Slot, *Mubarak Al-Sabah: Founder of Modern Kuwait: 1896-1915* (Arabian Publishing 2005) 8. Slot is a historian publishing on the region's history, particularly its early history. See also Casey, 18.

[118] A. N. Longva, 'Citizenship in the Gulf States: Conceptualization and Practice' in Nils A Butenschon, Uri Davis and Manuel Hassassian (eds.), *Citizenship and the State in the Middle East* (Syracuse 2000) 181. See also A. al-Dekhayel, *Kuwait: Oil, State and Political Legitimization* (Ithaca Press 2000) 1 (hereinafter al-Dekhayel); J. S. Ismael, *Kuwait: Dependency and Class in a Rentier State* (UP of Florida 1993) 17, 21 (hereinafter Ismael). I am indebted to anthropologist Anthony Toth's comments.

[119] P. Carmichael, *Nomads* (Collins and Brown 1991) 66-78
(hereinafter Carmichael).

[120] Slot, 8, 11.

important part of town-desert relations.[121] The ruling Al-Sabah family in Kuwait Town relied on loyal Bedouin groups to protect the town from Saudi raids and to work in the pearl industry.[122] As well, connections with powerful Bedouin camel tribes gave the Al-Sabah family access to the caravan routes and long-distance trade. Groups would travel from northern Arabia and what is now Iraq to trade in the town and pasture their animals.[123]

Like with other pastoral nomads such as the Tuareg, discussed below, pastoral Bedouin maintained a relationship to land that was shifting and seasonal, frequently relying on collective ownership and informal agreements between tribes to determine control of a *dira*, or pasturage area, and water sources.[124] Many Bedouin tribes, however, also owned land which they hired out to others for cultivation, blurring the distinction between settled and non-settled peoples, particularly in oasis areas.[125] The coastal areas contained diverse communities, including many Bedouin practicing agriculture, fishing and pearling.[126] Several of the tribes inhabiting what is now northern Kuwait had extensive areas of influence in what are now Saudi Arabia and Iraq. The Bedouin in this area are sometimes now called the "northern tribes".[127]

Belonging and membership in Bedouin tribes was based on family and kin relationships, but Islam also served as a cultural unifier across the region. The foundation of Bedouin society was the tribe, with membership based on descent from a Bedouin father. Clans, or *ibn 'amm,* would often encompass multiple generations descended from the same male ancestor.[128] Belonging in Bedouin society was based along kinship lines, with clans organized into large confederations.[129] But as Beaugrand notes, Bedouin political alliances were often fluid and shifting, particularly when it came to alliances with settled, urban

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[121] Beaugrand, Stateless, 2018 11.

[122] Carmichael, 66.

[123] R. Fletcher, 'Between the Devil of the Desert and the Deep Blue Sea: Reorienting Kuwait: 1900-1940' 50 *Journal of Historical Geography* 51 (2015) 58.

[124] Chatty, Pastoralists, 3; J. Janzen, *Nomads in the Sultanate of Oman* (Westview Press 1986) 64; Anscombe, 11 (hereinafter Janzen); J. C. Wilkinson, 'Traditional Concepts of Territory in South East Arabia' 149 *Geographic Journal* (1983) (hereinafter Wilkinson) 306-307. For more on Bedouin territoriality see K. Franz, 'The Bedouin in History or Bedouin History?' 15 *Nomadic Peoples* 11 (2011).

[125] Wilkinson, 305.

[126] Casey, 17-18.

[127] Both northern and southern Bedouin tribes included Shi'a and Sunni members. Beaugrand, Stateless, 2018, 50.

[128] M. al-Serhan and A. L. Furr, 'Tribal Customary Law in Jordan' 4 *S. Ca J. of Int'l L. and Bus.* 17 (2008) 18 (hereinafter al-Serhan and Furr).

[129] Al-Serhan and Furr, 21; Janzen, 12.

rulers.[130] The delineation between nomads, agriculturalists and urbanites was not strict in pre-colonial Arabia and there was much intermingling and overlap between settled and nomadic communities. Many families settled in Kuwait Town had Bedouin relatives, while clans and federations were frequently allied with settled families.[131]

For example, the Bani Khalid confederation dominated the Arabian interior and had a significant presence in what would become Kuwait, coming to run the large caravan trade with Iraq.[132] Kuwait Town is usually described as being founded by the Bani Utub federation who migrated to the region, settled on the natural harbour and took up fishing and trade.[133] Kuwaiti historian Salwa Alghanim argues that the Utub lacked the connections to desert clans that had typified the rule of the Bani Khalid.[134] While the history of these tribal confederations is often disputed by modern scholars, alliances forged during this period of Bedouin history play a role in modern Kuwaiti politics, including the politics of belonging. Over centuries, other groups settled in the area, including Bedouin from other parts of Arabia, as well as immigrants from Persia.

Territoriality as the basis of political membership played a role in Bedouin society. Yet, the role of territoriality in forming group identity under Islamic law is debated.[135] What is knows is that adherence to Islam and family ties could united Bedouin leaders and urban elites across long distances. While Islam bound together Bedouin and urban and oasis dwellers, however, it is important to note that Bedouin custom differed in important points

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[130] Beaugrand cites the shifting allegiances of the Ikhwan during the early 20th century. Beaugrand, Stateless, 2018, 64.

[131] Carmichael, 10.

[132] Carmichael, 62. See also Casey, 23. The exact history of the founding of Kuwait is somewhat contested. See for example S. Alghanim, *The Reign of Mubarak-Al-Sabah: Shaikh of Kuwait 1896-1915* (Tauris 1998) 5-6, (hereinafter Alghanim) which notes the problem with historical sources from this period.

[133] A. N. Longva, 'Citizenship in the Gulf States: Conceptualization and Practice' in N. A. Butenschon, U. Davis and M. Hassassian (eds.), *Citizenship and the State in the Middle East* (Syracuse 2000) 181 (hereinafter Longva, Citizenship). See also al-Dekhayel, 1; Ismael, 17.

[134] Alghanim, 6. The extent to which this lack of relations with desert Bedouin tribes informs later Kuwaiti politics is simply not clear from the literature review done by this dissertation. Alghanim notes the problematic nature of many sources from this period in Kuwait's history.

[135] For an overview of this debate, see J. D. Fry and M. H. Loj, 'The Roots of Historic Title: Non-Western Pre-Colonial Normative Systems and Legal Resolution of Territorial Disputes' 27 *Leiden J. of Int'l L.* 727 (2014). "(C)lassical Islamic law concepts ... practically ignored the principle of territorial sovereignty as it developed among the European powers and became a basic feature of nineteenth century western international law." Award of the Arbitral Tribunal in the First Stage of the Proceedings Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute),9 October 1998 at 118, 130, quoted in J. D. Fry and M. H. Loj, 'The Roots of Historic Title: Non-Western Pre-Colonial Normative Systems and Legal Resolution of Territorial Disputes' 27 *Leiden J. of Int'l L.* 727 (2014) 741.

from Sharia law, particularly in matters of the solving of disputes and inheritance, a fact which sometimes complicated nomad-urban relations.[136]

Though ownership of resource points like water sources and grazing land was not delineated on maps, both settled and nomadic families had clear ownership of territory. Ownership could change hands as families declined in importance or lost control of a resource.[137] As historian Ben Slot puts it, "(t)he desert is like the sea: it is difficult to delineate precise borderlines there. Nomadic peoples move amongst each other and tribal loyalties may shift from one paramount shaikh to another."[138] Bedouin land ownership was often non-exclusive and changed over time. This fluidity suited the desert environment and the fragility of water sources, pastures and trade routes.

The Bedouin had clearly established connections with both settled oasis towns and coastal trading ports like Kuwait. These relationships can be demonstrated through the systems of taxation and contracts that existed at the time:

> Economic life functioned through a series of integrating structural processes, activated by face to face participation, formulated in terms of contracts, treaties and agreements and validated through customary law and practice.[139]

As trade increased in importance throughout Arabia, it led to the growth of finance, money lending, money changing and other commercial activities that required regulation by contract and custom guided by tradition and, over time, Islamic legal principles.[140] Islam provided a comprehensive set of economic, cultural and political rules that helped standardize things like taxes, land ownership and trade throughout the region, rules which blended with ancient customs and practices.[141] Important to this system was the payment of various types of taxes such as khuwwa (brotherhood) or zakat (alms). Settled populations and traders would often pay various taxes to powerful Bedouin in exchange for protection while traveling across their territories or as an expression of allegiance.[142] Beaugrand argues such payments were a de facto recognition of tribal dominance in a

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[136] Al-Serhan and Furr, 22.

[137] I am indebted to Anthony Toth for his points on this issue.

[138] Slot, 8.

[139] W. Lancaster and F. Lancaster, 'Integration into Modernity: Some Tribal Rural Societies in the Bilad Ash-Sham' in D. Chatty (ed.), *Nomadic Societies in the Middle East and North Africa: Entering the 21st Century* (Brill 2006) 339.

[140] Al-Ashker and Wilson, 21.

[141] Al-Ashker and Wilson, 56-76.

[142] Commins, 8.

particular region and would later be used by Ibn Saud in the early 20th century to claim territory in what would become Saudi Arabia.[143]

Islam also created the concept of *umma,* or a community of believers that could incorporate all Muslims, a fact which would sometimes cut against territorial divisions in Gulf society. Islam would also create new divisions in Gulf society between different Islamic sects, particularly between Sunni and Shi'a Muslims.[144] Throughout this period, the Bedouin occupied a central role in broader Gulf society, linked to urban and oasis dwellers by blood, religion, culture and the trade economy. At the risk of over-simplification, Gulf society before the colonial period is best described as one of mutual dependency between nomadic and urban groups; a web of economic, social and family relationships.

The example of the Bedouin in the Gulf region is instructive of the ways in which nomadic and settled society blended together into an inter-dependent whole.[145] Common family, social, religious, linguistic and economic ties united many Bedouin communities with settled coastal and oasis towns. The line between nomadic and settled Bedouin was often unclear or not determinate of either allegiance or status.[146] Yet, while Kuwait Town became an important hub of trade and, as a result, relations with merchant families were critical to Bedouin welfare, relations with other regional cities were also important. Many Bedouin families maintained wide-ranging alliances with clans in what are now Saudi Arabia and Iraq.

While remaining independent, the arrival of British interests in the Gulf would begin to change the relationship between the Bedouin and the settled merchants of Kuwait Town as well as the Al-Sabah family. No longer on the edge of the Ottoman Empire, Kuwait became central to British power in the region. In particular, the British period would usher in an era dominated by obsessive concerns over Kuwait's borders and the protection of the port city from being "overrun" by "lawless" desert nomads.[147] Meanwhile, the fluid and complex political structure if the Bedouin did not easily align with a territorial model of statehood upon which the British empire was based, as future sections will explore.

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[143] Beaugrand, Stateless, 2018, 63.

[144] Carmichael, 18-21.

[145] Al-Ashker and Wilson 5, noting that the line between settled and nomadic in Arabia was "unclear."

[146] G. Parolin, *Citizenship in the Arab World* (Amsterdam UP 2009) 33 (hereinafter Parolin).

[147] See for example the signing of the Bahra and Hadda agreements with Ibn Saud in 1925, which were in part signed to restrict the movement of nomadic tribes. Beaugrand, Stateless, 2018, 64.

The Tuareg of the Sahel

Tuareg Trade Routes, 13th-14th century

Bedouin and Tuareg society contain many points of similarity. Like the Bedouin, the Tuareg, or *Kel Tamasheq*, are a nomadic, pastoralist group. They occupy a broad area from northern Mali and Niger to southern Algeria. Today, they remain one of the region's main pastoralist groups, though many Tuareg are settled in towns.[148] It is difficult to generalize about Tuareg society before colonization as many of the sources for our knowledge of pre-colonial Tuareg society come from verbal histories of Tuareg that have been filtered through the writings of outsiders like Muslim explorers, French soldiers and administrators and non-Tuareg scholars based in urban areas like Timbuktu and Masina. Many important histories of the region are old, though more recent scholarship has done much to fill in the blanks and correct the record. This section will attempt to acknowledge weaknesses in the source material where appropriate. Nevertheless, scholarship into

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[148] D. Boureima, 'La constitution d'un réseau régional avec les communautés pastorales d'Afrique de l'Ouest : le Réseau Billital Maroobé' in *Pasteurs Nomades et Transhumants Autochtones* (L'Harmattan 2010) 113 (hereinafter Boureima). Dodo Boureima is a noted expert on pastoralism in the Sahel.

Current statistics for the Tuareg are not reliable, but an example may be found in M. Leonhardt, 'Regional Policies and Response to Manage Pastoral Movements within the ECOWAS Region Study on behalf of the International Organization for Migration (IOM), within the framework of the Support to Free Movement of Persons and Migration in West Africa (FMM West Africa) Project' (FFM West Africa 2019) 37.

The Tuareg are the largest nomadic group in Mali, but there are also groups of nomadic Arabs, or "Maures". While this case study is primarily about the Tuareg, the two groups live in close contact with each other and many studies address both groups. Where this dissertation refers to nomads in the region more generally, rather than specifically to the Tuareg, it will be talking about both Tuareg and Arab nomads. S. Pezard and M. Shurkin, *Toward a Secure and Stable Northern Mali: Approaches to Engaging Local Actors* (Rand Corp. 2013) (hereinafter Pezard and Shurkin).

Arabic sources and the oral record have augmented colonial sources and given a clearer picture of Tuareg society, though there is still much work to be done and the recent political situation has made field research difficult.[149] As with the Bedouin section, above, this section will rely on the work of historians and anthropologists. Disagreement between experts will be noted where appropriate.

The exact origins of the Tuareg are unknown, but it is generally agreed upon that they are Berber peoples who first migrated south into present day Mali in the fifth century, increasing in numbers in the 1700s.[150] Unlike the Bedouin in the Gulf, the Tuareg migrated into a region that had been the site of several major empires over several centuries, including the Mali and Songhai Empires and, in the 19th century, the Masina caliphate. When the Tuareg arrived, major trading cities like Timbuktu had already been famous centres of learning and culture for hundreds of years. During the period immediately preceding French conquest, Tuareg society was in a state of constant flux, changing rapidly due to internal social pressures, but also as a result of the turmoil that accompanied the fall of the Songhai Empire and the rise of the Masina caliphate in what is now central Mali.[151] The collapse of the Songhai Empire in the 16th century led to a period of instability in the region in which multiple smaller caliphates, like the Ayar Sultanate in what is now Niger and the larger Masina caliphate, would flourish. Some scholars argue that the arrival of the Tuareg in the Sahel played a role in the decline of the Songhai Empire, but this claim is disputed.[152]

Like Bedouin society, nomadic Tuareg society was hierarchical. Pastoral Tuareg were divided into clans, or "drum groups," each comprising a noble class in charge of military protection or religious learning, vassals in charge of raising livestock, slaves and *haratin*, or semi-free agriculturalists and herders, often of sub-Saharan origin.[153] The slaves and

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[149] See the discussion of sources on this period of Tuareg history in D. M. Hamani, *Au carrefour du Soudan et de la Berbérie : Le Sultanat Touareg de l'Ayar* (Institut de Recherches en Sciences Humaines, Niamey 1989) (hereinafter Hamani) 17-31. Djibo Mallam Hamani is the Director of the *Institut de recherches en sciences humaines* in Niger. See also the work of Bruce Hall on using original sources. B. Hall, *A History of Race in Muslim West Africa, 1600-1960* (Cambridge UP 2011) (hereinafter Hall).

[150] According to Pierre Boilley, a noted anthropologist who has extensively studied the Tuareg, Many Tuareg trace their lineage back to Morocco. Boilley, Les Touaregs ,1999, 47-48.

[151] Boilley, Les Touaregs, 1999, 58.

[152] O. O. Kane, *Beyond Timbuktu: An Intellectual History of Muslim West Africa* (Harvard UP 2016) 6, 46 (hereinafter Kane); M. Hiskett, *The Development of Islam in West Africa* (Longman 1984) 152 (hereinafter Hiskett); Gaudio 1988 66, 175. See also M. Tymowski, *The Origins and Structures of Political Institutions in Pre-Colonial Black Africa; Dynastic Monarchy, Taxes and Tributes, War and Slavery, Kinship and Territory* (Edwin Mellen Press 2009) 11.

[153] Bourgeot, Résistances, 24-28, 344. J. Keenan, 'Resisting Imperialism: Tuareg Threaten US, Chinese and Other Foreign Interests' in A. Fischer and I. Kohl (eds.) *Tuareg Society within a Globalized World: Saharan Life in Transition* (Tauris 2010) 32. (hereinafter Keenan, Resisting). Gaudio 1988 176-181

The vassal clans are also known as *Kel Ulli*, or goat herders. They may or may not be nomadic. Bourgeot, Résistances, 25. The *Haratin* are a class of settled peoples of sub-Saharan and Berber descent. They may or

haratin were involved in agriculture, goat herding and other tasks, leaving the Tuareg nobility free to focus on warcraft, learning and culture.[154]

As with the Bedouin, there was much contact, conflict and cooperation between nomadic and settled Tuareg.[155] Tuareg society included both settled and nomadic elements, as many Tuareg settled in large, urban centres like Timbuktu. There was also considerable diversity of lifestyles between Tuareg groups, with some drum groups, such as those near Air in Niger, forming fixed, sedentary villages along the caravan routes and others living an urban lifestyle in capital cities such as Agades.[156] The relationship between Tuareg rulers and settled rulers was often complex. Rulers of the kingdom of Mali,[157] for example, would have had sovereignty over local villages and their inhabitants.[158] The place of the Tuareg in relation to the rulers of sedentarised kingdoms, however, is less clear. Tuareg nobles often occupied positions of high status in the region, in control of political, religious and economic life. While the Tuareg nomadic nobility was politically independent for much of this time, it maintained strong economic, cultural and social ties with urban rulers.

At the time of the French invasion, the Tuareg city of Agadez was critical node in the Saharan web of trade and a centre of learning and culture.[159] Though the Sultan of Ayar and other urban rulers would collect taxes, their power was always weak and decentralized, running parallel to the power of the nomadic Tuareg nobility.[160] The line between pastoralists and agriculturalists in the Sahel was often fluid. French sources likely confused the extent to which nomadic and settled Tuareg formed separate communities.[161]

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may not be considered as Tuareg by anthropologists. See generally the work on race in the Sahel by Bruce Hall and also Keenan, Resisting, 62. See also E. Bernus, 'Dates, Dromedaries, and Drought: Diversification in Tuareg Pastoral Systems' in J. G. Galaty and D. L. Johnson, (eds.) *The World of Pastoralism: Herding Systems in Contemporary Perspective* (Guilford P. 1990) 152.

[154] Keenan, Resisting, 8, 62. See also Boilley, Les Touaregs, 1999, 29.

[155] There was conflict between settled and nomadic groups throughout the Sahel. Diallo notes, writing of the Fuble peoples in the Sahel, that even in pre-colonial times, nomads were often presented by settled rulers as a menace and cause of destabilization. Diallo, 27.

[156] Boilley, Les Touaregs, 1999, 22, 33. See also Bourgeot, Résistances, 85, 153; B. Lecocq, 'Tuareg City Blues - Cultural Capital in a Global Cosmopole' in I. Kohl and A. Fischer (eds.) *Tuareg Society Within a Globalized World: Saharan Life in Transition* (Tauris 2010) 52; Clarke, 91.

[157] In 1337, the Mali Empire stretched from the mouth of the Gambia river to Gao.

[158] J. Ki-Zerbo, 'À quand l'Afrique : entretien avec René Holenstein,' Éditions de l'Aube, (2003) 79, cited in African Commission on Human and Peoples Rights, 'The Right to Nationality in Africa' (2015) 8.

[159] Hamani, 292.

[160] Hamani, 292.

[161] D. Badi, 'Genesis and Change in the Socio-political Structure of the Tuareg' in Anja Fisher and Ines Kohl (eds.), *Tuareg Society Within a Globalized World: Saharan Life in Transition* (Tauris 2010) 75 (hereinafter Badi).

Urban and pastoral Tuareg communities, however, were parallel communities politically, with pastoral communities organized into a loose federation headed by an *Amanokal* who wielded considerable power, and urban communities such as the Ayar Sultanate governed by a Sultan. According to the French, who spent "much time collecting and drawing up genealogical tables" of nomadic society, the following major drum groups of nomadic Tuareg existed in French West Africa (*Afrique occidentale française* - AOF) in the late 1800s and early 1900s: the *Iwellemmedan, Tengeregif, Igawaddaran, Kel Temulayt, and Irraganatan*.[162] Each of these drum groups occupied a particular region of the Sahel and each would have had many vassal clans, slaves and *haratin* families under their protection.[163]

Tuareg traders played an important role in the salt trade, running some of the trans-Sahara caravans upon which the region's economy was based.[164] In exchange for military protection, noble Tuareg families levied taxes of grain and other agricultural products, called *tiwse*, against their vassals, but also taxed the trading caravans who travelled through their lands.[165] Despite operating under parallel power structures, there was much inter-connectedness and inter-relatedness between town and countryside.[166] Strong cultural and linguistic bonds connected nomadic and urban Tuareg in places like the Moroccan-influenced kingdom of the Arma based around Timbuktu, as well as Hausa kingdoms to the south and, in the 19th century, the Sokoto and Masina caliphates. These post-Songhai kingdoms prospered from the Sahel's far-flung system of trade in which nomadic Tuareg played a key role in offering military protection, as well as profiting from local livestock-rearing and agriculture, activities with which the Tuareg were deeply involved.[167]

While unified by a common language, nomadic Tuareg society was often multi-racial incorporating Berber people, local agriculturalists and slaves from as far away as what is now Sudan. This diversity of both ethnicity and lifestyle means that the Tuareg are united primarily by language, culture and family alliances. The Tuareg, however, unlike the Bedouin, were a small minority in much of the Sahel, even in pre-colonial times. Alongside the Tuareg lived many Arab clans like the Kunta, who also engaged in Sahara trade and the spread of Islam, as well as communities of settled agriculturalists such as the Songhai and

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[162] Hall, 187.

[163] Boilley, Les Touaregs, 1999, 53.

[164] Hamani, 301.

[165] Boilley, Les Touaregs, 1999, 54. See also Hall, 250; Hamani, 313; A. Khazanov, 'Nomads in the History of the Sedentary World' in A. Khazanov and A. Wink (eds.), *Nomads in the Sedentary World* (Curzon 2001) 1.

[166] Hamani, 301-313. See also Boilley, Les Touaregs, 1999, 49.

[167] Hiskett, 148, 151-155. See also Kane, 6. During this period, the region's trade with Europe also increased, linked via the caravan trade. Trimingham, 185, 191.

Bambara peoples.[168] The region was also home to Mande West Africans, Arma peoples descended from Moroccan invaders, and many others.[169]

In part because of their minority status, Tuareg played an important role in the spread and interpretation of Islam, though the level of adherence among the Tuareg to Islamic law should not be overstated.[170] While many other communities retained animist beliefs in the Sahel,[171] certain noble Tuareg families had abandoned the warrior lifestyle and devoted themselves to Islam, becoming a religious class, with prominent religious figures offering advice and council throughout the region.[172] In this, they served a similar function to Arab scholars who would sometimes cross the Sahara to spread Islamic learning. Islam served a unifying role across the region by creating a common frame of reference between traders and rulers of various caliphates in the 18th century. The Sahara caravans, through which Islam spread, also served as a cultural unifier across the region and a connection to Muslim communities to the north and east.[173] Being Muslim indicated adherence to a common system of laws.[174] Tuareg and other nomad groups would attend prayer in towns when possible and all Muslims were expected to give Zakat as part of mandatory taxation,

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[168] Hall, 152, 187.

[169] The question of race in the Niger Bend and, in particular, among the Tuareg is hotly debated by scholars. See for example Keenan, Resisting, 63, 68; D. J. Stewart, *What's next for Mali? The Roots of Conflict and Challenges to Stability* (US Army War College, Strategic Studies Institute 2013) 16 (hereinafter Stewart); J. Chipman, *French Power in Africa* (Basil Blackwell 1989) 27 (hereinafter Chipman); Bourgeot, Résistances, 40; Hiskett, 34.

Lecocq points out that the French did much to advance the idea that the Tuareg were not native to the region. Lecocq, Desert, 2002, 99. See also Hall, generally, chapter one. Lecocq argues that white and nomad have now come to be synonyms used by the Malian government to designate the "other." Lecocq, Desert, 2002, 101. The issue of race in the Sahel is disputed.

[170] Trimingham, 69, 186.

[171] Clarke, 58.

[172] Keenan, Resisting, 63, 151. See also Boilley, Les Touaregs, 1999, 30, 32; Hiskett 47-48.

[173] Trimingham, 73-74, 85, 146. Trimingham argues that the universal quality of the Wahhabi school provided standard rules on trade and, in particular, contract law and limits on usury. Trimingham, 193-194. See also Kane, 82-83. The Sahara caravans brought not only Muslim clerics, but also books, paper and other necessities for establishing an Islamic society, as well as facilitating the pilgrimage and study trips to Arabia, a religious development with which the Tuareg were active participants. As Kane puts it; "(b)eing Muslim was a marker of status in urban centers located in the axes of the trans-Saharan trade prior to the arrival of Europeans. Merchants trading with Arabs built strong relationship based on trust, gained by belonging to the same religion." Kane, 63.

[174] In particular, Islamic law determined the rules of personal status, including the legitimacy of enslavement and the status of non-Muslims. Kane, 84, 98, 105-106.

including a tithe from nomad herds. The extent to which the Tuareg adhered to Islamic law as opposed to their customary traditions, however, remains somewhat disputed.[175]

Like the Bedouin, pastoral Tuareg clans dominated specific territories that were well defined and recognized by neighbouring clans and urban rulers. Certain Tuareg groups became associated with particular regions, or *akals*, such as the Air massif in Niger or the *Adrar des Ifoghas*, the mountains of the Ifogha clan, in the Soudan.[176] Like the powerful Bedouin clans, Tuareg drum groups would escort caravans that travelled through their areas in exchange for a tax, an expression of their sovereignty over their regions.[177] It should be noted that the issue of Tuareg territoriality is debated by anthropologists. As with the Bedouin, Tuareg land use differed from that of agricultural societies like the Songhai, who had a long established system of individual, family-based land tenure.[178] As the next sections will show, these differences in land ownership systems would play an important role in how the Sahel was administrated by the French.

Land use often caused conflict in the Sahel before colonization between the Tuareg and other ethnic groups. Urban rulers sometimes attempted to bring pastoral Tuareg under their control[179] and Tuareg often enslaved and raided sedentary villages.[180] During the 18th century, Tuareg mobility was also sometimes viewed as inhibiting the spread and development of Islam, which required daily prayer and study. Perceived tensions between the practice of Islam and the practice of nomadism was sometimes a factor in Tuareg settlement programs instituted by caliphates like Masina prior to the arrival of the French. As the next section will explain, these attempts to settle the Tuareg would foreshadow future settlement policies of French administrators. The relationship between nomadic

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[175] Kane, 44-49; Trimingham, 91-98. Ibn Battuta, the Arabic scholar, noted that the Tuareg leaders were Muslims on his 1352 visit to Takedda in Air. P. Clarke (ed.), *The Oxford Handbook of the Sociology of Religion* (Oxford 2009) 54 (hereinafter Clarke).

[176] Hamani, 313.

[177] C. Gremont, 'Villages and Crossroads: Changing Territorialities among the Tuareg of Northern Mali' in J. McDougall and J. Scheele (eds.) *Saharan Frontiers: Space and Mobility in Northwest Africa* (Indiana UP 2012) 133-135, 143 (hereinafter Gremont). Boilley, Les Touaregs, 1999, 26, 28. Like the Bedouin, wells were some of the only fixed points in the Tuareg territories, but though grazing areas would shift with the seasons, most Tuareg drum groups controlled specific regions. Bourgeot, Résistances, 148; Keenan, Resisting, 141. J. Scheele, *Smugglers and Saints of the Sahara: Regional Connectivity in the 20th Century* (Cambridge 2012). See also Hall, 262; Bourgeot, Résistances, 150-151.

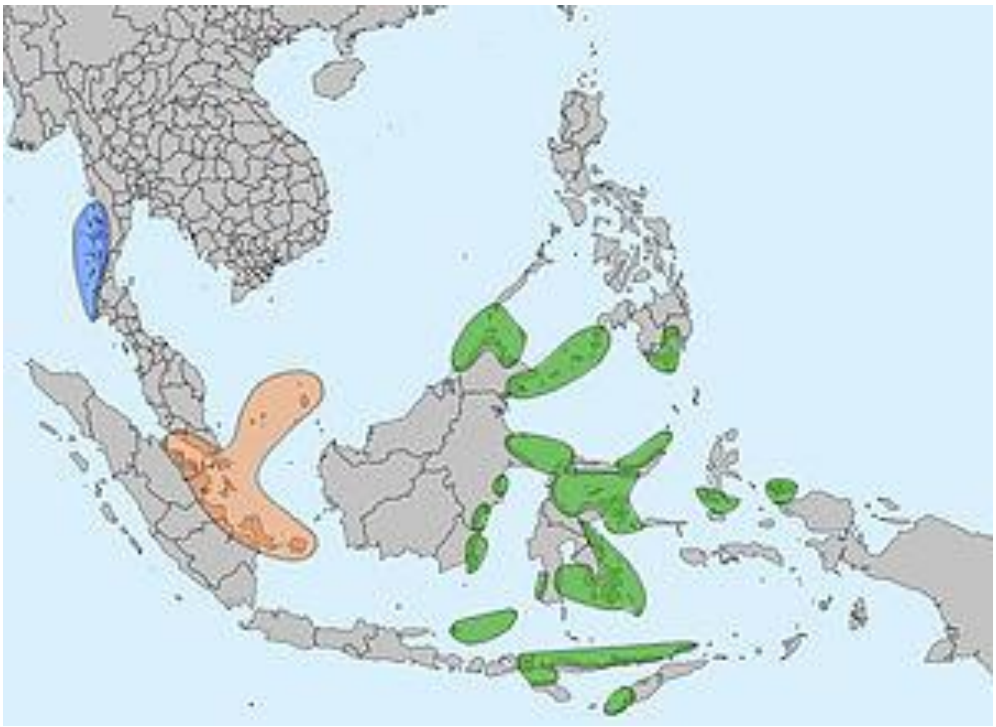
[178] Hall, 262.

[179] Hiskett ,178, 193. See also Clarke, 124-129.

[180] V. Azarya, 'The Nomadic Factor in Africa: Dominance or Marginality' in Anatoly M. Khazanov and Andre Wink (eds.), *Nomads in the Sedentary World* (Curzon 2001) (hereinafter Azarya) 257-259. See also W. J. Foltz, *From French West Africa to the Mali Federation* (Yale U P 1965) 8 (hereinafter Foltz). See also J. LaGarde, 'La nomadisation des Ifoghas et son contrôle (1943-1944-1945)' in *Nomades et commandants : l'administration et sociétés nomades dans l'ancienne A.O.F.* (Karthala 1993) 117; Hiskett, citing Marion Johnson, 178; Trimingham, 146.

Tuareg drum groups and the various urban and agricultural empires, caliphates and kingdoms that developed in the Sahel in the 16th, 17th and 18th centuries was therefore multi-layered, complex and overlapping.

The Sama Dilaut of the Sulu Sea



Sama Dilaut Fishing Zones, 1960s, in green (orange and blue are other "sea gypsy" groups)

The Sama Dilaut (Bajau Laut)[181] are an ocean-dwelling group who have lived for centuries in the Celebes and Sulu Seas between the southern Philippines and the island of Borneo. They occupy an area that is now divided between Malaysia, the Philippines and Indonesia.[182] While some facts about the Sama Dilaut are contested, there is more

[181] While the Sama Dilaut refer to themselves by a number of different names, some anthropologists argue the term Sama Dilaut is more accurate. Thanks to Helen Brunt for her comments on this point. See also C. Sather, 'Commodity, Trade, Gift Exchange, and the History of Maritime Nomadism in Southeastern Sabah' 6 *Nomadic Peoples* 20 (2002) (hereinafter Sather, Commodity) 24.

[182] H. Brunt, 'The Vulnerability of Sama Dilaut (Bajau Laut) Children in Sabah, Malaysia, (Asia Pacific Refugee Rights Network 2015) 3 (hereinafter Brunt, Vulnerability). See also G. Acciaioli, H. Brunt and J. Clifton, 'Foreigners Everywhere, Nationals Nowhere: Exclusion, Irregularity, and Invisibility of Stateless Bajau Laut in Eastern Sabah, Malaysia' 15 *J. of Imm. and Ref. Studies* 232 (2017) 233.
The "sea nomads" of southeast Asia can be divided into three main groups: the Moken of Thailand/Burma, the Sama Dilaut/Bajau Laut of Malaysia/Philippines and the Orang Suku Laut of Indonesia. Acciaioli, Brunt and Clifton are anthropologists working on the Sama Dilaut/Bajau Laut. See also L. Lenhart, 'Recent research on Southeast Asian sea nomads' 36 and 37 *Nomadic Peoples* 245 (1995) 246 (hereinafter Lenhart). Lenhart is an

consensus about their lifestyle and relationship to settled kingdoms than for the Bedouin and Tuareg. However, there is less agreement over the extent to which the Sama Dilaut should be classified as nomads. While some scholars argue that the Sama Dilaut are not nomads because they do not practice pastoralism and should instead be referred to as mobile peoples, this dissertation will refer to them as nomads because this is how they are viewed by the Malaysian government and many outsiders.[183]

In the pre-colonial period, boat nomadism could be found scattered throughout Southeast Asia[184] and until the mid-1950s, the Sama Dilaut lived almost exclusively in boats.[185] They practiced hunting, gathering and mobile, seasonal fishing.[186] There is evidence of sea nomadism off the coast of what is now Sabah, Malaysia going back as far as 3,000 years.[187] The Sama Dilaut, however, had a close relationship with shore communities, trading sea products, collecting fresh water and burying their dead on land.[188] Before the arrival of the British, Sama Dilaut migration followed a seasonal pattern throughout the Sulu Sea between what is now Malaysia, Indonesia and the Philippines.[189]

Like the Tuareg and the Bedouin, the Sama Dilaut had established relationships to certain ocean zones and islands. Sama Dilaut families would fish in certain areas or regions, controlling moorage and fresh water points.[190] Boats of families would travel the seas within recognized fishing ranges, fishing for valuable sea cucumber and other commodities to trade with shore-based groups.[191] Like other nomads, however, the ways in which the Sama Dilaut related to their ocean domains was dominated by seasonal and shifting use

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ethnologist working on "sea gypsy" groups, including the Bajau Laut/Sama Dilaut, Moken and Orang Suku Laut. Where relevant, this section will make references to the experiences of these related groups.

[183] Lenhart argues against the use of the term nomadic for non-pastoralists, because nomadic implies pastoral nomadism. Lenhart 245.

[184] A. Wink, *Indo-Islamic Society: 14th-15th Centuries* (Brill 2004) 103-104.

[185] Sather, Commodity, 2002, 27.

[186] Sather, Commodity, 2002, 20. See also C. Warren, 'Consciousness in Social Transformation: The Sama Dilaut of East Malaysia' 5 *Dialectical Anthropology* 227 (1980) 227 (hereinafter C. Warren, Consciousness); C. Sather, *The Sama Dilaut: Adaptation, History, and Fate in a Maritime Fishing Society of South-eastern Sabah* (Oxford UP 1997) 2-8 (hereinafter Sather, Adaptation). Sather and the two Warrens are anthropologists whose careers have produced much of the scholarship on the Sama Dilaut (Bajau Laut).

[187] B. Andaya and L. Andaya, *A History of Malaysia* (Palgrave 2nd 2001) (hereinafter Andaya) 14.

[188] Sather, Commodity, 2002, 23; C. Warren, Consciousness, 1980, 227-228.

[189] J. Warren, *The North Borneo Chartered Company's administration of the Bajau, 1878-1909; the pacification of a maritime, nomadic people* (Ohio U. 1971) 65-66 (hereinafter J. Warren, Chartered).

[190] Sather, Commodity, 2002, 27 See also C. Chao, *The Orang Suku Laut of Riau, Indonesia: The Inalienable Gift of Territory* (Routledge 2010) 10 (discussing the similar practices of the Orang Suku Laut) (hereinafter Chao, Riau). Chao writes generally of the sea nomads of the Sulu Sea region during the colonial period.

[191] Sather, Commodity, 2002, 27.

without hard borders or exclusive ownership arrangements. Families might shift fishing areas from season to season as fishing stocks changed and certain islands and reefs might become too dangerous due to the presence of pirates.[192] Families would also take longer voyages to visit relatives to what is now the Philippines and Indonesia, though the Sama Dilaut themselves did not engage in long distance trade.[193] Rather, they served as the first link in a chain of trade in sea cucumber and other delicacies that stretched all the way to the royal courts of China.[194] In this regard, the Sama Dilaut had a similar relationship to the ocean as the Bedouin and Tuareg did to the desert: shifting, seasonal use, though with close ties to certain islands and fishing zones.

Like the Tuareg and Bedouin, the Sama Dilaut maintained close relations with shore-based peoples as they supplied products for regional trade. Many families had exclusive trade relationships with patrons from the land-based aristocracy in Borneo. This patronage relationship offered the Sama Dilaut a great deal of autonomy, but also provided them with clearly established trading partners and protection. Importantly, the Sama Dilaut were not slaves, but were rather clients of land-based communities under an established and widely recognized patronage system. Having a patron was vitally important in an age of "endemic violence" on the high seas. But patronage was not exclusive; Sama Dilaut families could end patron relationships at any time and would often have multiple patrons.[195]

Like with the Tuareg and Bedouin, therefore, the Sama Dilaut were involved in long-distance trade, though they did not practice it themselves. The seas around Borneo were less dividers of land masses than they were linkages between trade-oriented city-kingdoms in constant competition with each other for trade and manpower,[196] and the Sama Dilaut formed the first link in a web of trade upon which much of the Sulu Sultanate's wealth was

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[192] Anthropologist Cynthia Chou writes that the Orang Suku Laut, a related group, view borders as "temporary markers" that shift along with the changing political realities of the region imposed upon them by outside groups. Chou, Riau, 80.

[193] Sather, Commodity, 2002, 27 See also Sather, Adaptation, 1997, 67.

[194] There are records of trade with India and China going back to the fifth century and records of Bajau maritime trade since at least 1,000 BC. Andaya, 11 See also V. Hooker, *A Short History of Malaysia: Linking East and West* (Allen and Unwin 2003) 29-35 (hereinafter Hooker). See also N. Tarling, *Sulu and Sabah; A Study of British Policy Towards the Philippines and North Borneo from the Late 18th Century* (Oxford U. P. 1978) 1.

[195] C. Sather, 'Sulu's Political Jurisdiction over the Bajau Laut' 3 *Borneo Research Bulletin* (1971) 59 (hereinafter Sather, Political).

[196] This point is made most compellingly by James Warren in J. Warren, *The Sulu Zone: 1768-1898* (Singapore UP 1981) (hereinafter Warren, Zone). See also Hooker, 16-17.

James Warren refers to the Sulu Zone, or the area around the Sulu Sea, as a "web of exchange" that united various kingdoms and cities on the coasts together into a single economy in which the Sama Dilaut served a critical role as deep sea fishermen of valuable sea products like sea cucumber. See also J. Warren, 'Looking Back on 'The Sulu Zone': State Formation, Slave Raiding and Ethnic Diversity in Southeast Asia' 69 *Journal of the Malaysian Branch of the Royal Asiatic Society* (1996) 21-33, 23 (hereinafter Warren, Looking).

based. This trade fuelled the growth of great trading cities throughout the region like Melacca, Johor and Kuta Raja (Banda Aceh).[197]

The dominant rulers on the island of Borneo were the Sultanate of Sulu, centred around the Sulu Sea, and the Sultanate of Brunei, centred on northern Borneo. For many centuries, these kingdoms prospered off long distance Arab trade in pearls, sea cucumber and other sea products, particularly with India and, later, China. Many of these products were sourced by the Sama Dilaut.[198] Like in the Gulf region and the Sahel, these Sultanates did not have territorial borders, but rather ruler-client relationships with various subject groups, including the "sea nomad" populations.[199] This does not mean that the Sultanates had no concept of territoriality, rather that they did not impose strict boundaries. As Clifford Sather puts it, "the state was defined...by reference to its centre, not its geographical boundaries."[200]

The role played by the Sama Dilaut in the Sultanate of Sulu, however, was arguably different than that played by the Tuareg or Bedouin. Like the Bedouin and the Tuareg, Sama Dilaut society was very much dependent upon the settled societies with which it traded. But many of the Sama Dilaut were not Muslims, unlike many of the Bedouin and Tuareg. While Clifford Sather argues that the Sama Dilaut were regarded by settled Bajau and other land-based communities as a "pariah class" due to their animist beliefs, this categorization is somewhat disputed.[201]

Like in the Gulf and the Niger Bend, belonging in the Sulu Sultanate was rooted in the customary law of the period blended with Islamic principles, with Islam creating a common sense of belonging and identity throughout the Sultanate.[202] As well, rather than offering protection to settled communities, the Sama Dilaut required protection from the ethnic Tausug (Suluk) ruling class, not the other way around.[203] Also, the Sama Dilaut were ethnically and culturally distinct from the ruling classes of the Sultanate of Sulu and were instead most closely related to other Sama/Bajau coastal peoples who lived under Tausug

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[197] Andaya, 12-14; Hooker, 72-77; See also Chao, Riau, 8.

[198] Andaya, 61, 62, 80.

[199] Chao, Raiu, 42, 50 See generally International Court of Justice, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (2008) ICJ Rep. 625.

[200] Sather, Political citing T. M. Keifer, *The Sultanate of Sulu: Problems in the Analysis of a Segmentary State* 46.

[201] Sather, Political Jurisdiction, 1971, 61. See also Sather, Commodity, 2002, 27-29; Sather, Adaptation, 1997, 61-63; C. Warren Consciousness, 1980, 227 The idea that the Sama Dilaut were a "pariah class" is debated among experts. See also the work of James Warren.

[202] J. Holbrook, 'Legal Hybridity in the Philippines: Lessons in Legal Pluralism from Mindanao and the Sulu Archipelago' 18 *Tulane Journal of International & Comparative Law* (2010) 403, 409-410.

[203] Warren, Chartered, 109. Sather claims the Sama Dilaut's status as non-Muslims was enforced by land-based Muslims like the land Bajau and Tausug. Sather, Political, 62.

rule.[204] While seafaring lay at the heart of the Sulu economy, long-distance seafaring was not an activity undertaken by the Sama Dilaut. Instead, long-distance trade was dominated by Arab seafarers.

Nevertheless, like in Gulf region and the Sahel, the Sama Dilaut were critical to trade as a source of products to be traded. In North Borneo, powerful Tausug and Malay rulers relied on the Sama peoples for much of their wealth and competition for the allegiance of fishing communities was crucial to the survival of the great trading cities in northern Borneo.[205] Over time, the Sultanate of Brunei declined and the Sultanate of Sulu became more prominent, in part by winning the loyalty of the coastal and nomadic Bajau/Sama peoples.[206] The Sama Dilaut were one of a number of fishing societies whose allegiance was key to any trading empire in the region. The Sama Dilaut not only participated in trade, they may have been employed as crew on slave ships along with other Bajau/Sama peoples, though there is less information on this role played by Sama Dilaut.[207] In a 2002 case before the International Court of Justice, the Malaysian government went so far to argue that the Sama Dilaut owed allegiance to the Sultan of Sulu. The government also claimed that the Sultan appointed the leaders of the Sama Dilaut clans, though these points are disputed.[208]

Unlike the Tuareg and Bedouin, the Sama Dilaut did not share a common religion with shore-based peoples. Once again, however, as with Bedouin and Tuareg nomads, the relationship between settled communities, partially settled Bajau fishing communities and the Sama Dilaut in the Sulu Sea is best described as one of inter-dependence, with the Sama Dilaut occupying a valuable niche in the economy and politics of the region, despite their non-Muslim status.[209] The Sama Dilaut were quite well-integrated into the Sulu economy,

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[204] Sather, Political, 61.

[205] J. Akamine, 'The Role of Sama/Bajaus in Sea Cucumber Trades in the Sulu Sultanate Economy: Towards a Reconstruction of Dynamic Maritime History in Southeast Asia' (Hitotsubashi University Conference Paper, March 2017).

[206] Andaya, 80.

[207] Andaya, 113. See also Sather, Adaptation, 1997, 40. See also S. Eklof, *Pirates in Paradise, A Modern History of Southeast Asia's Maritime Marauders* (Nias Press 2006) 5 (hereinafter Eklof). See also J. Warren, 'Trade for Bullion to Trade for Commodities and 'Piracy': China, the West and the Sulu Zone, 1768-1898' in S. Amirell and L. Muller (eds.) *Persistent Piracy: Maritime Violence and State-Formation in Global Historical Perspective* (Palgrave Macmillan 2014) (hereinafter Warren, Trade).

[208] International Court of Justice, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia),* (2008) ICJ Rep. 625.

[209] Sather, Commodity, 2002, 30 See also T. P. Barnard, 'Celates, Rayat-Laut, Pirates: The Orang Laut and Their Decline in History' 80 *Journal of the Malaysian Branch of the Royal Asiatic Society* 33 (2007) 34.

trading with settled Bajau, Tausug and Suluk communities in a state of mutual dependence.[210]

It is important to here note that despite some evidence that some Sama Dilaut might have been involved in ocean raiding, the Sultans drew distinctions between slave taking and "legitimate" raiding versus outright piracy.[211] Nevertheless, because the Sama Dilaut also served the Sultanates as fishermen and crew for raiding ships, they came with time to be associated with slaving during the colonial period and, later, with "lawlessness."[212] By the end of the eighteenth century, as the Sultanates declined, piracy and slave raiding in the Celebes and Sulu seas came to be dominated by the Illanun peoples, who also employed Samal and Bajau fishermen and sea nomads as crew. The links between the Sama Dilaut and their land-based patrons began to decrease in importance and increased political fragmentation meant that sanctioned raiding often blended seamlessly into piracy.[213] The relationship between the Sama Dilaut and what the British would come to call piracy would be extremely important during the colonial period, when the British came to see sea nomadism as associated with lawlessness and a challenge to establishing borders in the region.

[210] Lenhart, 247.

[211] Chao, Riau, 55. See also Sather, Adaptation, 1997, 40 (explaining that the economy of Sulu was maintained by "a system of active marauding"). See also T. Barnard, 'Celates, Rayat-Laut, Pirates: The Orang Laut and Their Decline in History' 80 *Journal of the Malaysian Branch of the Royal Asiatic Society* 33 (2007) 35.

[212] Hooker, 141.

[213] Eklof, 9. See also Chao, Raiu, 23.

Conclusion

The above sections show that the line between nomadic and settled communities in pre-colonial society in the Gulf, the Sahel and the Sulu Sea was often blurry, with nomads and settled communities highly dependent on one another in trade-based societies where mobility, often across long distances, was key. Nomads often controlled their territories, even levying taxes on non-nomadic communities, but this control was not exclusive. There were few hard borders in pre-colonial kingdoms and allegiance relationships might exist over long distances, often based on the shared values of Islam or economic ties.

Though enjoying a certain degree of political independence, nomads in the Gulf, the Sahel and the Sulu Sea also performed numerous specialized functions in society that were crucial to the local economy and society as a whole, including the spread of culture, religion and information, the protection of the caravan trade and the production of specialized products like sea cucumber. The place of nomads in wider society varied greatly and encompassed enormous diversity, but in none of the three examples explored in Part 2 were nomads outsiders living apart from settled society. Quite to the contrary. The relationship between nomads and settled peoples in the three examples is perhaps best described as one of fluid inter-dependence.

Critically, belonging in these pre-colonial societies in the Gulf, the Sahel and the Sulu Sea was often determined by factors like religion, trade contracts, and extended family and clan relationships. Such relationships often spanned long distances and knit far-flung empires together into a web of economic and social connections. Pre-colonial empires often contained both nomadic and settled communities. Place of birth was often far less important than religious, economic and social ties. Nevertheless, nomads had a strong sense of territoriality, occupying and claiming certain regions as their own, even if they did not set borders or use land or oceans exclusively. Frequently, these ownership rights were acknowledged and respected by others. Far from being wanderers with no claims to land, nomads frequently owned water sources, grazing areas, moorage points and other pieces of immovable property and were recognized as owning these resources by society at large.

It is important to note, however, that negative opinions of nomadism existed among settled rulers and thinkers of the day, as can be seen in West Africa during the period of the establishment of various Islamic kingdoms, amongst the Sultans and administrators of the Sulu Sultanate, and even in the Gulf region amongst the settled, urban elite. Despite these negative opinions, however, nomads remained economically, socially, militarily and politically important to settled societies and kingdoms.

In the Gulf and the Sahel, nomads often occupied positions of high status. In some places, like the Sahel, they were politically independent, though allied with urban rulers. In other places, they occupied a particular class in an existing empire, such as the Sulu Sultanate. Political independence, which was enjoyed by some nomadic societies for portions of their history, did not mean political isolation. In fact, it is perhaps unhelpful for the purposes to think of nomads as separate, discrete groups in the pre-colonial period, but rather as part

of a continuum of economic and social activity that made up trade-based societies that relied on mobility of all kinds.

As the next section will discuss, the status of all three nomadic groups, the Bedouin, the Tuareg and the Sama Dilaut, would radically change with the coming of European colonization. The next sections will explore the changes brought by colonization to the nomadic way of life and to their standing in society and how these changes influenced the development of nationality law during the colonial period.

Colonial Policy Towards Nomads

> To regard a population in the normal case as related to particular areas of territory is not to revert to forms of feudalism but to recognize a human and political reality which underlies modern territorial settlements...[214]

The colonial period marked the beginning of the nationality and statelessness of many nomads. Nationality law developed in tandem with colonization and would evolve to be an important tool of colonial rule. The following sections will explore colonial policy towards nomads and how these policies affected nomad nationality during the colonial period. While the early colonial period was marked by an almost total vacuum of laws for colonized peoples,[215] over the course of the colonial period, many colonized peoples would be granted some sort of nationality status. Yet not all colonized peoples would be treated the same under this emerging system of laws.

This section will explore colonial policies towards nomads. European governments saw the establishment of colonial empires as a fundamental good, necessary for the progress of civilization and modernization. This often-meant remaking colonized societies in the image of Europe.[216] But colonization was also an economic endeavour, undertaken to enrich Europe. As a result, colonization was a fiercely competitive process. It was a scramble to grab, claim and secure territory against competing claims, both by other colonial powers and local leaders. It was these dual goals, the goal to remake colonized societies in the image of Europe and the goal to claim territory, that would drive colonial policy towards nomads.

The British and French administrations are the two colonial administrations most relevant to this dissertation as they were the primary operators in the Gulf region, the Sahel and North Borneo.[217] British and French policies would have a deep and lasting effect on the nomads living in their territories. Both the French and British colonial administrations had very clear policies and attitudes towards nomadic populations living in their colonies. These policies and attitudes would come to have a profound effect on the nationality of nomads, both during the colonial period and beyond.

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[214] I. Brownlie, *Principles of Public International Law* (6th edn, Oxford UP 2003) 568 (hereinafter Brownlie, Principles).

[215] Van Genugten et al., 2014, 99.

[216] As historian J. Bury explains in the *Idea of Progress*, "(t)he 'idea of progress' means that civilization has moved, is moving, and will move in a desirable direction." J. Bury, *The Idea of Progress: An Inquiry into its Origin and Growth* (Macmillan 1932) 2.

[217] The Ottoman Empire was also relevant to the Bedouin in the Gulf, though most of the Bedouin in the region around Kuwait were not directly affected by Ottoman policy, as Kuwait marked the outer-most sphere of the Ottoman Empires' influence. See the section on the Bedouin, below.

Determining the proper role of nomads in the colonial project was not a side-issue in European colonial thought, it presented a major challenge to legal and philosophical thinking of the time. The examples discussed below did not happen in isolation, but were part of a global system and worldview. While important differences existed between the French and English colonial systems, there were many similarities in how colonial territory was invaded, conquered and administrated, and colonial policy towards nomads and mobile peoples also shared many commonalities. This section will summarize some of what is known about colonial theories on nomadism in order to understand the policies implemented in Kuwait, French Soudan and North Borneo, described in the next sections.

This section is meant to be a summary of some of the main colonial theories on nomads. It should not be taken as an exhaustive account of this topic, nor is it a review of all the relevant literature.[218] Where there is disagreement among experts, this will be noted.

Colonial Theories on Nomads

Since Europeans first came into contact with nomadic societies in the 15th century, European scholars struggled to fit nomads into the European model of the state.[219] This section will explore the theories European colonialists developed towards nomads. Most importantly, European political theory developed the idea that nomads cannot form states. According to European legal theories popular at the time, land ownership is key to civilization and statehood.[220] Colonial powers needed to promote agriculture, mining and other activities that would make productive use of the land.[221] While not universally accepted, the colonial idea that nomads were incapable of forming states would prove to be

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[218] For more on this subject, see the work of Jérémie Gilbert, which contains a thorough review of sources and theories.

[219] Diallo, 28, talking about colonial views of the Fulbe people in Burkina Faso and Cote d'Ivoire. For another example, see Great Britain's Enclosure Act: *An Act for the better Cultivation, Improvement, and Regulation of the Common Arable Fields, Wastes, and Commons of Pasture in this Kingdom* 13 Geo 3. c. 81 (1773). To a certain extent, these ideas continue to influence nomad-state relations in Europe. See for example N. Sigona, 'How can a Nomad be a Refugee? Kosovo Roma and Labeling Policy in Italy' 37 Sociology 69 (2003) 71-72, 75 (discussing Roma in the Kosovar and Italian contexts). See generally M. Goodwin, 'The Lessons of Romani National Claims for Conceptions of European Citizenship: From and Imaginary Community to an Imagined One?' in A. Ott and E. Vos, *Fifty Years of European Integration: Foundations and Perspectives* (Asser Press 2009) (discussing Roma people and the modern European conception of the territorialized nation-state).

[220] For a discussion on settlement and state formation in natural law theory, see Gilbert, Nomadic, 2014, 59-70.

[221] Gilbert, Nomadic, 2014, 58-63, 60-61, 91-92. At the risk of oversimplifying European philosophy on state formation, European thought centered state legitimacy on property rights and the productive use of land. Locke, Grotius, Vattel and other Enlightenment philosophers believed that property rights are created when individuals make productive use of land. The political state forms in order to enforce exclusive and productive land use. K. Baynes, 'Kant on Property Rights and the Social Contract' 72 *The Monist* 433 (1989) 434. See also S. Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Clarendon Press 1991) 189 (hereinafter, Buckle). See also Sack, 74, (217).

highly influential throughout the colonial period and beyond.[222] According to dominant theories of the day, nomads had no states of their own, but only tribes.[223] Important to this theory was the idea that nomads were not territorial. New research has often uncovered that presentations of nomads as not territorial were a colonial interpretation,[224] yet this view of nomadism became entrenched during the colonial period.

At the risk of oversimplification, under this widely accepted theory of European state formation, territoriality was key to statehood. The oft-cited starting point for the modern, territorial model of statehood in Europe is the Peace of Westphalia, which ending the Thirty Years War in Germany. This treaty helped to establish the principle of exclusive state sovereignty over an area of bounded territory, though the influence of this single event in European history remains the subject of much debate.[225] Under popular theories of statehood of the day, the state ultimately controls all territory and resources, like farms, mines, and fisheries.[226] As international law expert Ian Brownlie put it, "(t)he state territory and its appurtenances (airspace and territorial sea), together with the government and population within its frontiers, comprise the physical and social manifestations of...the state."[227]

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[222] See for example K. Yelpaala, 'Western anthropological concepts in stateless societies: A retrospective and introspective look at the Dagaaba' 17 *Dialectical Anthropology* 431 (1992) for a critique of the "stateless society" theory. See also Tymowski, 5.

[223] Gibney, 2014, 54.

[224] For example, see B. McMahon, 'Scientist Debunks Nomadic Aborigine 'Myth'' *The Guardian* (9 Oct. 2007).

[225] A copy of the treaty can be found online at Yale's Avalon Project. For an overview of the role the Treaty has played in theories of state formation, see Gilbert, Territories, 2007, 59 . It is not the purpose of this dissertation to enter into this debate, but rather to demonstrate that hard borders between competing European empires was a major goal of colonial administrators.

[226] For an expression of this theory of state formation, see for example *Island of Palmas*, quoted in Shaw 2008 211, footnote 74. See also Conklin, where he points to the state's "radical title to all territory under its control." W. Conklin, *Statelessness: The Enigma of an International Community* (Oxford 2014) 73.

[227] Brownlie, Principles, 57 71-72, 76, 105 (discussing the role of territory in the creation of states). See also the Montevideo Convention on the Rights and Duties of States, signed at Montevideo, 26 December 1933, entered into force, 26 December 1934, 165 L.N.T.S. 19 (1933) art. 1. See also Shaw, 2008, 197-204 (discussing the role of territory in the creation of states); Van Panhuys, 33, 43, 195; Weis, 7; T. Baldwin, 'The Territorial State' in Hyman Gross and Ross Harrison (eds.) *Jurisprudence: Cambridge Essays* (Clarendon Press 1992) (hereinafter Baldwin) 210-211 (examining the origins of the territorial conception of a state in Europe); M. Weber, 'Politics as a Vocation' in H. H. Gerth and C. W. Mills (eds.), *From Max Weber: Essays in Sociology* (Routledge and Kegan Paul, 1970), 78 (arguing that exclusive territorial sovereignty is necessary for the exclusive use of force); Crawford, 37 P. Jessup, 'Remarks at UNSCOR, 383d mtg. at 9-11, Supp. No. 128,' (2 December 1948) UN. Doc. S/P.V. 383; R. Donner, *The Regulation of Nationality in International Law* (2nd Edn Transnational P. 1994), 5; Shaw, 2008, 48-64, 171; V. Lowe, *International Law* (Oxford University Press, 2007) 207; J. McAdam, 'Disappearing States, Statelessness and the Boundaries of International Law' in J. McAdam (ed.) *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford, 2010), Sec. VIII.

"A territory without a people, a government without a clearly bounded community to be governed, makes no sense." V. Stolcke, 'The "Nature" of Nationality' in V. Bader (ed.), *Citizenship and Exclusion* (Universiteit van

As Gilbert puts it in his work on the treatment of nomads during colonization, nomads were seen as ineffective occupiers of their territories, creating a "sovereignty vacuum" that could only be filled by settled peoples.[228] Nomad areas were, to quote Sack, "an emptiable and fillable mold."[229] The amount to which colonized societies were recognized by Europeans as being states, or as "state-like," depended upon the extent to which they resembled European societies, including the extent to which they were settled.[230] As Diallo, an anthropologist and expert on nomads in West Africa, puts it:

> On the question of land rights, the European system and the West-African system on agricultural and pastoral land use seem to oppose one another.[231]

Under European theories of state formation, nomadic land use, by contrast, did not create sovereignty, so nomadic communities had no rights to their land.[232] The early colonial period coincided with the feudal period in Europe, where the herding of animals was

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Amsterdam 1997) 61. "...protecting territorial integrity is the obverse side of the power of the state to assert its jurisdictional authority." S. Benhabib, 'Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times' in E. Isin, P. Nyers, and B. Turner (eds.), *Citizenship between Past and Future* (Routledge 2008) 23.

The requirement of territory, however, while widely accepted, remains under examined. See for example A. Simmons, 'On the Territorial Rights of States' 35 Noûs 300-326 (2001) (discussing the moral claims of states to territory). See also A. Stilz, 'Why do States have Territorial Rights?' International Theory 185 (2009) 188; P. Weil, *Qu'est-ce qu'un français ? histoire de la nationalité française depuis la Révolution* (Bernard Grasset 2002) 10. Control of territory, however, should be distinguished from control over a particular piece of territory. K. Marek, *Identity and Continuity of States in Public International Law* (Librairie Droz 1968) 21 (arguing that "territorial changes are irrelevant to the problem of state identity.")

[228] J. Gilbert, 'Nomadic Territories: A Human Rights Approach to Nomadic Peoples' Land Rights' 7 Human Rights L. R. 681 (2007) 685. See also Gilbert, Nomadic, 2014 67. For examples of forced settlement from outside this dissertation, see A. Stilz, 'Nation, States and Territory' 121 *Ethics* 572 (2011) 573. Forced settlement was also practiced against nomads in Europe. See J. Gilbert, 'Still No Place to Go: Nomadic Peoples Territorial Rights in Europe' 4 *European Yearbook on Minority Issues* 141 (2004-2005) 144-145, 159 (hereinafter Gilbert, Still). See also James Scott, who cites to the forced settlement of nomadic peoples in Vietnam in the 1950s and 1960s. Scott, 2009, 12.

[229] Sack 88. Gilbert, Nomadic, 2014, 29-31.

[230] J. Crawford, *The Creation of States in International Law* (2nd edn., Oxford University Press, 2006) 257, 260 (hereinafter Crawford). See generally M. Moretti, *International Law and Nomadic People* (Author House UK 2012) (hereinafter Moretti). See also H. van Panhuys, *The Role of Nationality in International Law* (A. W. Sijthoff 1959) 108 (hereinafter Van Panhuys); Shaw, 2008, 23-24; Gilbert, Nomadic, 2014, 59-60.

[231] Diallo, 28.

[232] In North America, for example, there were no "'cities, castles, townes, and villages', but only 'empty space' with primitive people and communal land use." R. Sack, *Human Territoriality: Its Theory and History* (Cambridge UP 1986) 132, quoting the Letters Patent of King Henry VII to John Cabot in 1496.

limited by strict rules on land use.[233] Where pastoralism existed in Europe, it often did so as a highly regulated activity under the feudal system.[234]

The idea that nomads do not form states or own their lands would develop into the concept of *terra nullius*, which labelled nomad territories as empty and ripe for colonial exploitation.[235] Because nomad lands had been deemed *terra nullius* in many regions, their lands were seen as being best administrated directly by the state.[236] According to similar theories, the oceans could not be owned because they could not be improved upon or occupied.[237] This theory, that of *mare liberum,* meant that the oceans could not be under private control or the control of any one monarch.[238]

It should be noted that the above theories on the lack of nomad statehood and territoriality were not universally accepted at the time and continue to be debated today. Some colonial-era European scholars continued to argue in favour of nomad land rights.[239] Nevertheless, theories that nomads do not form states have been very influential,[240] and these theories would influence colonial policy towards nomads during the colonial period and during decolonization.[241] Even today, the link between nomads, land and statehood remains

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[233] Diallo, 28.

[234] Diallo, 33.

[235] Gilbert, Nomadic, 2014, 90-100. See also Sack, 127-129.

[236] In the United States, Eleanor Roosevelt noted the link between nationality and the seizure of nomad lands by "predatory interests." Bloom, Members, 2017, 162. See also Scott, 2009, 8.

[237] Buckle highlights the importance of occupation or possession of property as giving rise to ownership rights in the theory of Grotius, another European philosopher critical to the development of the concept of statehood in Europe and the ocean as unowned space. Buckle, 14. See also J. Larkins, *From Hierarchy to Anarchy; Territory and Politics before Westphalia* (Palgrave Macmillan 2010) 25 (talking about Rousseau). See also Gilbert, Territories, 2007, 685-686; Bloom, Citizenship, 2018, 119.

[238] See the work of philosopher Hugo Grotius. H. Grotius, '*Mare Liberum Sive De Jure Quod Batavis Competit Ad Indicana Commercia Dissertatio*' (Elsevier 2014).

[239] Moretti cites to the work of Christian Wolff, who rejected all arguments against the land rights of nomadic and indigenous peoples. Moretti.

[240] As Bader puts it, "(c)ontrary to the legal and political myth of absolute, unitary, and indivisible sovereignty, states have never been as sovereign as that." V. Bader, 'Introduction' in V. Bader (ed.) *Citizenship and Exclusion* (U Amsterdam 1997) (hereinafter Bader) 1. Crawford refers to sovereignty's "long and troubled history" and "variety of meanings." Crawford, 32 See also Gilbert, Nomadic, 2014 90-102; Kane, 9 140). See the section on Kant in Moretti

[241] There has been extensive scholarship on the question of whether or not pre-colonial nomad societies were states or participated in states and how these concepts related to nomad settlement. Some of this literature is summarized by Gilbert, Nomadic, 2014, 63-67. See also for example, S. Dicken and F. Pitts, *Introduction to Cultural Geography: A Study of Man and His Environment,* (Ginn and Company 1970) (hereinafter Dicken and Pitts) 40. See also Chatty, Pastoralists, 80-81; Fouberg, Murphy and de Blij, 2009, 241; Sack, 7-8, 55, 66-67; Salzman, Introduction, 11; Khazanov, Outside, 198-199.

debated, but the idea that nomads do not form states and are not territorial persists and remains highly influential.[242]

Closely related to the idea that nomads can't form states is the colonial idea of nomadism as a backward stage of human development that is destined to die out. Even when seen through the misty lens of European romanticism that often typified European writings on nomads, nomads were considered to be an obstacle to progress by even the most admiring colonial administrators. Colonial administrators adopted negative views of nomadism even in places where nomadism was a crucial and thriving part of the local economy. While on the one hand, these writings present nomadism as a "'golden age of simplicity," it was also a way of life that must die out for "progress" to occur.[243] As a result, European administrators consistently showed a preference for settled groups over the "wandering peoples."[244]

The view that nomadism was somehow backwards would persist into the post-colonial period. Writing of government responses to Bedouin nomads in the Middle East, anthropologist Hilary Gilbert points out that:

> (p)astoralism, constructed as rooted in a primitive, pre-agricultural past, affronts the linear narratives of 'progress' and 'modernity' adopted by many states."[245]

"The emergence of nomadic states was linked with at least limited sedentarization (because) a nomadic aristocracy could not do without towns which were the centres of political power, handicrafts and trade." Khazanov, Outside, 232. The example of the Tuareg is illustrative of the ways in which scholars and experts have argued over whether or not nomads form states. See for example Azarya, 258, 277; Boilley, Les Touaregs, 1999, 44; Bourgeot, Résistances, 39-41; A. Bourgeot, 'Sahara : espace géostratégique et enjeux politiques (Niger)' 31 NAQD 153 (2014) 31 (hereinafter Bourgeot, Sahara); Foltz, 1-2; Tymowski, 1.

The nomadic Tuareg were often contrasted with agricultural societies like the Songhai, which were described as "state-like." Foltz, 4. Trimingham claims that not only the Tuareg and Arab nomads, but all Sahara kingdoms, lacked territoriality, claiming that "(i)t is impossible to demarcate these spheres upon a map for the frontier did not exist nor was there a capital city...Empires were spheres of influence, defined not by territorial borders or boundary lines, but by social strata..." Trimingham, 35. The point of this section is not to take a side in the argument over whether or not nomads can form states, but merely point out the theories that contributed to colonial policy.

[242] R. Bauböck, 'Transnational Citizenship and Political Autonomy' in T. Faiset and P. Kivisto (eds.), *Dual Citizenship in Global Perspective: From Unitary to Multiple Citizenship* (Palgrave 2007) 84-85. See for example E. Marushiakova and V. Popov, 'The Roma – a Nation without a State? Historical Background and Contemporary Tendencies' in Bernhard Streck (ed.), *Segmentation und Komplementarität. Organisatorische, ökonomische und kulturelle Aspekte der Interaktion von Nomaden und Sesshaften* (6 Orientwissenschaftliche Hefte 2004) 71.

[243] Bury, 8.

[244] Larkins, 25, 186 (discussing the views of colonizers towards indigenous and nomadic peoples).

[245] H. Gilbert, ''This is Not Our Life, It's Just a Copy of Other Peoples': Bedouin and the Price of 'Development' in South Sinai' 15 *Nomadic Peoples* 8 (2011) 7 (hereinafter H. Gilbert, 2011).

Yet, as the sections above showed, pastoralism was not a "primitive" or "pre-agricultural" way of life in the Middle East during the pre-colonial period. To the contrary, as the example of Bedouin nomads in Kuwait exposed, far from being a problem, nomadism in the Middle East was a key part of the economy, linking settled kingdoms together in a web of trade upon which the entire region depended. Pastoralism formed an integral part of the economy. Despite their mobility, many nomads in the Middle East claimed territory, owned land as individuals and had close ties to settled communities. Yet the idea that nomadism was somehow primitive and destined to die out became entrenched in colonial policy, influencing governments up to the present day.[246]

Importantly for the question of nomad nationality, nomads were seen as incapable of the exclusive allegiance that was necessary to create sovereignty.[247] Feudal society required exclusive allegiance between ruler and peasant.[248] The concept of exclusive allegiance was crucial to claiming colonized peoples as subjects under treaties. Tribal allegiance, however, as supposedly practiced by nomadic communities, was seen as incompatible with allegiance to a state. Even though colonial militaries signed treaties with nomad leaders, over the course of the colonial period, it became increasingly common to view nomads as tribal and as unsuitable subjects for such treaties.[249]

While colonial administrators and military leaders did sign treaties with nomad leaders, these "colonial treaties were mainly acts aimed at achieving control over trade relationships with specific tribes, or capitulation arrangements."[250] Over time, as colonization progress beyond the initial conquest period, treaties with urban rulers were favoured over alliances with nomadic leaders. Protectorate agreements and other, more permanent relationships were mainly forged with settled and urban rulers.[251] By the 19th century, under laws like the Berlin Act of 1880, earlier treaties with nomadic peoples were invalidated on the grounds that nomads could not form states or fulfil their obligations

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[246] Diallo, 52-53

[247] Brownlie, Principles, 106-107. As Shaw puts it, "(p)erhaps the outstanding characteristic of a state is its independence, or sovereignty." Shaw, 2008, 211, 228, quoting the Draft Declaration on the Rights and Duties of States (1949); Simmons, 308-309 (discussing the moral rights of states to territory and particular territories); Larkins, 35 (territoriality is a founding principle of international relations theory). Conklin dates the notion of absolute state control of territory to Vattel. Conklin, 73-74.

[248] Van Panhuys, 139; Jault-Seseke, 22; Conklin, 181-183 (discussing the concept of allegiance in early European philosophy); Edwards, 12; A. Boll *Multiple Nationality and International Law* (Brill 2006) 38-39 43-47 (hereinafter Boll); R. Kubben, 'To Belong or Not Belong' 19 Tilburg LR 136 (2014); A. Shachar, *The Birthright Lottery* (Harvard UP 2009) 113-114 (hereinafter Shachar).

[249] Shaw, 2008, 29, 39. See also Sack, 15, 66-71; N. Elias, *The Civilizing Process: State Formation and Civilization* (Basil Blackwell 1994) 295-297 (discussing feudal Europe's land rush and land ownership as the fundamental basis of society); Dicken and Pitts 184-193 237, 322, 406; Carmichael 8.

[250] Gilbert, Nomadic, 2014, 61.

[251] Gilbert, Nomadic, 2014, 90-102. See also Dicken and Pitts, 415; Fouberg, Murphy and de Blij, 2009, 240.

under such treaties.[252] It should again be noted that not all legal theorists of the day agreed that nomads had no sovereignty.[253] Nevertheless, such views of nomads were dominant and very influential.

Meanwhile, the existence of nomads in the colonies was seen as weakening colonial sovereignty and the primacy of settled, urban rulers.[254] Nomadism came to be seen as a problem for colonization and the sovereignty of local, settled rulers under the colonial system.[255] The prioritization of urban rulers would lead a sharp decline in the status and power of nomads, while many colonial administrators adopted forced and coercive settlement programs for nomads. These programs will be explored in depth in the examples, below.

The idea that nomads did not form states also affected how they were seen by international legal theorists. Once again, though not universally accepted, nomads were also excluded from the international definition of statehood by some theorists:

> So entirely is (international law's) conception of a state bound up with the notion of territorial possession that it would be impossible for a nomadic tribe, even if highly organized and civilized, to come under its provisions.[256]

These theories were highly influential on colonial policy in both British and French colonies. In particular, Gilbert notes that the forced settlement of nomads became a major goal of many colonial administrators.[257] Nomadic settlement was more than simply the accidental by product of political and economic development during the colonial period. Forced and deliberate, coercive settlement were major features of colonial policy. While nomadism has always waxed and waned as nomads have adjusted to the surrounding

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[252] Bloom, Members, 2017, 160. See also Crawford, 269.

[253] See generally Moretti.

[254] Diallo, 28.

[255] Diallo, 25.

[256] Lawrence, *The Principles of International Law* 58, quoted in Gilbert, Nomadic, 2014, 62.

[257] Gilbert, Nomadic, 2014, 67-70. See also J. Maury, *Nationalité: Théorie générale et droit français* (Paris Recueil Sirey 1931) 22 (hereinafter Maury). It is important to note, however, that the process of sedentarization during the colonial period had complex causes, with many factors occurring in tandem.

Deliberate policy encouraging settlement went hand in hand with environmental change, the introduction of a cash economy, the broader re-orientation of trade towards routes that were more suitable for Europeans through the creation of railroads, ports and other infrastructure and the centralization of trade under European control. This re-orienting of trade, encroachment of the cash economy and environmental change would continue after colonization ended. Salzman, 11-12 (discussing the impact of drought, military defeat, modernization and urbanization on pastoral settlement). See also J. Galaty, 'The Maasai Group-Ranch: Politics and Development in an African Pastoral Society' in P. Salzman (ed.) *When Nomads Settle* (Praeger 1980) 161 (discussing land development projects in Kenya); P. Salzman, *Pastoralists: Equality, Hierarchy and the State* (Westview 2004) 122.

conditions, moving in and out of the nomad economy as it suited them, the colonial period brought about a long decline in nomadism due, in part, to colonial policies deliberately targeting nomadism as undesirable and backward.[258] Meanwhile, negative views of nomadism would continue to dominate sociology, anthropology and other fields both before, during and after the colonial period.[259] These views would, in turn, deeply influence how nomads were treated during the colonial period and beyond.

It is important to note that in other parts of the world not examined by this dissertation, the extermination of entire nomadic societies was not uncommon.[260] Negative treatment of nomads has been documented across the colonial system, including many cases of mass murder and mass forced removal from land.[261] As Jérémie Gilbert points out in his book on nomads and human rights, sometimes forced settlement, relocation and extermination was the inadvertent effect of disease and destruction of habitat, but often it was purposeful, part of clearing areas to make room for settlement and removing nomadic groups.[262]

> Acts of elimination and mass killing were based on a racist bias against nomadic peoples, not only because of their race or ethnicity but because they were nomads…[263] the crimes (against nomads by colonists) were committed on the basis of historical stereotyping in which the nomadic element has played a central role.[264]

This section has summarized some of the negative theories on nomads and state formation that influenced colonial policy. The next sections will explore how these colonial theories on nomadism influenced colonial polices towards nomads in Kuwait, French Soudan and North Borneo.

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[258] Lenhart, 248.

[259] For an overview of the subject, see the work of geographer Robert Sack and the field of geography more generally. See also Diallo, 28.

[260] This occurred to the entire nomadic population of Uruguay, the Selk'nam population of Patagonia, and almost the entire Techuelche nomadic population in Argentina. Gilbert, Nomadic, 2014, 22-25.

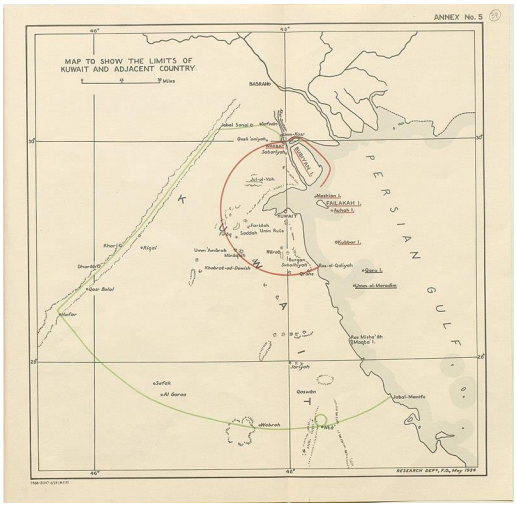
[261] The view that nomads have no sense of territoriality justified, for example, President Andrew Jackson's argument for the Indian Removal Act of 1830 in the United States. President Jackson's Message to Congress, 'On Indian Removal,' December 6, 1830; Records of the United States Senate, 1789-1990; Record Group 46; Records of the United States Senate, 1789-1990; National Archives. See also Conklin, 74 (on the use of title against native peoples.)

[262] Gilbert, Nomadic, 2014, 23. See also S. Irudaya Rajan, V. J. Varghese and M. S. Jayakumar, *Dreaming Mobility and Buying Vulnerability: Overseas Recruitment Practices in* India Routledge 2011) 26-28, discussing the *maistry* and *kangani* systems.

[263] Gilbert, Nomadic, 2014, 31.

[264] Gilbert, Nomadic, 2014, 54.

The Bedouin in the Sheikdom of Kuwait



Kuwait, 1954

This section will summarize British colonial policy towards the Bedouin. Colonial policies on nomad land use, sovereignty and allegiance would have a devastating impact on Bedouin nomads. The British territorial system of administration would also have a deep and lasting effect on the makeup of the Kuwaiti state. Most importantly, the alliance between the British Crown and the Emir of Kuwait would centralize power in the hands of the urban Al-Sabah family and bisect Bedouin lands by hard borders. These events would come to have enormous repercussions for Bedouin nationality at the time of decolonization. While in the 1920s and 1930s, the Kuwaiti government would "go out of its way" to facilitate Bedouin trade,[265] by the 1960s, Bedouin movement was viewed as a security threat and a problem for Kuwait's sovereignty.

In the 1930s, according to Toth, there were approximately 10,000 Bedouin in Kuwait.[266] Many more Bedouin groups migrated across what would become Kuwaiti territory or lived in oasis towns in the interior.[267] As the proceeding sections explored, there was always a distinction in Kuwait between the Bedouin, or Bedu, peoples of the desert and the settled merchants of Kuwait City. By the mid-twentieth century, however, this distinction had become so entrenched in Kuwaiti society and politics that it became the defining feature of Kuwaiti nationality. Why this happened can only be explained by looking at the creation of the Kuwaiti territorial state and the discovery of oil during the British Protected State period. During the period of British influence, the territorial concept of statehood that had developed in Europe, described above, was imposed on the Middle East. But most crucially,

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[265] Longva, Citizenship, 188.

[266] F. al-Nakib, 'Revisiting Hadar and Badu in Kuwait: Citizenship, Housing, and the Construction of a Dichotomy' 46 *Int'l J. of Middle Eastern Studies* 5 (2014) 6 (hereinafter al-Nakib); A. Toth, 'Tribes and Tribulations: Bedouin Losses in the Saudi and Iraqi Struggles over Kuwait's Frontiers, 1918-1943' 32 *British Journal of Middle Eastern Studies* 145 (2005) 149, citing Dickenson (hereinafter Toth, Tribes).

[267] Toth, Tribes, 149.

it was imposed in a way that divided the Bedouin between different states and centralized power in Kuwait Town.

In particular, this section will explore how the drive to set borders and exclusively claim the Arabian desert, would dominate British policy in the Gulf.[268] As Toth points out, "the appearance of modern states was an important factor in the decline of Bedouin power and independence."[269] The creation of Kuwait is best seen as only part of a much larger story involving the dividing up of the Arabian Peninsula and the mass settlement of, and movement restrictions on, Bedouin nomads, two events that were intimately entwined. The establishment of the borders of Kuwait coincided with the carving up of "greater Syria" in 1920 during the Mandate period, which resulted in the large-scale division of Bedouin kin groups across the peninsula.[270] As Chatty puts it, "(w)ith the consolidation of state power and authority in the 'state'...most of the nations of the Middle East turned to their pastoral populations with a view to settling them in one place...(to)...assure control over them."[271] Controlling the Bedouin was important to the colonial powers and, increasingly, local sheiks of the Gulf because it led to the control of Bedouin territories.

The British Protectorate period saw the creation of borders as key to protecting the sovereignty of Kuwait and its control over the desert regions outside of Kuwait Town. These entwined goals, settling the Bedouin and setting borders in the desert, would be adopted by the Kuwaiti government after the British left.

The fight for exclusive sovereignty over the desert would only intensify with the discovery of oil in 1938.[272] In 1890, the population of Kuwait Town was around only about 20,000, excluding seasonal Bedouins. Over the next sixty years, however, Kuwait would explode in size and economic importance as it became a major oil supplier.[273] The discovery of oil under the desert would greatly raise the stakes for control of the desert beyond mere strategic importance.

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[268] This example will focus primarily on the treatment of the Bedouin by the British, but French and Ottoman colonial treatment of the Bedouin in northern Arabia was markedly similar to British policy, with a focus on forced settlement, formal boundaries and the establishment of a western administrative structure. Chatty discusses French administration of the Bedouin in Chatty, Persistence, 2014, 20-22 (discussing the Syrian and Lebanese contexts.)

[269] Toth, Tribes, 146.

[270] Al-Serhan and Furr, 19. Much of the Kuwaiti Bedouin experience was replicated in other countries, such as Jordan.

[271] Chatty, Pastoralists, 2.

[272] A. Rush, *Al-Sabah: History and Genealogy of Kuwait's Ruling Family, 1752-1987* (Ithica 1987) 4. Today, Kuwait controls 10% of the world's oil reserves. Casey, 7. Because of WWII, oil exploration did not begin in Kuwait until 1946. Longva, Citizenship, 182.

[273] Slot, 53-54.

> The sedentarization projects for pastoral nomads undertaken in the Middle East between 1950 and 1970 did not mark a departure from policies carried out during the Mandate period or in Wahhabite Arabia. Then, as earlier, the solution suggested for the nomad 'problem' was the same: sedentarization.[274]

The scramble for territory also influenced the actions of local rulers, none more than Ibn Saud in what would become Saudi Arabia. Ibn Saud in particular, used alliances with Bedouin rulers as part of his expansionist strategy to claim territory for his empire.[275] The British become both willing participants and pawns in these state-building exercises, which brought the European concept of statehood, with exclusive allegiance, territorial sovereignty and hard borders, to Gulf politics. This meant that alliances with the Bedouin came to be crucial to exerting sovereignty over the desert. At the same time, however, the British and many local leaders came to see the Bedouin as a "problem," hindering attempts to set borders and establish clear zones of influence in the desert.

The "problem" of the Bedouin began under the Ottoman Empire, which had established a foothold in the region at Basra at the end of the 18th century. Kuwait Town, however, remained almost entirely independent during the Ottoman period.[276] Nevertheless, the Ottoman Empire established administrative and military outposts to the north, particularly at Basra, as well as a system of tax collection, policies to promote agriculture and other attempts to create sovereignty in the region.[277] While the Bedouin enjoyed a great deal of autonomy during the Ottoman period, they began to feel the influence of the colonial struggle for territory.[278] This period would usher in the beginning of a "great historical transformation" that would culminate in the creation of modern states in the region.[279] "(T)he long period of Bedouin hegemony in the desert and the steppe diminished, probably forever."[280]

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[274] R. Bocco, 'The Settlement of Pastoral Nomads in the Arab Middle East: International Organizations and Trends in Development Policies, 1950-1990' in D. Chatty (ed.) *Nomadic Societies in the Middle East and North Africa: Entering the 21st Century* (Brill 2006) 302.

[275] Beaugrand, Stateless, 2018, 65-66.

[276] Al-Dekhayel, 1. See also Slot, 9.

[277] Slot, 9, 13-36. See also A. Toth, 'Last Battles of the Bedouin and the Rise of Modern States in Northern Arabia: 1850-1950' in D. Chatty (ed.) *Nomadic Societies in the Middle East and North Africa: Entering the 21st Century* (Brill 2006) 59-61 (hereinafter Toth, Battles); B. Busch, *Britain and the Persian Gulf: 1894-1914* (U. Cal P. 1967) 95 (hereinafter Busch).

[278] F. Stewart, 'The Contract with Surety in Bedouin Customary Law' 2 *UCLA J. Islam* 163, 168-169. (2003) (focusing mainly on Bedouin in the Sinai).

[279] Toth, Tribes, 145.

[280] Toth, Tribes, 145.

In general, the Ottoman authorities viewed nomadism as a "problem" to nation-building in their Arabian colonies.[281] Nomads were "bandits," attacking Ottoman caravans and towns and leading to instability, making it difficult to secure borders and territory.[282] They were a "disease that needed to be cured," as one Ottoman official put it.[283] According to many Ottoman administrators, the Bedouin frequently refused to pay Ottoman taxes, did not acknowledge the authority of the Empire, raided their settled farmer neighbours and were seen as an obstacle to agricultural development and making the region "self-sufficient," by which the Ottoman government really meant the opposite; dependent on Ottoman control.[284] The Ottomans employed what would become a familiar strategy for territorial empires against the Bedouin: forced settlement, military reprisals and the promotion of agriculture.[285] For example, Fazil Mustafa Pasa, who became Grand Vizier in 1689, ordered the settlement and registration of nomads in order to promote farming, despite the unsuitability of many parts of the Gulf for a large-scale expansion of agriculture.

In the end, Ottoman policies brought few changes to Kuwait as the Ottomans were overstretched. In general, as long as the Bedouin paid taxes, the local Ottoman administrations often failed to carry through on settlement programs. Camel-herding Bedouin from the desert interior were frequently left alone by Ottoman administrators, who tended to focus on smaller, sheep herding groups living closer to settled areas.[286] Ottoman administrators were often reduced to paying off Bedouin leaders in order to maintain security.[287] By the 19th century, the Ottomans were still struggling to control even coastal areas around Basra, register plots of land and establish a land tenure system.[288]

Meanwhile, the Arabian interior remained primarily under nomadic Bedouin control, its markings and orientation points entirely a matter of Bedouin rules and customs. At the dawn of the 20th century, while Kuwait's northern border was "relatively well-defined," though "disputed," its southern border was a "shifting line between tribes loyal to the Al-

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[281] J. Büssow, 'Negotiating the Future of a Bedouin Polity in Mandatory Syria: Political Dynamics of the Sba'a 'Abada During the 1930s' 15 *Nomadic Peoples* 70 (2011) 78-79 (hereinafter Büssow). I am indebted to Anthony Toth for his comments on Ottoman influence in Kuwait.

[282] B. Masters, *The Arabs of the Ottoman Empire 1516-1918: A Social and Cultural History* (Cambridge UP 2013) 95.

[283] R. Kasaba, *A Movable Empire: Ottoman Nomads, Migrants and* Refugees (U of Wash P 2009) 7 (hereinafter Kasaba).

[284] Kasaba, 60. See also Anscombe, 42.

[285] Anscombe, 42.

[286] Kasaba, 66, 103. See also Toth, 61-62.

[287] Masters, 96.

[288] Anscombe, 33-38, 43.

Sabah and those loyal to whichever ruler controlled Najd..."[289] The struggles to control the Bedouin, establish sovereignty and set borders would later be taken up by the British and the Al-Sabah family.[290]

By 1899, Sheikh Mubarak of the ruling Al-Sabah family in Kuwait Town, sensing Ottoman weakness and distrustful of their intentions as well as worried about attack by hostile Bedouin groups, entered into a treaty with Britain for protection.[291] The Sheikh, with his position as the head of the powerful Al-Sabah family in Kuwait town, had already been recognized as the authority over Kuwait Town by the Ottomans. The British would further elevate the Sheikh as the recognized authority not only in Kuwait Town, but over Kuwait as a territorial state. The Sheikh and Britain were natural allies, since the Sheikh could provide the British with access to Kuwait's harbour. Control of Kuwait's port was not only important economically, it provided a foothold for British territorial expansion on the Peninsula.[292]

Until the discovery of oil, Britain's interest in Arabia was focused on the coastal areas and shipping. The desert interior was valuable primarily for strategic reasons. Kuwait was dependent on freshwater supplies from Basra, its economy based on pearl fishing and cross-desert trade for which the Bedouin were crucial.[293] For the Kuwaiti Emir, the Bedouin were important allies.[294] Unlike in Jordan and Saudi Arabia, which in the early 20th century remained majority Bedouin, Kuwait's Bedouin were only one seventh of the total Kuwaiti population and in a constantly moving into and out of the region throughout the seasons.[295] The Sheikh would call upon friendly tribes for defence, and tribes would migrate to Kuwait Town and other towns to trade, but Al-Sabah sovereignty did not extend much further than Kuwait Town's walls.[296]

Over the next few decades, Kuwait would became a British Protected State under the authority of the Sheikh.[297] The agreement with Sheikh placed the might of the British military in service of protecting Kuwait's "independence" as an exclusive client of

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[289] Slot, 8-9.

[290] Kasaba, 5.

[291] Longva, Citizenship, 182; Slot, 88; Al-Dekhayel, 2; Busch, 108. In 1901, the Sheikh and Britain reaffirmed their pact.

[292] Carmichael, 107.

[293] Casey, 21.

[294] Anscombe, 26. See also Y. Alon, *The Making of Jordan: Tribes, Colonialism and the Modern State* (I. B. Tauris 2007) 60 (hereinafter Alon).

[295] Commins, 145.

[296] Al-Dekhayel, 89.

[297] Anscombe, 122; Casey, 21.

Britain.[298] For both the British and the Al-Sabah family, the loyalty of the Bedouin and the need for a hard border would emerge as major, and closely related, security issues.

In 1912, the protectorate agreement between Britain and Kuwait was finally formally recognized by the Ottomans. The British began their aggressive push to fix not only Kuwait's border, but borders throughout the Gulf.[299] The issue of borders had long worried the British, who during the Ottoman period had been eager to demarcate the "'line between the two empires,' or spheres of influence."[300] Following the logic of territorial sovereignty described in the proceeding section on the European system of statehood, Britain wished to set a border through the desert to prevent attacks on their allies and foil expansion by other European empires.[301]

The border was also of growing concern to the Sheikh, who was mainly worried about Kuwait's independence from his inland neighbours, such as Ibn Rashid and Ibn Saud.[302] As the region developed into territorial units along the European model, the allegiance of the Bedouin and, by proxy, control of the desert would come to be a major issue. At the same time, however, as power centralized in the hands of urban rulers, border lines would be drawn through Bedouin areas, slicing through the heart of Bedouin society. While the border began as a semi-circle drawn on a map, in time, it would weaken Bedouin society, harm trade and shift political power away from Bedouin leaders.

The border was finally set down by the Anglo-Ottoman agreement. Critically, this agreement included a clause placing the "tribes within the territory" of Kuwait as "subordinate" to the Kuwaiti Sheikh.[303] This clause may have represented an effort to create a ruler-subject arrangement between the Emir and the Bedouin groups living within an arbitrary circle created for the first time by this very agreement. If so, it ignored the complex relationship between many Bedouin and the Sheikh. It is not clear to what extent the various Bedouin groups with ties to Kuwait were consulted on either the position of the border or their relationship to the Sheikh now that Kuwait was being set up as a territorial state, though the sources cited in this section imply that little outreach and consultation with the Bedouin was undertaken. What is clear from research, however, is that subsequent attempts to secure the border in practice were met with widespread Bedouin resistance.

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[298] Slot, 114-115.

[299] Slot, 384-387. See also Carmichael,101. The location of the border was the subject of much debate and compromise.

[300] Slot, 41.

[301] Busch, 336. See also Carmichael, 109.

[302] Slot, 131. See also Carmichael, 101.

[303] Slot, 380.

As Slot puts it, "(n)obody seems to have envisaged how this geometric circle might be applied to daily desert practice."[304] In particular, the border would inevitably cut through long-distance trade routes, as well as Bedouin territories and pastures, disrupting the region's economy. This was of little concern to the British, who saw Bedouin trade as competition for ocean trade routes. In fact, the creation of a hard border would transform Bedouin trade into a state regulated activity, as trade must now take place subject to government regulation, not Bedouin rules.

The border also created a question as to the loyalty of many Bedouin tribes, who were now expected not only to choose sides between various urban power centres, but to express these loyalties spatially through adhering to certain artificially drawn, invisible boundaries in the desert.

> In a situation where there was a general scarcity of funds, the colonial administrations in Syria and Iraq, much like their predecessors, the Ottomans, treated tribes as groups with rights and responsibilities who would guarantee some measure of order in a peripheral territory and would help in the outsourcing of some administrative functions such as public security and taxation.[305]

Yet right from the start, the British struggled with their project to pacify the Bedouin in order to use them to support the border. Because Bedouin groups often travelled long distances and owed allegiance to several sheikhs depending on the time of year or shifting political alliances, they were viewed by the British as unreliable allies.[306]

The Al-Sabah family had long relied on the support of loyal Bedouin for military protection, but many Bedouin and former Bedouin were now allies of Ibn Saud, including the powerful Ikhwan.[307] Meanwhile, the Saudis began to look to make their own deal with the British,[308] and Kuwait Town, with its access to one of the best ports in the region, was a prize worth taking.

In 1920, the Sheikh's concerns over the growing power of Ibn Saud proved justified. In an attempt to absorb Kuwait Town into the emerging Saudi empire, thousands of Bedouin fighters under Faisal al-Dawish, allied to Ibn Saud, attacked the oasis town of Jahra not far from Kuwait Town.[309] The town pushed the invasion back with British support. Families from Kuwait Town worked nonstop for two months to build a wall around the town,

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[304] Slot, 378.

[305] Büssow, 88. See also Beaugrand, Stateless, 2018, 67.

[306] Commins, 159.

[307] Beaugrand, Stateless, 2018, 57.

[308] Slot, 400.

[309] Toth, Tribes, 147-148Casey, 21; Carmichael, 110.

helping to repel the invasion.[310] Both the Al-Sabah family and British government, however, feared future attack. This moment, the foiled invasion and the construction of the border wall around Jahra, would become the founding story of Kuwaiti national identity and would influence Kuwaiti nationality law in the decades to come.

Following the attempted invasion, the British and Emir again tried to establish a firm border around Kuwait Town with the Uqair Protocol, centralizing the Kuwaiti state on Kuwait City. The line drawn by the Uqair Protocol was based on previous treaties, including the Anglo-Ottoman agreement mentioned above.[311] The extension of the Sheikh's territory into the desert would provide a "buffer zone" around the city, taking into account what the British believed to be Al-Sabah's sphere of influence, including neighbouring towns like Jahra. The agreement was a clear attempt to elevate the legitimacy of the Emir and weaken the claims of Bedouin rulers to Kuwaiti territory.

For the time being, the new border would have little practical effect, though the British made many attempts to secure the border areas of Kuwait using a combination of treaties and military force.[312] At this point, there were no border posts and nothing to prevent Bedouin migration, which continued in spite of the lines drawn by the British on maps. The creation of a hard border, however, would begin to have an effect on how mobility was viewed by the governments of the region.[313] Now there was a Saudi side of the desert, an Iraqi side, and a Kuwaiti side. In the scramble for control of the Arabian Peninsula, not only the Al-Sabah family, but also Ibn Saud and others were intent on claiming as much territory as possible.[314] As a result, by the early 20th century, the territorial conception of statehood had been entirely adopted by leaders in the region. Increasingly, Gulf leaders began using

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[310] Longva, Citizenship, 186.

[311] Ismael, 69; Casey, 21. The Protocol affirmed the border as a semi-circle 80 miles from Kuwait City. The boundary was described as; "(t)he frontier between Najd and Kuwait begins in the west from the junction of the Wadi al 'Awja' with Wadi al Batin, leaving Raq'i to Najd; from this point it continues in a straight line until it joins latitude 29 degree and the red semi-circle referred to in Article 5 of the Anglo - Turkish Agreement of July 29, 1913. The line then follows the side of the red semi-circle until it reaches a point terminating on the coast south of Ras al Qali'ah and this is the indubitable southern frontier of Kuwait territory."

A "wadi" is a seasonal riverbed. See also Commins, 120. The agreement had created a zone of sovereignty for Kuwait extending 80 miles outward from Kuwait City. Another 100 kilometers beyond this border was designated as the Sheik's "zone of influence." For examples of earlier proposals for Kuwait's border, see photos, Slot, 270. For examples of the complex web of Bedouin allegiance at the time, see Beaugrand, Stateless, 2018, 53-62.

[312] Toth, Tribes, 149-150.

[313] Conversations with experts. See also Commins, 139.

[314] Toth, Tribes, 149.

the word *watan* to describe the state, a word associated with territory, rather than the traditional term *umma*, with its emphasis on the Muslim community.[315]

Kuwait was not the only place where the British attempted to control the Bedouin territorially in order to support their newly drawn borders. Governments across the region, many with the cooperation and encouragement of Britain and France, tried a combination of "carrot and stick" approaches to restrict the movement of Bedouin, including financial rewards and penalties, inter-tribal marriages, formal recognition of smaller tribes, and forced emigration of certain individuals and groups.[316] In Iraq, for example, the British offered land to Syrian Bedouin to entice them to settle in Iraqi territory. The French in Syria were also trying to force the Bedouin to settle.[317] Forced settlement became a major government goal even in countries with majority Bedouin populations like Jordan.[318] Settlement programs for the Bedouin in the desert regions was part of larger economic development schemes increasingly undertaken by local, as well as colonial, administrators.[319]

Beginning in the 1920s and 1930s, the borders of Kuwait would become facts on the ground for many Bedouin as Ibn Saud began a blockade of caravans to Kuwait City.[320] Ibn Saud made many exceptions to the blockade when politically necessary, but the blockade did much to reduce the power of Bedouin groups to move freely across the border. To weaken Kuwait's economy and raise money, Iraq also instituted border controls in the 1930s, labelling Bedouin trade that did not comply with the new laws and taxes as "smuggling."[321] While many Bedouin continued to cross the border clandestinely, these

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[315] N. Partrick, 'Nationalism in the Gulf States,' in D. Held and K Ulrichsen, *The Transformation of the Gulf* (Routledge 2011) 59.

[316] Beaugrand, Stateless, 2018, 68. These programs were employed across the region, sometimes leading to armed conflict. Janzen, 232-250. See also Alon, 8-9 (on Oman).

[317] Büssow, 78, 81.

[318] Alon, 60-72, 75-76.

[319] Saudi Arabia issued identity documents to Bedouin tribes living in border regions with Oman in order to claim that territory. Janzen 71 Many government settlement programs in Saudi Arabia, including relocation, farm loans, and land grants, however, were later abandoned because agriculture did not take hold in the very dry desert environment. S. Yizraeli, *Politics and Society in Saudi Arabia: The Crucial Years of Development 1960-1982* (Oxford 2012) 166-174, 178-179 (hereinafter Yizraeli).

Because the Bedouin made up the majority of the population in Saudi Arabia, While Saudi policy came to be more inclusive of the Bedouin nomads than in Kuwait, nevertheless, unsettled Bedouin became increasingly poor and marginalized in Saudi society, and nomadism often went hand in hand with lack of registration and access to public welfare programs designed for settled populations. Alon, 1-7 See also Yizraeli, 181.

[320] Fletcher, 58; See also Toth, Tribes, 145, 148, 155, 159, 162. In 1943, a trade agreement was established between the two countries. Toth, Battles, 160.

[321] Toth, Tribes, 160.

border controls began to have an impact on Bedouin economics, pushing yet more nomads to settle.

This marked the beginning of the treatment of traditional Bedouin movement as "illegal" border crossings, a theme which will reoccur during the post-protectorate period. The blockade, and subsequent border restrictions, along with drought and famine, would take a great toll on the Bedouin during this period, reducing Bedouin movement and fuelling urban settlement.[322] While "smuggling," as it was now called, became big business for some Bedouin and was tacitly supported by the Al-Sabah family in some cases,[323] the overall effect of the border was to decrease movement and encourage settlement in towns.

Nevertheless, Bedouin families continued to come to Kuwait City to take part in seasonal pearl diving before returning to their herds, maintaining close connections between certain tribes and Kuwaiti merchants. The Al-Sabah family still relied on its Bedouin allies for economic and political support.[324] The status of the Bedouin in regional politics, however, was beginning to decline rapidly due to the discovery of oil.

Oil would elevate the problem of the Kuwaiti border to an issue of paramount importance. It would make the desert zone surrounding Kuwait City incredibly valuable to all governments in the region and external actors as far away as the United States. The extreme wealth it generated would catapult the ruling families of the region like the Al-Sabah family into competition for territory.[325] Crucially for the Bedouin, the discovery of oil would also shift the economy away from Bedouin trade, as well as weakening the merchant families in Kuwait Town, breaking down their historical economic inter-dependency.[326] The Bedouin would increasingly find themselves less valuable as trade and military allies.

The oil economy would accelerate Bedouin settlement in urban areas as Bedouin began to migrate to cities to take part in the emerging wage economy. While the imposition of borders and the shift to the oil economy encouraged settlement, state actors also actively coerced Bedouin settlement. Local administrators, as well as agents of the British and French, used land grants and subsidies to tribes to settle the population. As Toth points out, states like Kuwait, Saudi Arabia and Iraq often employed the same methods as the British in order to solidify their sovereignty and control the Bedouin.[327] Many Bedouin families settled in shanty towns outside Kuwait's urban areas.

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[322] Toth, Tribes, 156.

[323] Fletcher, 58-59.

[324] Fletcher, 60-61.

[325] Longva, Citizenship, 181.

[326] Longva, Citizenship, 182.

[327] A. Toth, 'Control and Allegiance at the Dawn of the Oil Age: Bedouin, Zakat and Struggles for Sovereignty in Arabia, 1916-1955' 21 *Middle East Critique* (2012) 57 (hereinafter Toth, Control).

The idea that the Bedouin were a "problem" for which settlement and relocation to urban areas was the "solution" was now firmly entrenched in government policy. Though no longer as important to the economy, by the 1960s, both the Saudis and the Al-Sabah family still relied on the Bedouin for military troops, meaning that claiming loyal Bedouin groups would become vitally important for the protection of the state. In the case of Kuwait, this meant settling and assimilating those Bedouin families who were loyal to the Emir while excluding groups seen as problematic.[328] Certain nomadic Bedouin were now seen as disloyal and, potentially, criminal.

"Nomadic tribes were armed, mobile and flexible in their political allegiances, making them an often menacing and unpredictable quantity in the eyes of rulers in the settled zone."[329] On the eve of the termination of the protectorate agreement and the withdrawal of British administrators, both local and foreign administrators were united in a desire to secure regional borders, establish exclusive sovereignty, cut down on what they termed smuggling and, to accomplish all of these goals, restrict Bedouin movement and settle the Bedouin.

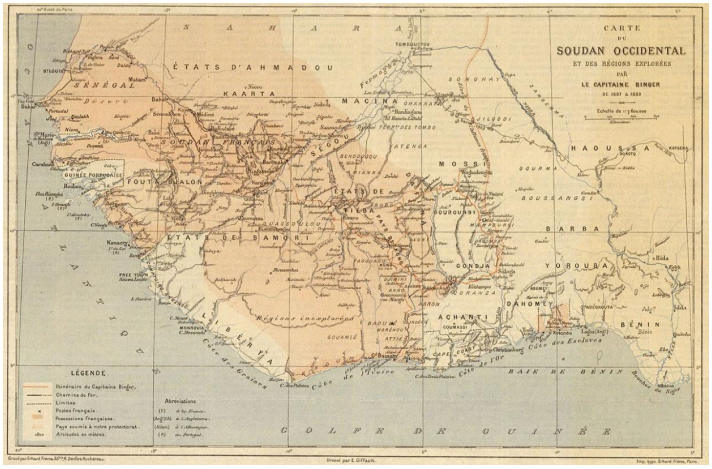
At the termination of the protectorate agreement, Kuwait would inherit the borders established by the Uqair Protocol alongside concerns over ownership of the oil against the claims of neighbouring states, worries over the arbitrary border and, most importantly for this dissertation, concerns over the suitability of Bedouin as nationals and ongoing questions over their loyalty. "In the 1960s, modernity, in the form of national borders and oil explorations, forced (the Bedouin) to give up their traditional law of life."[330]

[328] Toth, Tribes, 149. See also Toth, Control, 59.

[329] Toth, Control, 2012, 58.

[330] Longva, Citizenship, 188.

The Tuareg in French Soudan



West Africa, 1887-1889

Arguably even more than the Bedouin, colonial views on the ability of the Tuareg to help establish French sovereignty over the Sahel would prompt French administrators to divide Tuareg lands with borders and to push aggressively to settle the Tuareg. Like the British in Kuwait, the French in the Soudan would centralize economic and political power in cities with urban rulers.

The Sahel came under nominal French control when Colonels Joffre and Bonnier entered the fabled city of Timbuktu in 1894 under dubious authority, against orders from the French government, and encountering stiff local resistance. The French had secured European recognition for their sovereignty over West Africa at the Conference of Berlin in 1884-1885, but French presence on the ground was for many years limited to a few military outposts.[331] As in the Arabian Peninsula, the Sahel was mainly important to the French during the early colonial period for strategic reasons. France needed to occupy the desert and sign treaties with local rulers, in order to protect from incursions by other colonial powers. Yet establishing sovereignty in desert areas would prove difficult.

French estimates put the number of Tuareg in norther French Soudan at around 60,000 in 1906, with an additional 24,000 nomads of Arab descent.[332] Like in Kuwait, the push to establish French territorial sovereignty would dominate French-Tuareg relations. Though far less important than oil in the Gulf, however, the possibility of mineral wealth would also

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[331] Bourgeot, Résistances, 276 (discussing the ongoing struggles of the French for even nominal military control of the region). Up until 1945, there were only nine French citizens in all of the Kidal region, for example, all military. Only in 1948 did Kidal get its first on-site civilian administrator. T. Benetti, *Entwicklung des Verhältnisses zwischen Tuareg und staatlichen Strukturen in Mali* (University of Vienna 2008) 43 (hereinafter Benetti).

[332] Hall, 143.

come to influence French policy. As with the British in Kuwait, the French struggled to administer the nomadic population. Colonial administrators came to work most closely with urban and agricultural communities, even as they romanticized Tuareg culture. Right from the start, French administrators would treat the Tuareg as antithetical to the running of the French empire in the Sahara and would adopt settlement as the solution. This section will look at how French territorial ambitions shaped the status of the Tuareg during the colonial period in ways that would have a profound effect on how the Tuareg were treated at decolonization.

The incorporation of French Soudan into the French Empire began as a tactical move by the French military, who were intent on connecting France's holdings in north Africa with those in west Africa.[333] In this way, French goals were somewhat different from those of the British in the Gulf region, where the presence of a natural harbour made Kuwait a valuable target in its own right and the later discovery of oil made the desert the subject of intense economic competition. While consisting of vast areas of territory,[334] France's holdings in West and Central Africa were never as important to France as its north African colonies, particularly Algeria.[335] The "scramble for Africa" had led France to invade the Sahara and northern Sahel more for prestige and territorial continuity than material benefit.[336]

By the end of the colonial period, however, minerals and mining would emerge as a major, secondary cause of concern for territorial control of the Sahel. The French never determined how to fully economically exploit the Sahel, however, and they continued to occupy it militarily for strategic reasons,[337] establishing quasi-military rule over the Tuareg while expanding civil administration in settled and urban areas, including, as the next sections will discuss, civil registration. The differences between what this dissertation terms French military rule versus administrative rule will be discussed in more detail below.

The borders of France's African holdings were determined completely arbitrarily, with the border between Algeria and the AOF originating at the place where French troops met coming from opposite directions near the wells of Timiaouine, in present-day Algeria. During the early colonial period, Tuareg seasonal migration was relatively unaffected by French borders, though they divided Tuareg territories. At the end of the colonial period, however, lines that had been drawn on maps were destined to become international

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[333] F. Cooper, *Nationality between Empire and Nation, Remaking France and French Africa 1945-1960*(Princeton UP 2014) 21 (hereinafter Cooper). See also Stewart, 16; Chipman, 2

[334] On the eve of the second World War, French West Africa, or AOF, a colony with its capital at Dakar, encompassed almost 5 million miles and had a population of almost 15 million people. Chipman, 88.

[335] Stewart, 16.

[336] Chipman, 2.

[337] Cooper, 23.

boundaries and barriers to Tuareg movement.[338] The administrative regions and borders were created by the French with almost no Tuareg input, and would be handed to the post-colonial governments with almost no revisions, applying the doctrine of *uti possidetis,* which says that territory remains with its possessor at the end of a conflict, unless otherwise provided by treaty.[339]

Unlike in the Gulf, however, the vast federation of French colonies of the AOF (which included French Soudan), and its proximity to Algeria, another French colony, meant that during the French colonial period, the Tuareg could move relatively freely between colonies. French Soudan was also insulated from incursions by rival colonial powers.[340] As a result, boundaries between colonies controlled by a single European power, like the AOF, were "somewhat fluid."[341] Nevertheless, the French administration viewed the settlement of the Tuareg as a major goal.

French influence would bring momentous change to the region and to the lives of the Tuareg.[342] The French began a long reorientation of the trade economy towards the coasts, sapping the relevance of the trans-Saharan routes and beginning to weaken the importance of the Tuareg to the economy.[343] Bamako, far to the south of Tuareg areas, was made the capital of French Soudan in 1920.[344] Landlocked Niger and French Soudan remained poorer than the coastal colonies of Senegal and Ivory Coast throughout the colonial period.

Much of the French effort in the Niger Bend was directed towards "pacification" and forced settlement of the Tuareg. While pockets of Tuareg resistance continued until the 1930s, the French slowly allied themselves with friendly Tuareg leaders and eliminated rivals.[345]

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[338] Keenan, Resisting, 49, 194.

[339] S. Lalonde, *Determining Boundaries in a Conflicted World: The Role of* Uti Possidetis (MQUP 2012) 108. See also M. Shaw, 'Peoples, Territorialism and Boundaries' 3 *European Journal of In't Law* 478 (1997) (hereinafter Shaw, Boundaries, 1997) 493. This will be discussed in more detail in the next section.

[340] Cooper, 23. See also A. Zatzepine, *Le Droit de la nationalité des Républiques Francophones d'Afrique et de Madagascar* (Paris 1963) ; 7. B. Kamian « La dynamique des intégrations, de la période coloniale à nos jours » in B. Sanankoua (ed.) *Les États-nations face à l'intégration régionale en Afrique de l'Ouest : Le cas du Mali* (Karthala, Paris, 2007) 53-56.

[341] C. Young, 'The Colonial State and Post-Colonial Crisis' in P. Gifford and W. Louis, *Decolonization and African Independence: The Transfers of Power, 1960-1980* (Yale UP 1988) 5.

[342] Gaudio, 1988, 77-87; Boilley, Les Touaregs, 1999, 62-63; Stewart, 17-18.

[343] Trimingham, 213; Kane, 8.

[344] Chipman, 88; Gaudio, 90-92, 1988; Foltz, 16.

[345] Stewart, 20. In 1894, the influential Tuareg chief Sobbo ag Fondogomo allied with the French, beginning a period of Tuareg and French cooperation. Hall 161-163, 184-185. In July 1916, the Tuareg leader Fihroun was killed during one of the last Tuareg revolts, and his successor, Akorakor, signed a treaty with the French, becoming the Amanokal over all the Tuareg in northern Soudan with French support. Gaudio, 1988, 87; Boilley, Les Touaregs, 1999, 11, 93.

Ultimately, the French did not have the resources to police the Sahel, so they instead sought to control the Tuareg through treaties and agreements, including letters of cooperation signed with various Tuareg leaders. These letters had dubious value to the Tuareg themselves, who would ignore these treaties when it suited them.[346]

The French got intimately involved in the selection of Tuareg leaders.[347] They encouraged, or sometimes forced, the Tuareg to settle the land for agriculture and to access schools.[348] As well, the promoted the end of slavery, liberating the agricultural class and empowering agriculturalists over the nomadic nobility.[349] Many of these efforts were designed to keep the Tuareg within local administrative limits and reduce nomadism.[350]

The French administration began a series of programs designed to limit Tuareg mobility and "develop" the region, by which they meant settlement and the promotion of agriculture. For the French, a settled population living in towns or practicing agriculture would facilitate French control, particularly through the establishment of a clear land tenure and taxation program.[351] Treaties or no, Tuareg who did not cooperate with these programs would be treated as hostile. Unlike in Kuwait, with Kuwait's harbour of regional importance to British shipping, the French lacked a clear economic strategy for the region apart from the goal of promoting agriculture in the desert and eliminating resistance to French sovereignty.[352] The extreme difficulties in creating a settled, agricultural society in the Sahel among a nomadic population were simply ignored. Meanwhile, any Tuareg resistance to French "development" was cast as a dangerous security threat.

In 1917, Kaocen of the Kel Air Tuareg also signed a peace treaty. Despite the cooperation of key Tuareg leaders, guerrilla movements against the French continued. Boilley gives the example of the Tuareg guerrilla leader Alla in Kel Adagh. Boilley, Les Touaregs, 1999, 256. See also Beamus, 158-159, discussing treaties signed by the Kel Denneg and Kel Geres.

[346] Hall, 138.

[347] Hall, 193. See also Keenan, Resisting, 41.

[348] R. ag Alfarouk, « La politique coloniale d'affaiblissement de la confédération Kel Denneg de 1900 à 1949 » in *Nomades et commandants : administration et sociétés nomades dans l'ancienne A.O.F.* (Karthala 1993) 90-91.

[349] Boilley, Les Touaregs, 1999, 196.

[350] Boilley, Les Touaregs, 1999, 196.

[351] R. Bates, 'Modernization, Ethnic Competition, and the Rationality of Politics in Contemporary Africa' in D. Rothchild and V. Olorunsola (eds.) *State versus Ethnic Claims: African Policy Dilemmas* (Westview Press 1982) 15. See also Foltz, 16.

[352] J. Frémeaux, « La mise en place d'une administration aux marges sahariennes de l'A.O.F. (1891-1930) » in E. Bemus, P. Boilley, J. Clauzel, J. Triaud (eds.) *Nomades et commandants : administration et sociétés nomades dans l'ancienne A.O.F.* (Karthala 1993) 24.

Commander Betrix, head of the Gao region, heavily favoured settlement for the Tuareg and their conversion to agriculture in his plan to administer the Tuareg.[353] French administrative goals, however, could not have been more at odds with the functioning of the nomadic Tuareg noble class. As described above, the nobility relied on mobility, pastoralism, fluid control of territory, traditional forms of education and the vassalage/slavery system.

In reality, the French instituted only a fraction of the changes envisioned by administrators like Commander Betrix, but their attempts to transform Tuareg society in line with the European administrative model would have a lasting effect on the Tuareg and would be taken up by the Malian government at independence.[354] French power was mostly concentrated in military posts in cities like Gao and Timbuktu, far from the areas occupied by the nomadic Tuareg.[355] These bases would later become the headquarters of French administrative regions, called *cercles* around which the various colonial departments would form, cutting the Tuareg's pastures into units centred around towns.[356] The local administrators, chosen by the French rather than according to Tuareg law, were often viewed as illegitimate in the eyes of the Tuareg.

In part as a result of these factors, the French administrators struggled to retain a relationship with nomadic Tuareg leaders, which led to a "double administration" with a more hands-on approach to the sedentary population and a more hands-off approach for the Tuareg.[357] As Bourgeot points out, racial theories also guided the way the French divided nomadic and settled populations. Skin tone was often invoked by the French to justify the hands-off approach of local French military administrators.[358] This may have created the illusion of independence for the Tuareg at the time, but while in theory, the Tuareg retained some independence, the French administration began to consolidate administrative functions in urban areas to the detriment of the nomadic population, including civil registration.[359] Over time, this separate administration distanced the Tuareg

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[353] Quoted in Boilley, Les Touaregs, 1999, 88-89 (my translation).

[354] Gaudio, 1988, 88. See also Hall, 170.

[355] Hall, 137-138.

[356] Hall, 138. Lecocq, Desert, 2002, 14. These "circles" were further divided into subdivisions, and finally into cantons under local administrators chosen by the French. See also Foltz, 12-13; Bernus, 161.

[357] P. Loiseau, « L'administration et les rapports nomades/sédentaires » in E. Bemus, P. Boilley, J. Clauzel, J. Triaud (eds.) *Nomades et commandants : administration et sociétés nomades dans l'ancienne A.O.F.* (Karthala 1993) 160-161.

[358] Bourgeot, Sahara, 39-41. The issue of race in the Sahel is contentious. This section will note the ways in which race and nomadism intersected in influencing French policy. For an overview of the topic of race in the Sahel, see Bruce Hall.

[359] Stewart, 18. See also Hall, 114-119.

from the French administrative system and placed their leaders outside a developing system of government that would form the basis of the Malian state.

Meanwhile, the colonial period saw the gradual decline of Tuareg economic importance as the focus of economic activity shifted to the coasts and away from Sahara trade.[360] Like the Bedouin, the Tuareg would become less and less crucial to the Sahel economy and would watch their political importance decline over the course of the colonial period. In particular, the division of Tuareg regions into administrative divisions oriented towards the south, the decrease in the caravan trade and the settlement policies of the French would not only decrease Tuareg economic and political power, it would influence their perceived status and usefulness to the state in ways that would have a profound effect on their later status during decolonization.[361]

During the early 1900s, the fluid borders of the AOF slowly solidified, bringing increased movement restrictions.[362] For the Tuareg, the introduction of arbitrary borders in the hitherto limitless Sahara would mark the beginning of restrictions on their traditional movement, the decline of Saharan trade, and convert the nobility to a more sedentary life.[363] At first, the imposition of borders and a centralized administration did little to change the Tuareg way of life. Tuareg families could simply move from one region to another to evade the census taker and tax collector.[364] To keep the Tuareg within their designated areas, the military was frequently employed to force Tuareg families to stay within their regions.[365] The Tuareg complained bitterly that such restrictions prevented them from adjusting their movements according to the rains and seasons. Controller-General Barba, a French administrator, stated that the Tuareg on the border with Algeria seemed "not to understand" the difference between the two colonies.[366]

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[360] Stewart, 18. See also Hall, 127, 132-133. Bourgeot cites the defeat of the Tuareg at In Salah in present day Algeria in 1905 as the turning point in the Tuareg wars against the French. Bourgeot, Résistances, 279-282, 311, 320.

[361] Stewart, 19.

[362] For example, under the decree of 24 April 1928, indigenous persons in the AOF could not leave their colonies without an identity document. See M. Rodet, *Les migrantes ignorées du Haut-Sénégal : 1900-1946* (Karthala 2009) 196-198. It should be noted that not all Tuareg groups were affected by the French in the same way, with the southern Tuareg, mostly the Iwellemmeden, being impacted the most. French control became more and more tenuous northwards, particularly in the Kidal region.

[363] For more on the effect of borders on Tuareg life in southern Algeria, see P. Marnham, *Nomads of the Sahel* (Minority Rights Group 1979).

[364] Boilley, Les Touaregs, 1999, 241.

[365] Boilley, Les Touaregs, 1999, 58, 243.

[366] J.-F. Barba, « L'administration en zone frontalière algero-soudanaise » in E. Bernus, P. Boilley, J. Clauzel and J.-L. Triaud (eds.) *Nomades et commandants : administration et sociétés nomades dans l'ancienne A.O.F.* (Karthala 1993) 38.

The French also used borders to adjust the social hierarchy in northern Soudan and decrease the power of Tuareg nobles. Ending slavery had become a goal of the empire as a whole,[367] but freeing the slaves also served to decrease nomadism. The French created separate administrative regions for settled and pastoral groups, attempting to keep the Tuareg away from villages and towns, in order to end the domination of the Tuareg over the settled villages and their agriculturalists.[368] As the Tuareg became confined to limited administrative areas, their migrations became more conscribed.[369]

Along with other aspects of the western state, the French brought the concept of registration and identity documents to the Soudan, services that were centralized in urban areas. The French also changed the systems of taxation, basing everything on administrative regions.[370] Tax collection was divided into two categories, taxes on the sedentary population, including Tuareg slaves and vassals, and taxes on the nomads, with the two groups often paying different rates. Over time, the French put tax collection under the control of settled, rather than nomadic, chiefs, greatly strengthening the authority of settled rulers and placing the Tuareg at a severe disadvantage.[371] Tax collection and the census both relied on territorial administrative regions but also reinforced them, decreasing not only Tuareg mobility, but all mobility while also increasing the marginalization of the entire region. French Soudan was now one of the most marginalized regions in French colonial Africa. The imposition of taxes based on centralized, administrative regions would most negatively affect the Tuareg, who relied on their own, contradictory, system of allegiance and taxation.

The Tuareg opposed French taxation and often left the area to avoid paying. The French response, however, was to forcibly return nomad groups to their assigned territories.[372] Jean-Marie Payen, head of administration in Niger, admitted that the Tuareg got little in return for their taxes, as what services the French provided were located in towns and oriented towards the settled population.[373] Payen called taxes and the census a way to reduce Tuareg mobility and liberty; a form of "administrative confinement" for the

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[367] In 1848, French law abolished slavery in the colonies. *Décret du Gouvernement provisoire du 4 mars 1848.*

[368] Hall, 180-181.

[369] Azarya, 260.

[370] For example, the French levied a tax on the Amanokal of the Ouelleminden Tuareg in 1902 of 150 cows and 50 camels. J.-M. Payen, « Le recensement et l'impôt » in E. Bernus, P. Boilley, J. Clauzel and J.-L. Triaud (eds.) *Nomades et commandants : administration et sociétés nomades dans l'ancienne A.O.F.* (Karthala 1993) 121-122 (hereinafter Payen). The census of the sedentary population was first taken in 1906 and listed 7,000 upper class settled families and 45,000 farmers, many of whom were probably Tuareg slaves and *haratin.* See also Hall 253.

[371] Azarya, 260. See also Hall, 145, 251; Foltz, 17-18; Grémont, 136; Bourgeot, Résistances, 32.

[372] Benetti, 49.

[373] Payen, 125.

Tuareg.[374] As a result, registration became entwined with abusive taxation and movement restrictions in the minds of many Tuareg.

The Tuareg resisted the census, which would later cause problems for them when it came to voter registration.[375] In the Soudan, the French attempts to establish electoral lists, take a census and issue family cards became limited to the sedentary population.[376] Registering the Tuareg was so difficult it was often not completed, leaving many Tuareg without documents.[377] Towards the end of the colonial period, Badi, the chief of the Kounta Tuareg, offered to travel around northern Soudan to educate the Tuareg about the importance of registering with the French before independence so that they could vote, but reported that many Tuareg did not appear to understand the need.[378] This would greatly affect the roll-out of nationality among the Tuareg, as the next section will explore.

Throughout their tenure, French investment in the Sahel and Sahara regions was poor, as the area was thought to be of greater strategic than economic value.[379] Uranium mining was still decades away. Nevertheless, settlement for agriculture was the main economic goal and the French actively promoted agriculture in the fertile areas around the Niger Bend. In particular, the French disliked what they saw as the destructive habit of the Tuareg nobles of raiding the farming communities of Songhai living close to the Niger river. While the French eventually came to accept pastoralism as a necessary part of the Sahel economy, they encouraged agriculture throughout their tenure,[380] and many French administrators saw the Songhai as struggling under the "yoke" of Tuareg dominance.[381]

French agricultural policy would encourage both settlement and overgrazing, as the French pursued their goal of turning the Sahel into a second "fertile crescent."[382] Despite the environmental and economic benefits of nomadism in desert regions, the French increasingly came to see the Tuareg as a menace to the environment and as a hindrance to the economy.[383] Ironically, the imposition of borders restricting Tuareg movement and the

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[374] Payen, 125.

[375] Boilley, Les Touaregs, 1999, 234-239.. See also Payen, 125.

[376] Gaudio 1988, 88.

[377] Boilley, Les Touaregs, 1999, 237..

[378] G. Féral, 'Administrations comparées en pays nomade' in E. Bernus, P. Boilley and J-L. Triaud, *Nomades et commandants : Administration et sociétés nomades dans l'ancienne A.O.F.* (Karthala 1993) 110 (hereinafter Féral). See also Boilley 283, footnote 11.

[379] Boilley, Les Touaregs, 1999, 203..

[380] Hall, 259, 269.

[381] Hall, 260-261.

[382] Marnham, 6.

[383] Hall, 179.

encouragement of settlement and overgrazing would overtax the fragile ecosystem of the Sahel, worsening subsequent droughts while limiting the Tuareg's ability to cope through nomadism.[384]

The process of settlement, along with the concentration of the Tuareg into smaller areas and over-grazing would culminate in the devastating droughts of the 1960s and 1970s, discussed below. The French promotion of agriculture and ban on slavery, however ineffectual, contributed to the decline of the noble class and the settlement of nomadic Tuareg.[385] It also shifted the balance of power in the region, as many French policies favoured the settled population.

As part of their efforts to mould Tuareg society along European lines, including by promoting land ownership, the French attempted to apply a land tenure system, already in use by the Songhai, to the Tuareg. They settled the lesser Tuareg vassal families, who were already engaged in some agriculture, and assigned them land.[386] The French also promoted land ownership by Tuareg chiefs, sometimes taking prime land from Songhai chiefs to entice the Tuareg nobles to settle.[387]

Pastoral groups often ignored the edicts to remain within their designated areas, giving rise to complaints by the Songhai of "illegal" Tuareg grazing.[388] The French also limited pastoral access to the river in response to Songhai complaints.[389] French land grants to the Tuareg were in many cases never viewed as legitimate by the Songhai, who came to see themselves as the original owners of the land.[390] French agriculture promotion led to conflict between the Tuareg and the Songhai, as well as between Songhai clans, as unoccupied agricultural land became scarce and the Tuareg nobles lost their dominance and, therefore, the ability to enforce their grazing rights.[391] The land policies of the French increased tensions with the Songhai agricultural class, a process that would continue under Malian administration.

By the 1920s, the Tuareg had lost control of much of the Sahel and needed to adapt to the way of life imposed by the French in order to survive, a way of life that was hostile to

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[384] Boilley, Les Touaregs, 1999, 261..

[385] Hall, 183-190, 209, 287-288. See also Boilley, Les Touaregs, 1999, 215; Keenan, Resisting, 40, 62; Azarya 259-261.

[386] Hall, 264.

[387] Hall, 265, 267.

[388] Hall, 268.

[389] Gremont, 135.

[390] Hall, 271.

[391] Hall, 270-271.

nomadism.[392] The promotion of settlement increased in the 1920s and 1930s as the French looked for ways to increase economic output.[393] Unlike in the Gulf, much of the Sahel's mineral riches, particularly lucrative uranium mining and the possibility of oil beneath the Taoudeni basin, had not yet been discovered. The French instead began infrastructure development designed to encourage settlement and agriculture. They introduced irrigation and began building roads.[394] The promotion of agriculture in particular would later be aggressively adopted by the Malian government.[395]

The French also tried to bring education and health care in line with their ideas of centralized control and settlement on land. Health projects like the *Assistance médicale indigène*, created in 1926, were mostly located in cities like Timbuktu and Gao. Because most Tuareg lived far from the urban centres where health services are located, this meant that only urban populations could access such services.[396] Schools were also used as a tool to encourage settlement, and, as such, were viewed with suspicion and hostility by many Tuareg. As Michel de Geyer d'Orth, administrator of the Agadez region, put it, nomadism presented an "'insurmountable handicap" to development and required an "evolution towards settlement."[397]

In order to encourage "modernization" among the Tuareg, the French decided to educate the sons of the Tuareg noble class, seeing them as the logical future administrators of the Sahel, but this program, like so many others, was mostly unsuccessful. Education in Tuareg areas lagged far behind other parts of French Soudan. In 1912, the system in southern French Soudan was reorganized in line with the system in France, with primary schools, professional schools and normal schools. In the Sahel, however, what few schools existed were reserved for the sons of chiefs until as late as 1947.[398] Even in the 1940s, there were only two schools in the entire administrative *cercle* of Gao for nomads.[399] Once again, this placed the Tuareg at a disadvantage at decolonization.

Schooling emerged as a contentious issue for the Tuareg. The Tuareg resisted French schooling as a plot to transform their children into foreigners and eradicate their

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[392] Azarya, 260.

[393] Boilley, Les Touaregs, 1999, 247.

[394] Boilley, Les Touaregs, 1999, 204. See also Hall, 285.

[395] Hall, 170.

[396] Boilley, Les Touaregs, 1999, 207-209.

[397] M. de Geyer d'Orth, « Les actions de développement, » in E. Bernus, P. Boilley and J-L. Triaud, *Nomades et commandants : Administration et sociétés nomades dans l'ancienne A.O.F.* (Karthala 1993) 127 (hereinafter de Geyer d'Orth).

[398] Boilley, Les Touaregs, 1999, 219.

[399] Boilley, Les Touaregs, 1999, 220.

knowledge of nomadism.[400] To attend school, Tuareg children had to be separated from their parents. This separation was not only hard on families, but it prevented the children from learning vital skills related to nomadism, such as raising and caring for animals.[401] As a result, many Tuareg fought bitterly to keep their children out of French schools. The French only ended forced recruitment for schools in the late 1950s, because at that time enough Tuareg had settled to make schooling voluntary.[402] At the end of their rule, the French administration began to consider the idea of mobile schools that would travel with the Tuareg families and incorporate more traditional skills, but independence came before this idea could be implemented.[403] In the end, as stated by Ibrahim Ag Litny, former student of a "nomad school" in Kidal, French schools amongst the Tuareg were mostly a failure.[404] After independence, all ideas of nomadic or traditional schools were abandoned as the new government sought to unify the Malian nation, and saw western style schools as key to this effort. Ag Litny states that while this effort would "democratize" teaching in Kidal, the new schools were also primarily unsuccessful as they did not allow the nomads to follow their lifestyle.[405]

Over time, the French began to recognize that their attempts to limit Tuareg migrations and promote agriculture were ineffective and causing a great deal of tension between Tuareg leaders and French administrators, as well as increasing tensions between the nomadic and settled populations. French administrators began allowing the Tuareg to apply for special permits to leave their areas to find better pasturage. To apply for such permits, families had to register with the French authorities and obtain identity documents, such as family cards. The French signed also agreements with Tuareg leaders, called "Conventions for Nomadism", in an attempt to legalize and control the movements that were already taking place, while limiting their scope.[406] In this way, registration became linked to movement restrictions in the eyes of many Tuareg.

Ultimately, French attempts to control the movement of the Tuareg were limited by the fact that the French did not have the manpower, or the interest, to police such vast areas, the environment simply could not support such a rapid expansion of farming, and local

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[400] Boilley, Les Touaregs, 1999, 197.

[401] Boilley, Les Touaregs, 1999, 228.

[402] Boilley, Les Touaregs, 1999, 232.

[403] Boilley, Les Touaregs, 1999 231. A series of these camping schools were begun in 1958 in the Niger Bend. For a description, see H. Combelles, « La scolarisation et les écoles nomades au Mali » in E. Bernus, P. Boilley and J-L. Triaud, *Nomades et commandants : Administration et sociétés nomades dans l'ancienne A.O.F.* (Karthala 1993) 137.

[404] I. Ag Litny, « La première école de l'Adagh » in E. Bernus, P. Boilley and J-L. Triaud, *Nomades et commandants : Administration et sociétés nomades dans l'ancienne A.O.F.* (Karthala 1993) 153.

[405] Ag Litny, 153.

[406] Boilley, Les Touaregs, 1999, 246. Page 248 of Boilley's book contains an example of an agreement between the French and Tuareg limiting Tuareg movement. See also J.-F. Barba, 36.

political conditions were against such meddling in land rights.[407] The Tuareg continued their seasonal migrations despite fines and deportations.[408] This would change when the Malian government came into being, as controlling the Sahel would be a primary goal of the new government, as opposed to a minor side issue in the governing of a vast empire. In particular, movement restrictions would become vital to enforcing what were now borders between sovereign states and the discovery of uranium in Niger would fuel new interest in the Sahel as a money-generator.

While the French presence ultimately lead to greater sedentarisation, by the end of French rule, many Tuareg remained nomadic.[409] Nevertheless, French policies would begin the slow process of the transformation of the Tuareg nobility from regional elites to discriminated-against minority.[410] French programs to promote agriculture, settlement and the imposition of territorial, administrative regions took their toll on nomadism.[411] French policies created tensions between nomads and settled communities and associated registration in the minds of many Tuareg with movement restrictions and taxation.

By the 1950s, independence loomed and some Tuareg leaders began to push for their own state. The concepts of territoriality and sovereignty had crept into the Tuareg discourse with the French in their negotiations over the possibility of an independent Tuareg state.[412] Some Tuareg leaders saw independence as an opportunity to unite the Sahara region as a single, political unit: a *Sahara français*.[413] Many educated Tuareg feared independence as bringing the "real colonization" of northern Mali by the south.[414] In 1958, Mohamed El Mehdi, the chief of the Kel Antassar and Territorial Advisor for Goundam, near Timbuktu, told the French government of his desire to create a "Republic of the Veiled" in the Sahel. Muhammad Ali ag Attaher, a leading Tuareg noble, wrote to Charles de Gaulle to protest dividing the Malian Tuareg from their relatives in Niger.[415] He organized a trip through Saudi Arabia and Libya to promote combining the Tuareg areas of Niger and Mali

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[407] Boilley, Les Touaregs, 1999, 245.

[408] Grémont, 137.

[409] Grémont, 135. See also Boilley, Les Touaregs, 1999, 12, 198; Keenan, Lesser Gods, 79-80, 147-149 (discussing Tuareg settlement in Algeria following independence); S. Randall and A. Giuffrida, 'Forced Migration, Sedentarization and Social Change: Malian Tuareg' in Chatty (ed.) *Nomadic Societies in the Middle East and North Africa: Entering the 21st Century* (Brill 2006) 431.

[410] Foltz, 41.

[411] Pezard and Shurkin, 8. Hall, 208. Hall calls it the *pax Gallica*, Boilley the p*ax français.* See also Boilley, Les Touaregs, 1999, 99, 108, 152.

[412] Grémont, 137.

[413] Bourgeot, Sahara, 33-35.

[414] Bourgeot, Résistances, 268. See also Bourgeot, Sahara, 33-34.

[415] Hall, 308.

with Morocco.[416] Tuareg chiefs sent petitions to France expressing their desire to separate from the rest of French Soudan.[417]

In 1951, concerned over losing the potential mineral wealth of the Sahara and leaving unstable states with nomadic minorities, the French considered setting up a new colony in the Saharan and Sahel regions called *Afrique saharienne français*.[418] The idea of shifting boundaries in the Sahara was not without precedent, as the French had moved boundaries and transferred territory throughout their tenure in West Africa.[419]

It should be noted that there is some historical debate over the extent to which these efforts were really organized and promoted by the French, rather than by Tuareg leaders, though it is clear that many Tuareg leaders were involved in this effort.[420] According to Marnham, some Tuareg leaders wanted to be included in Algeria and asked that the border be moved south to reflect this.[421]

News of the desire to separate the Niger Bend and the Kidal region from the rest of what would become Mali reached the south, causing great concern. Prominent southern politicians visited the north throughout the late 1950s and early 1960s to campaign against partition and in favour of Malian unity.[422] Neither the UN nor the Organization of African Unity took up the question of self-determination for the Tuareg, instead allowing

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[416] Boilley, Les Touaregs, 1999, 298.

[417] The first was sent in 1957, and again in 1958, by Mohammed Makhmoud ould Cheikh, an influential leader in Timbuktu. The second took the form of a letter to Charles de Gaulle from the notables of the Air region. It was signed by the "customary chiefs, the notables and the businessmen of the Niger bend" including several Songhai. The letter expressed their desire to remain a part of the French Empire rather than become part of an "autonomous or federal system with black Africa..." that did not represent their "interests and aspirations." They asked for a separation "politically and administratively" from the Soudan in order to become part of a "French Sahara." It should be noted that the history of this letter is contested. Boilley, Les Touaregs, 1999, 292-293.

[418] Oil was discovered in southern Algeria in 1954. See also Claudot-Hawad, « La question touarègue, quels enjeux? » in M. Galy, *La guerre au Mali : Comprendre la crise au Sahel et au Sahara : enjeux et zones d'ombre* (Découverte 2013) 664. See also Hall 299; Lecocq, Desert, 2002, 47. The discovery of uranium in Niger has led to political tensions between the Tuareg and the government. I. Kohl and A. Fischer, 'Tuareg Moving Global: An Introduction' in I. Kohl and A. Fischer (eds.) *Tuareg Society within a Globalized World: Saharan Life in Transition* (Tauris 2010) 6.

[419] For example, part of French Soudan had been transferred to Mauritania in 1944 in order to better administer the area, called the Hodh. Hall, 298. See also J. Rocaboy, « Le cas hamalliste » in E. Bernus, P. Boilley, J. Clauzel and J.-L. Triaud (eds.) *Nomades et commandants : administration et sociétés nomades dans l'ancienne A.O.F.* (Karthala 1993) 41.

[420] Boilley, Les Touaregs, 1999, 297. There is considerable argument over how genuine were the desires of the Tuareg nobility to be independent.

[421] Marnham, 6.

[422] Boilley, Les Touaregs, 1999, 305.

decolonization, for the most part, to fall along existing borders.[423] During decolonization, the principle of *uti possidetis* was used to resist any changes in the makeup of the territories of the colonies.[424] Decolonization would show "no consideration for the social, political and territorial integrity of the Tuareg and other (nomadic) societies like the Peul (Fulbe, Wodabee) or Berber (Imaziŕen), but in fact established their marginalization."[425]

The question of Tuareg self-determination would greatly influence Tuareg nationality at decolonization. There was considerable support for self-determination in international law,[426] yet during decolonization, the right to self-determination was invoked as a rationale for ending colonial rule, but not for reordering the colonial system.[427] In 1945, the United Nations placed eleven states under the Trusteeship system to facilitate their progress towards independence, but the breakup of colonial empires would eventually take place along the borders that had been already established by Europeans.[428]

In 1960, the United Nations General Assembly passed resolution 1514 on the Granting of Independence to Colonial Countries and Peoples as existing political groups, enshrining what Weller calls the territorial approach to decolonization.[429] Though the right to self-determination was a motivating factor for decolonization, the supposed stability of the post-colonial system was a major concern for all of the parties involved in the process and ultimately outweighed other concerns.[430] Resolution 1514, for example, expressly applied self-determination only to former colonies as a whole; "(t)rust and Non-self-governing

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[423] E. Keller, 'The State, Public Policy and the Mediation of Ethnic Conflict in Africa' in D. Rothchild and V. A Olorunsola (eds.) *State Versus Ethnic Claims: African Policy Dilemmas* (Routledge 1983) 252.

[424] S. Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (MQUP 2012) 108. See also Shaw, Boundaries, 1997, 493. See also Organization of African Unity, Resolution 16(1) (1964).

[425] Kohl and Fischer, 5.

[426] Prior to decolonization, the principle of self-determination had been successfully invoked in limited cases by the League of Nations in the Aland Islands case following WWI, where the Islands wished to be a part of Sweden rather than Finland based on their sociological links to Sweden. Aaland Islands Case (1920) League of Nations Official Journal Spec. Supp. 3. See also Crawford, 108.

[427] M. Weller, 'Settling Self-determination Conflicts: Recent Developments' 20 *European J. of Int'l L*. 111 (2009) 117-118 (hereinafter Weller). See also Shaw, 2008 252-253; Gilbert, Territories, 2007, 692-693; Crawford, 108, 122. Though not expressly in the United Nations Charter, the right to self-determination was enshrined in UNGA Resolution 1514 and was also guaranteed by several important early human rights treaties including the International Covenant on Civil and Political Rights, in art. 1, as well as the International Covenant on Economic, Social and Cultural Rights, UNGA Res. 1514 (XV) A/RES/1514(XV) (1960).

[428] Shaw, 2008, 252.

[429] Weller, 118. Declaration on the Granting of Independence to Colonial Countries and Peoples General Assembly Resolution 1514 (XV) 14 Dec. 1960.

[430] James Crawford has comprehensively addressed the decolonization process in *The Creation of States in International Law*, Chapter 13, 'Mandates and Trust Territories' and Chapter 14, 'Non-Self-Governing Territories: The Law and Practice of Decolonization'.

territories or all other territories which have not yet attained independence."[431] Self-determination was therefore limited to existing political and territorial units.[432] As a result, the decolonization process left many ethnic and indigenous groups, both nomadic and non-nomadic, without states of their own.[433]

In 1970, the UN General Assembly passed the Declaration on Friendly Relations and Cooperation Among States preventing self-determination claims that would "dismember...sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples."[434] The International Court of Justice affirmed the right to independence from colonization for former colonies in the Namibia Opinion of 1971.[435] As a result, while the right to self-determination from European colonization is arguably *jus cogens,* the right to self-determination by minorities and indigenous peoples within post-colonial states does not find similar support.

The 1975 Western Sahara case, however, provided something of an exception to the general focus only on European colonization and provides a limited example of a nomadic group successfully advocating for self-determination. The case provided nomadic groups in the western Sahara region with independence from both European states and earlier colonization by Morocco. The decision recognized that nomadic peoples were "socially and politically organized" as grounds for their claims to self-determination both from European colonization, but also the near colonization of a pre-colonial entity, Morocco.[436] While Western Sahara could have provided a blueprint to granting political independence to

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[431] Declaration on the Granting of Independence to Colonial Countries and Peoples General Assembly Resolution 1514 (XV) 14 Dec. 1960.

[432] Weller, 119.

[433] Shaw 2008 256-257; S. Craig, 'Indigenous Self-Determination and Decolonization of the International Imagination: A Plea,' 18 Hum R Quart 814 (1996) 817; Crawford, 116; J. Habermas, *The Postnational Constellation* (MIT Press 2001) 72 (hereinafter Habermas); W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford UP 1995) 27 (hereinafter Kymlicka).

Beside the Tuareg, there are many other groups who do not "...represent traditional colonial entities." I. Barnsley and R. Bleiker, 'Self Determination: From Decolonization to Deterritorialization' 20 Global Change, Peace and Security 121 (2008) 121-122. Barnsley and Bleiker point to the breakup of the former Soviet Union and the secession of Eritrea from Ethiopia as examples of successful self-determination unrelated to the colonial context, though it could be argued that both cases were rooted in colonialism, as most of the former soviet states were Russian colonies from the 19th century and Eritrea became part of Ethiopia due to Italian colonization.

[434] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/25/2625, 24 October 1970.

[435] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970).

[436] Western Sahara, Advisory Opinion 1975 I.C.J. 12 (Oct. 16). See also Crawford, 122-123, 605; Moretti, 173.

more nomads, it has not been followed by a wave of nomad, or even indigenous, independence and state formation.[437] Quite the opposite.[438]

Ultimately, the proposal of a Tuareg state would be set aside due to the strenuous objections of the new colonies, including Mali, in favour of an economic organization, the *Organization Commune des Regions Sahariennes (OCRS)*.[439] Discussions around the creation of this new economic block would only increase the mistrust between what would become the Malian government and the Tuareg.[440] Mali and Niger, in particular, saw this as Tuareg collusion with French imperialism. The long shadow of the *Sahara français* and the OCRS would darken future relations between the Tuareg and the Malian government, which would always present Tuareg independence as veiled French imperialism.[441] Once again, like in Kuwait, nomadic communities were presented as potential allies of foreign governments and disloyal to the state. All parties were concerned over the possible mineral and oil wealth hidden beneath the Sahara, and the new governments in the region viewed any sign of separatism by the Tuareg with extreme suspicion.[442]

> Various Tamasheq and Bidân leaders in Soudan Français actively supported either the French or the Moroccan and Mauritanian claims, or all at the same time. Their support for these 'foreign' claims made them highly suspect in the eyes of

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[437] "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." UNGA Res. 1514 (XV), para. 2, cited in Crawford, 335.

[438] Rather than supporting the right to self-determination, more recent decades saw a shift towards the recognition of only partial autonomy for many indigenous and minority groups, sometimes called internal self-determination. For more examples, see Weller, 120-122. For more on the perceived risks to states from self-determination, see Habermas, 64.

Meanwhile, events like the breakup of the former Yugoslav republic demonstrated that self-determination may require a Security Council resolution before it is legal under international law. "Within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law." International Court of Justice, Advisory Opinions and Orders, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010.

[439] E. Grégoire and J. Schmitz, « Monde arabe et Afrique noire : permanences et nouveaux liens » in E. Grégoire and J. Schmitz, *Afrique noire et monde arabe : continuités et ruptures* (Institut de recherche pour le développement 2000) 8-9 (hereinafter Grégoire and Schmitz).

[440] Grégoire and Schmitz, 43-44. The OCRS was a semi-autonomous alliance of Sahel and Saharan regions, existing from 1957 to 1963, containing the Saharan and Sahel regions of French Soudan, Niger, Algeria and Chad. Loi N. 57-27 du 10 Janvier 1957, Créant une Organisation Commune des Régions Sahariennes, JORF (11 janvier 1957) 578. The stated purpose of the OCRS was to promote economic development, manage natural resources and represent the peoples of the Sahara to the French government, but was viewed with hostility by many African politicians as a thinly veiled attempt to create a Saharan colony. Hall, 301-304.

[441] Boilley, Les Touaregs, 1999, 286.

[442] Boilley, Les Touaregs, 1999, 287, 306.

> the Malian nationalists. After independence they were regarded as enemies of the Malian state and 'vassals' to the 'French neo-imperialist cause'.[443]

The OCRS ended in 1962, but the concerns of some Tuareg leaders over their future as part of what would become Mali, would long outlast it.[444] Disappointment over the failure of a Tuareg state and anger at Mali's southern dominated post-colonial government were factors in the first Tuareg rebellion of 1962, the rebellion that would end Tuareg integration into Mali before it had even begun.[445] Badi, the chief of the Kounta Tuareg, is quoted by Gabriel Féral as saying,

> Quand vous (les français) partirez, c'est Bamako qui va commander, ce sont les sédentaires, les nègres... maintenant, les choses ne se font plus avec le fusil, avec la *takoba*, tout cela c'est fini, cela se fait avec le vote, avec les élections. Or nous, nous, les nomades, nous sommes en minorité... (When you (the French) leave, it's Bamako who will rule, the settled peoples, the blacks...now, things are no longer done with the gun, with the *takoba (sword)*, all that is finished, it will be done with the vote, with the elections. But we, the nomads, are in the minority...)[446]

The departure of the French brought breathtakingly swift changes to northern Mali, discussed below, as the new Malian government moved aggressively to settle the nomads, free the Tuareg slaves and promote agriculture. Meanwhile, the administrative structure created by the French would persist into the post-colonial period, with power centralized in the hands of urban and southern rulers and international borders dividing the Tuareg and placing them at the periphery of political power.

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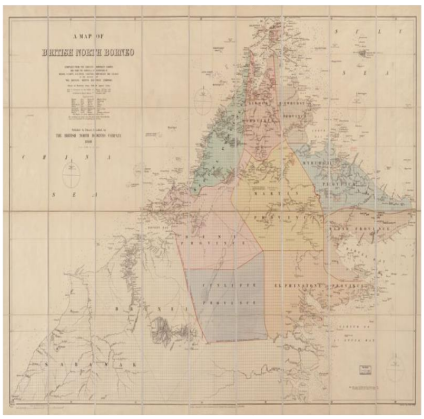
[443] Lecocq, Desert, 2002 ,48.

[444] Boilley, Les Touaregs, 1999, 291.

[445] Hall, 275. Tuareg chiefs were also involved in the border dispute between Mali and Mauritania following independence, deepening Malian suspicion of Tuareg loyalty. Lecocq, Desert, 2002, 67-68.

[446] Féral, 111. (My translation).

The Sama Dilaut in British North Borneo



Like the Bedouin and Tuareg, the Sama Dilaut would suffer from colonial attitudes about the ability to nomads to participate in states, their ability to own their territories and their alleged backwardness. Like the Bedouin and Tuareg, the Sama Dilaut would be subjected to forced and coercive settlement practices which went hand in hand with registration and taxation. And like the Bedouin and Tuareg, the Sama Dilaut would find their territories split by colonial borders.

The Spanish had come to the Sulu Sultanate in 1578, conquering the Sultanate in the early 1600s and signing a series of treaties with the Sultan in the mid-1600s and early 1700s.[447] Spanish influence over the Sultanate was weak, however, and large-scale changes to the way of life in North Borneo did not begin until the arrival of the British. Invasive British policies would begin the forced settlement of the Sama Dilaut. As Warren puts it, Sama/Bajau "mobility and independence from the land gave them a practical immunity from government authority...", a fact which made their settlement by the British, "imperative."[448] As this section will show, however, Sama Dilaut mobility didn't simply threaten colonial control over individual Sama Dilaut families, it also implied a lack of control over the oceans at a time when the British government was trying to establish its dominance over ocean trade.

The colonial period began the marginalization of northern Borneo in the region, as it had resulted in the marginalization of northern French Soudan. The British focused mainly on their colonies in the Malay Peninsula, which was of enormous regional trade importance.[449] Meanwhile, northern Borneo with its dense jungles, was seen as less

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[447] N. Saleeby, *Studies in Moro History, Law and Religion* (Department of the Interior, Philippines, 1905) 164 (hereinafter Saleeby).

[448] J. Warren, Chartered, 1971, 77.

[449] Four of the British controlled city-states on the Peninsula eventually became the Straits Settlements, a Crown Colony, with the capital at Singapore. The remaining Peninsular states became British Protected States. Andaya, 126. See also Hooker, 135.

economically useful at the time. With its unknown and uncharted potential, it came to the attention of various British adventurers looking to make money in southeast Asia.[450] For the early part of the colonial period, it was under the exclusive sovereignty of the British North Borneo Chartered Company (BNBC), a quasi-sovereign, private entity with little oversight from London.[451] While there was technically a formal charter governing the terms of North Borneo's governance, in reality, North Borneo operated in a legal vacuum. North Borneo officially became a Protected State in 1888, but remained under the administration of the BNBC.[452] North Borneo was converted to a Crown Colony after WWII.

The BNBC claimed sovereignty over north Borneo in an agreement with the Sultan of Sulu in 1877.[453] A Chartered Company, the BNBC typified the public-private, semi-military nature of British expansionism of an earlier era, and was an anachronism in the late 1800s.[454] The Company had sovereign powers like those of a state, but was unofficial and lacked resources and accountability.[455]

Next door, James Brooke of England became Rajah of Sarawak in 1839, taking over much of the former Brunei Sultanate, which his family ruled as their personal kingdom until the end of World War Two.[456] Despite their sweeping claims on maps from the period, neither Brooke nor the BNBC had much control over their supposed territory.[457] What control the BNBC and Brooke family did have was based almost exclusively on the coasts.

As in the Gulf, the late 19th and early 20th centuries in North Borneo saw a succession of shifting and unclear borders as various European powers struggled for supremacy. North Borneo (Sabah, Malaysia) began the colonial period as a semi-autonomous area sandwiched between Dutch-controlled Borneo territories and the Spanish-controlled

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[450] H. Singh, *South Asia Defense and Strategic Year Book* (Pentagon Press 2015) 216 (hereinafter Singh). The British North Borneo Company was the creation of English businessman Alfred Dent and German adventurer Baron de Overbeck. It obtained its Royal Charter in 1881.

[451] M. Clark and J. Pietsch, *Indonesia-Malaysia Relations: Cultural heritage, politics and labour migration* (Routledge 2014) 158 (hereinafter Clark and Pietsch). See also J. Warren, Looking, 1996, 21-33, 23.

[452] Andaya, 185, 207, 241-248.

[453] Andaya, 188. See also K. Young, W. Bussink, P. Hasan, *Malaysia: Growth and Equity in a Multiracial Society* (Johns Hopkins UP 1980) 12 (hereinafter K. Young, W. Bussink, P. Hasan); Hooker, 131 ; J. Warren, Chartered, 1971, 33-35.

[454] Warren, Chartered, 1971, 2-3.

[455] Warren, Chartered, 1971, 3.

[456] Hooker, 109.

[457] Resources were so taxed that, for example, the BNBC had only twenty-three officers overseeing all of Sabah in 1882. Sather, Adaptation, 1997, 45. Warren describes the BNBC as "relatively weak," but that it nevertheless left a "profound impression" on the Sama Dilaut. J. Warren, Chartered, 1971, ix.

Philippines. In 1824, with the Spanish in decline, the British and Dutch[458] signed the Anglo-Dutch Treaty dividing Southeast Asia into spheres, with the Malay Peninsula in the British sphere and the islands of the East Indies in the Dutch sphere.[459] No mention was made of Borneo in this Treaty. The maritime border between Sabah and the Philippines was set down in Article III of the Treaty of Paris of 1898.[460]

Over a period from 1891 to 1915, the Dutch and British officially established the border between their colonies in Borneo, which became the modern-day border between Malaysia and Indonesia.[461] In 1930, the boundary between north Borneo and the Philippines was fixed by the British and the United States (who succeeded the Spanish in the Southern Philippines).[462] One result of this period was the division of northern Borneo from both southern Borneo and the rest of the Sulu Sultanate.[463] Southern Borneo remained under Dutch control, dividing the island, while Jolo, Sulu and other parts of the former Sulu Sultanate were now under Spanish control.[464]

As with other colonial treaties described in the previous sections, little regard was given to local political organizations or the needs and realities of the local trade-based economy. Instead, these treaties set aside centuries of trade and political unity between the islands of the East Indies, including Sumatra, and the Malay Peninsula, where a web of trade and alliances had united diverse peoples for centuries.[465] These treaties would lay the foundation for the modern maritime borders in the region and the breakup of the region into discrete, territorial units.[466]

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[458] The Dutch had by this point gained a foothold in southern Borneo and Sumatra.

[459] Hooker, 132. For a detailed description of the subsequent establishment of the border, see J. Warren, Chartered, 1971, 49-50.

[460] Treaty of Peace Between the United States and Spain; December 10, 1898 (1898) Art. III. United Nations Convention on the Law of the Sea (1982). See also G. Poling, 'The South China Sea in Focus: Clarifying the Limits of Maritime Dispute' Center for Strategic and International Studies (2013) 3-7.

[461] Andaya, 190. International Court of Justice, Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia) (Merits) Judgment of 17 December 2002. For more on the establishment of the border, see J. Warren, Chartered, 1971, 48-51.

[462] Convention Between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of North Borneo (1930), 1932.

[463] International Court of Justice, Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia) (Merits) Judgment of 17 December 2002.

[464] L. Wright, 'Historical Notes on the North Borneo Dispute' 25 *J. of Asian Studies* 471 (1966) (hereinafter Wright).

[465] Andaya, 125.

[466] "The new post-colonial states that emerged in Southeast Asia after 1945 inherited the idea of a system of sovereign states with fixed maritime and territorial boundaries." Eklof, 13.

In particular, these treaties marked the beginning of the division of the Sultanate of Sulu, laying the foundation for later arguments over ownership of North Borneo.[467] These agreements between colonial powers took no account of the outlines of the Sulu Sultanate or the social and trade links between peoples on the ground. Today, there are multiple border disputes between Malaysia, the Philippines and Indonesia due to the complex history of shifting borders and the multitude of historical documents establishing sovereignty by one or another power at different points in time.[468] Crucially for this dissertation, Sama Dilaut territories would end up being at the epicentre of some of the most acute of these border disputes.

As in French Soudan and, to a lesser extent, Kuwait, British policy in North Borneo focused on the settlement of the nomadic population. The British North Borneo Company was anxious to clearly establish its sovereignty over Northern Borneo. Unlike in French Sudan, however, but more like in Kuwait, the region around North Borneo was one of intense competition by colonial powers anxious to control regional shipping and trade. As a result, the key goals of the BNBC were similar to those of the British government in the Gulf: to set borders against the claims of other colonial powers in the region and protect British shipping from "piracy." What the British called "piracy" in Borneo was often attacks by rival, local traders, to some extent sponsored by the Sulu Sultanate, whose income depended on trade that was now being supplanted by the British.[469]

The BNBC were alarmed by what they perceived as the lack of centralized authority in Borneo, which they viewed as being left to its own devises by the weakening Sultanates of Sulu and Brunei.[470] The crackdown on piracy and the introduction of a police force were BNBC goals to make the area safer for settlement and increased trade.[471] Brooke launched a violent military offensive against what they labelled piracy in the region,[472] and, in the early twentieth century, the BNBC began an anti-piracy program targeting the Sama Dilaut.[473]

Brooke and the BNBC viewed nomadism as practically synonymous with piracy, which they saw as harming trade and creating insecurity.[474] It is not clear, however, to what extent the Sama Dilaut were actually involved in piracy and raiding as opposed to fishing and

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[467] These border disputes are discussed in greater detail below.

[468] See generally Wright.

[469] Andaya, 135-136. See also Chao, Riau, 55.

[470] Warren, Chartered, 1971, 44-45.

[471] Warren, Chartered, 1971, 45.

[472] Andaya, 128-129.

[473] Sather, Adaptation, 1997, 47.

[474] J. Warren, Trade, 2014, 167.

trade.[475] Nevertheless, by the beginning of the 20th century, boat nomadism and the Sama Dilaut had become synonymous with piracy, lawlessness, the weakness of the maritime border and lack of sovereignty.

The Sama Dilaut and Orang Suku Laut were particularly targeted by anti-piracy programs.[476] The British North Borneo Chartered Company (BNBC) considered the Sama Dilaut to be a "martial," "rebellious" people who could not be governed except by their conversion to a settled way of life.[477] Forced settlement and the eradication of nomadism therefore became among the most important goals of the BNBC administrators. Warren continues:

> (e)ssential to the establishment of thorough control in the region would be a reorientation of the Bajau toward a surplus productivity involving them in a cash economy and in more sedentary habits.[478]

Arguably, this negative attitude was even more extreme than the one held by British and French administrators towards the pastoral nomads of the Niger Bend and the Gulf. By the 1840s, the colonial powers had come to dominate the South China Sea, reducing non-colonial trade, with disastrous results for the local economy.[479] The reduction in "piracy", or non-European trade, led to a sharp decline in the Sulu Sultanate and a breakdown of the patronage system that has sustained the Sama Dilaut for centuries.[480]

Sama Dilaut/Bajau Laut migrations also appeared to threaten the establishment of the border between US and British interests. The BNBC and the American authorities in Jolo claimed "roving bands of Bajau", or "bad hat Bajaus", as one administrator called them, plied the seas and islands between the two powers, supposedly attacking outposts and raiding shops.[481] The Sama Dilaut were quickly characterized not only as "pirates," but also

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[475] J. Warren, Chartered, 1971, 91-93. Piracy was dominated by other groups such as the Tausug/Suluk and Iranun.

[476] Andaya 134-135. See also T. Barnard, 'Celates, Rayat-Laut, Pirates: The Orang Laut and Their Decline in History' *80 Journal of the Malaysian Branch of the Royal Asiatic Society* (2007) 33-49, 35.

[477] J. Warren, Chartered, 1971, 106-107.

[478] J. Warren, Chartered, 1971, 77-78.

[479] Eklof, 11. So-called piracy persisted in the Sulu Sea under the weak Spanish government until the United States gained sovereignty over the Philippines in 1898.

[480] J. Warren, Looking, 1996, 21-33, 30.

[481] J. Warren, Chartered, 1871, 4, 91-9.

as "rebels," a threat to British sovereignty in the region.[482] Across the region, including in what would become Indonesia, the colonizing powers labelled boat nomads a "disgrace".[483]

The Sama Dilaut were seen as too involved with the Sulu Sultanate, centred around Jolo, loyal to the Sultan and not to the British.[484] Settlement of "sea nomads" was a universally adopted solution to the "problem" of uncontrolled mobility and links to the territory of what would become the Philippines. The colonial powers worked to limit the areas in which the "sea nomads" could travel to keep them within agreed upon spheres of influence.[485] The BNBC began to put into place various restrictions on Sama Dilaut movement, including a system of boat licenses.[486] This helped bring to an end the Sama Dilaut long distance migrations to what is now the southern Philippines and Indonesia.[487]

A large part of ending Sama Dilaut/Bajau Laut movement involved relocating supposedly far-flung or nomadic, families to villages on the coast. Starting in 1909, the BNBC began relocating Sama/Bajau villages to more central locations near big towns to bring them under centralized control.[488] This brought many nomadic Sama Dilaut groups into contact with British administration for the first time.[489]

At the beginning of the twentieth century, the BNBC had begun to gain enough control over the local population that they could begin to put into place a system of indirect rule similar to that in other British colonies. In 1898, the BNBC began to appoint of local leaders, usually drawn from the shore-based elite. Unlike in the Gulf and the Sahel, however, the Sama Dilaut were used to a patronage relationship with powerful, shore-based rulers, so this hierarchy was not necessarily a big change for them. Nevertheless, a centralized administrative structure was as foreign to the Sama Dilaut as it was for other nomads.

To justify the settlement of sea nomads and other sea faring groups, colonial administrators described the nomad's way of life as "wretched", implying that any change would be an improvement for the nomads themselves.[490] They cast the shift from a maritime-based lifestyle to agriculture as part of their development from a "primitive" way

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[482] J. Warren, Chartered, 1971, 14.

[483] Chao, Riau, 55-58.

[484] J. Warren, Chartered, 1971, 92.

[485] Chao, Riau, 55.

[486] Andaya, 136.

[487] Sather, Adaptation, 1997, 30.

[488] J. Warren, Chartered, 1971, 93-94.

[489] J. Warren, Chartered, 1971, 94.

[490] Chao, Riau, 8.

of life to a "modern" one.[491] Settlement and centralization therefore came to be associated with modernization and economic growth, despite the clear unsuitability of many colonial agricultural efforts from an environmental and economic perspective.

The BNBC faced challenges in making a profit in North Borneo. The trade-based economy could be taxed, but the Sama Dilaut in particular were in the habit of decamping to Jolo whenever they were confronted by BNBC tax collectors. This cut off one of the main ways the colony sought to make money: taxing local trade. To end piracy and promote more controllable economic activity, both the BNBC and the Brooke family forced the local communities to settle and take up agriculture despite the unsuitability of the Borneo terrain for large-scale agriculture.[492]

The BNBC also began to make inroads into the interior, opening up land to some agricultural production, a shift in the local economy that would have huge repercussions for the Sama Dilaut.[493] The first crop the BNBC attempted in Borneo was the coconut tree, which provided the justification for their first attempt at mass relocation and settlement of the Bajau peoples, including Sama Dilaut. The BNBC relocated Bajau peoples, both nomadic and sedentary, from remote islands to mainland Borneo for this project.[494] Settlement of the "roving" Sama Dilaut was not really necessary to obtain workers for the new plantations, as the BNBC also imported Chinese workers for this task.[495] Rather, it was key to shifting the Sama Dilaut and other seafaring peoples away from nomadism and "piracy" to a mode of life that was easier for the colonial administrators to control and would protect British trade.[496]

Importantly, such projects were not side issues for British administrators, they were a major part of their empire-building strategy. Carol Warren calls the efforts by the British to settle the Sama Dilaut as "strenuous".[497] It involved massive manpower and policing to round up scattered villages and flotillas of Bajau peoples, both nomadic and semi-nomadic, and train them to grow coconuts. At first, the Sama Dilaut ignored British efforts to settle them for agriculture, but when the United States took over in the Philippines from the weak Spanish administration in 1898, the Sama Dilaut could no longer easily relocate to the

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[491] Chao, Riau, 17.

[492] J. Warren, Trade, 2014, 168-170.

[493] Sather, Adaptation, 1997, 45-46. See also Hooker, 138.

[494] Hooker, 141. See also Sather ,Adaptation, 1997, 27, 47 (discussing resettlement schemes and coconut plantations). See also J. Warren, Chartered, 69.

[495] Forced settlement of the Sama Dilaut and other sea faring groups would supply the British with more workers. It should be noted that the need to settle the Sama Dilaut in order to procure more workers is debated by historians. For example, Virginia Matheson Hooker disagrees with this point in Hooker, 141. See also Lenhart, 248.

[496] Sather, Adaptation, 1997, 49.

[497] C. Warren, Consciousness, 1990, 228.

southern Philippines to escape British policies. As a result, Sama Dilaut settlement accelerated.[498]

Despite their steady promotion of agriculture, the BNBC struggled to make a profit in Borneo. Like in the Sahel, the topography and climate was simply unsuited to large-scale agriculture.[499] The BNBC tried various cash crops such as tobacco and rubber, eventually turning to timber, beginning the devastation of Borneo's forests.[500] By independence, Borneo's timber, its most successful export, was already running out.[501] The British replaced the traditional system of land tenure to bring more acres under cultivation, but still struggled with low productivity.[502]

In a further attempt to crack down on Sama Dilaut migration and raise revenue, the BNBC introduced a system of boat registration.[503] British agents travelled the islands issuing and checking licenses.[504] While not expensive, many families might have been unable to pay. It was also, however, viewed by many Bajau communities as an impermissible attempt to restrict freedom of movement.[505] As Sather explains, for most of the first decade of the twentieth century, the BNBC was almost wholly occupied with enforcing boat registration as a means to collect revenue, restrict mobility, and get the local communities to provide "acknowledgment of Company sovereignty".[506]

After considerable resistance, boat registration was finally, grudgingly, accepted by the Sama Dilaut, which lead to the sharp reduction in long distance boat travel.[507] A similar system of boat registration was introduced by the United States in the Philippines, but the systems were not integrated, meaning that boats registered in Borneo could not easily travel to what was now the Philippines. Boat registration was not relaxed until after independence, but by that point most Sama Dilaut families had settled in "water villages" near urban centres like Semporna.[508]

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[498] J. Warren, Chartered, 1971, 79.

[499] J. Warren, Chartered, 1971, 3.

[500] Andaya, 222-225.

[501] Andaya, 222-223.

[502] Andaya, 212.

[503] See generally J. Warren, Chartered, 1971, 79-9. See also Hooker, 141. See also Sather Adaptation 1997 47.

[504] J. Warren, Chartered, 1971, 82.

[505] J. Warren, Chartered, 1971, 80.

[506] Sather, Adaptation, 1997, 47.

[507] Sather, Adaptation, 1997, 47-48.

[508] Sather, Adaptation, 1997, 69.

In addition to programs settling the Sama Dilaut and restrict their movement, the BNBC also encouraged settlement through more indirect means. The British granted pardon to Bajau and Sama peoples who broke the law, including convicted pirates, in exchange for their settlement.[509] The rise of agriculture and logging in Borneo also contributed indirectly to Sama Dilaut settlement in a number of ways, by introducing the cash economy, wage labour and modern technology.

As the Sama Dilaut began to settle on pile houses in villages near shore, the old barter system was replaced with a cash economy, and the introduction of the engine and nets gave the Sama Dilaut something to buy in the face of growing competition from commercial fishing.[510] The founding of Semporna Town, for example, was a key moment in the settlement of the Sama Dilaut. The town provided a centre for what had been dispersed trade, a central market for trading all ocean products in one place, and provided security in the form of the police and, eventually, a navy, the role that had been formally played by the Sama Dilaut's wealthy, settled patrons.[511]

Such indirect means of promoting settlement were part of Britain's "development" and "civilizing" programs in the region. As one Company official put it,

> under British rule, the Bajau is proving himself a good workman, and is building up a permanent home, in place of leading the roving piratical life he was formerly accustomed to.[512]

The Sama Dilaut were not the only nomads encouraged or forced to settle in the rush to claim sovereignty over Borneo. Crop raising and timber cutting placed pressure on Borneo's nomadic groups living in the interior. Their settlement was also actively encouraged by the BNBC as they slowly began to penetrate the mountainous interior of Borneo and began to stake a claim against the Dutch in Indonesia.[513] In Sarawak, the Brookes granted extensive logging contracts over the objections of nomadic groups and implemented policies to encourage the nomads to settle and work in the timber industry. The Brooks also encouraged large-scale Chinese migration and settlement in Sarawak, greatly increasing the population and clearing and claiming so-called empty land owned by nomads.[514]

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[509] J. Warren, Chartered, 1971, 83.

[510] Sather, Commodity, 2002, 32, 38-39. See also Sather, Adaptation, 1997, 67.

[511] Sather, Commodity, 2002, 38-39. Hooker, 142. See also J. Warren, Chartered, 1971, 66-67.

[512] L. Lovegrove, British North Borneo, 60 J. of the Royal Society of Arts 545 (1912) quoted in Warren, Chartered, 1971, 86.

[513] Andaya 225. For information on the setting of the land boundary with Indonesia, see F. Durand and R. Curtis, *Maps of Malaysia and Borneo: Discovery, Statehood and Progress* (Editions Didier Millet 2014) 243.

[514] Andaya, 224-225.

As in Kuwait and Mali, the goals of exclusive territorial sovereignty, hard borders and exclusive allegiance among the population would be passed on to post-colonial governments. The goal of hard borders and exclusive sovereignty over land and contiguous waters in North Borneo would only grow in importance to the government of Malaysia after independence.[515] Like in Kuwait, the discovery of oil off the coast of Borneo would drastically raise the stakes for borders and sovereignty over the oceans in the region. It would create a number of maritime boundary disputes throughout the region.[516] It would also begin a gradual shift of the economy away from trade and towards oil exploration, just as it did in Kuwait and, to a lesser extent, Mali.

By 1919, the British administrations in Singapore and Kuala Lumpur were increasingly looking at uniting the Malay Peninsula with their Borneo territories in preparation for independence. The British and many of the Sultans wished to unite North Borneo with the colonies of Peninsular Malaysia.[517] The vulnerability of Borneo as a political entity on its own was exposed during the Japanese invasion during World War II, when the poorly defended Borneo territories quickly fell to the Japanese, a target because of their recently discovered oil and proximity to shipping lanes.[518] The allied bombing campaign had destroyed most of the infrastructure in Borneo, and the return of British rule was now cast as a rebuilding period as a Crown Colony followed by a transition to a unity state comprised of all the former British colonies in the region.

Creating the Federation of Malaysia would not be an easy task.[519] Uniting British holdings in the region would require unifying many different, diverse territories under a central government. While North Borneo under the Sulu Sultanate had had relations with the kingdoms of the Malay peninsula dating from the pre-colonial period and the common experience of British rule had led to administrative and political ties, these relations would not easily form the basis of a new political unit along the lines of what the British and some Sultans envisioned.[520] The unification of many former British colonies into the Federation of Malaysia would leave the Sama Dilaut on the periphery of two states, divided by an international border, their lands now a disputed border zone containing vast oil reserves.

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[515] C. Warren, Consciousness, 1980, 228.

[516] For information on some of the other boundary disputes between Malaysia, Singapore and Brunei, see the work of R. Haller-Trost.

[517] See generally Wright. See also Sather, Adaptation, 1997, 64-65.

[518] Hooker, 217.

[519] Hooker, 181-186.

[520] E. Fernandez, 'Philippine-Malaysia Dispute over Sabah: A Bibliographic Survey' 7 *Asia Pacific Social Science R.* 53 (2008) 53.

Conclusion

As the examples showed, it is not an overstatement to say that European colonization was a disaster for nomads. In particular, colonization would impose on nomads a set of extremely negative views on nomadism. These negative opinions included the view that nomads neither formed states nor participated in them, that nomads merely "wandered" over land without owning or improving upon it, and that nomads were unreliable allies whose way of life needed to be eliminated in order for the colonial project to succeed.

Anti-nomad bias was reflected in almost every aspect of colonial policy, from the establishment of urban schools to the issuance of identity documents, licenses and other paperwork to keep nomads within administrative areas. This bias against nomads during the colonial period had an important impact on their status. Nomads ended up at the bottom of the colonial hierarchy, their lands split by borders, their leaders marginalized while power vested in urban rulers. Nomads now lived long distances away from state structures and were left out of important decisions.

Negative views of nomadism would fuel strenuous projects to eliminate it in places like the Gulf, the Sahel and the Sulu Sea. Eliminating nomadism through forced or coercive settlement became a major project of the colonial era, despite how feasible, practical or economically desirable it might be. The treatment of nomads by colonial administrators stands in stark contrast to the important role nomads played in the local and regional economies at the time of colonization, as described in the first section, above. While treaties were sometimes signed with nomadic leaders, colonial administers saw their true partners in the powerful Sultans and Emirs in the great capitals of the Gulf, Sahel and Sulu Sea. During the colonial period, nomadic leaders became increasingly marginalized and nomad societies were often governed by military, rather than civilian, administrations.

As colonization moved into the 19th and early 20th century, early treaties with nomads were often invalidated or ignored. Instead, colonial administrators granted vast authority to urban rulers in ways that did not actually reflect their authority over nomadic societies. The centralization of power in urban areas was a key part of colonization. Far flung trade relationships, the bond created by Islam and the web of family and clan allegiances described in the first section were overlooked in the establishment of an administrative system of government based on centralization, borders, agriculture and urban living.

The French and British would use various strategies to settled nomad areas, including the promotion of agriculture as part of so-called development, the imposition of movement restrictions, military force, taxation, centralized schooling and other methods. In North Borneo, nomads were forcibly settled in water villages, away from their fishing regions, and attempts were made to convert them to agriculture. In other cases, like the Sahel and the Gulf, nomads were administered under a separate system designed to limit their movement and contain them within designated areas while subjected to coercive settlement policies and movement restrictions. Agriculture was often prioritized in order to settle nomads, even in places like the jungle or desert where agriculture was not desirable.

To justify forced settlement policies, nomadic trade was labelled as "piracy" or criminal activity. Border crossings were criminalized. Nomadic areas that could not be settled, like the ocean or the middle of the desert, were labelled as "remote" and often became the location off borders between colonial empires, dividing nomadic communities. These border zones were now areas of military, rather than civilian, rule. The fact that such borders severed trade routes and fishing zones was ignored as nomad territories were declared to be "empty." Meanwhile, settled, urban Emirs and Sultans were happy to support such arrangements, which placed their cities at the centre of colonies and regulated nomadic communities to the periphery.

Pastoralism, trade and fishing, which had occurred as part of normal life, were now recast as criminal activities, a threat to borders and the integrity of empire. This fed the view of nomadism as illegitimate, taking place outside of the activities of the administrative state, and cast nomads as inherently antithetical to the goals of colonial empires. This bias would also have devastating consequences for nomads at decolonization.

The placement of borders through such "remote" areas divided nomad groups, making them into minorities and placing them at the edge of empires, rather than in the centre of political and economic life. Colonial administrators frequently placed nomads under military domination, rather than civil administration, placing nomads outside the bounds of the administrative state. While this may have appeared to give nomads more political independence, in reality it began a long period of political marginalization.

All of the above factors led colonial administrators to treat the nomadic and settled portions of society very differently from one another, even when this was not justified by the reality of life on the ground. A system of tiers began to emerge, with nomads at the bottom of the colonial hierarchy, often in border zones and under military rule, subject to policies designed to eliminate their way of life. This trend can be seen in all three examples.

In the case of the Tuareg, an explicitly separate, parallel system of governance emerged. This appeared to grant the Tuareg some independence from colonial rule, but in reality, state functions, including registration, slowly concentrated in urban areas. In other places, such as the Gulf, the British forged close ties with the Emir in Kuwait to the detriment of nomadic leaders. At the moment of crucial decisions, such as the setting of the border between Kuwait and Saudi Arabia, it appears that nomadic communities were left out. In North Borneo, the Sama Dilaut were often treated as pirates who existed outside of society and whose way of life needed to be eliminated.

Such anti-nomad policies were not always driven by economics. Colonial administrations struggled to farm in desert or jungle areas and wasted huge resources cracking down on local trade. In Borneo, the BNBC attempted to forcibly settled nomadic Sama Dilaut fishermen to farm coconuts in what can be only termed a failure. In the Sahel, the French administrators promoted agriculture in the desert environment, risking increased draught. The reasons for such bad policies had less to do with the individual incompetence of colonial administrators in a given colony and more to do with the ways in which the settlement of nomads was seen not only as good economic policy, but as necessary to the establishment of the administrative state.

Finally, as the examples showed, the process of civil registration had already begun during colonization as part of the creation of the administrative state, which included the taking of the census, registration for schooling, the issuance of licenses and permits, and the collection of taxes. These administrative systems either excluded nomads or placed them under special registration or licensing schemes that were administrated separately from settled and urban populations. Registration often went hand in hand with coercive settlement policies and forced schooling, meaning that nomad societies came to view registration negatively, part of invasive state control, rather than as key to their belonging and inclusion. Such registration procedures also reinforced the centralization of administrative authority in urban and coastal areas. In some cases, like Kuwait, such systems were actually implemented by the Emir.

The next section will focus on one particular aspect of colonial administration: the establishment of nationality. It will explore the development of nationality law under the colonial system and how these laws were implemented in Kuwait, Borneo and French Sudan.

Nationality and Empire

> Citizenship is the one human right whose meaning is bounded by territory and is thus tied invariably to claims of sovereignty.[521]

The above sections summarized colonial policy towards nomads. The next sections will focus on a particular aspect of colonial policy: the enactment of nationality laws and the registration of colonized populations. Like all aspects of colonial policy, nationality during colonization was heavily influenced by the overall goals of colonization. European theories on nomadism and the inability of nomads to form and participate in states would influence how nationality laws came to be applied to nomads.

Belonging during the colonial period was dominated by the almost total lack of laws pertaining to the status of colonized peoples. This does not mean, however, that all colonized peoples were treated the same. Some colonized peoples received a nationality during the colonial period. Others were recognized as being in a position of authority in their regions. Others were entirely marginalized.

The following sections will explore the development of nationality law in the British and French empires and how these laws were applied in Kuwait, French Soudan and North Borneo. In particular, it will discuss what is known about how these laws were applied, or not applied, to nomads.

Nationality Law in the Colonies

This section will provide a brief overview of nationality law under the colonial system. Nationality law developed beginning in the 17th century and in particular the 19th century in tandem with colonization. Nationality law was uniformly centred on a territorial approach, supporting both colonial sovereignty and colonial borders. In order for European sovereignty to be established on colonized territory, empires would often settle their own nationals on it, or, when this was impractical, they would sign treaties with local leaders to create jurisdiction through indirect rule.[522] Colonial administrators often treated nomads as having no status beyond that of membership in their tribes.[523] Nomads were often governed separately and placed under military rule. As settled and urban peoples moved slowly towards the recognition of some sort of civil status during the final decades of the

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[521] C. Odinkalu, 'Natives, Subjects, and Wannabes: Internal Citizenship Problems in Postcolonial Nigeria' in R. Howard-Hassmann and M. Walton-Roberts, *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015) 99.

[522] See generally C. Nine, 'Colonialism, territory and pre-existing obligations' *Critical Review of International Social and Political Philosophy* (2020).

[523] Maury, 17.

colonial period, many nomads were treated as entirely outside the realm of political membership and their status often worsened.[524]

To support territorial sovereignty, nationality law employed what Van Waas calls "variations on the same theme."[525] Common methods to establish nationality at birth or by naturalization were often based on a "link" between the individual and the territory of the state, such as birth in the territory of the state (*jus soli*), descent from a national (*jus sanguinis*) or residency in the state.[526] Different European empires adopted different combinations of these principles,[527] but in all cases, a primary function of nationality law was used to reinforce territorial sovereignty.[528] In England, courts established the principle of *jus soli,* while Germany, France and other continental nations developed the principle of *jus sanguinis.*[529] Each of these methods of establishing nationality supports a territorial approach to group membership in the state, based on a connection between people and land.

While nationality by descent, or *jus sanguinis*, may on first observation lack a territorial element, the principle of *jus sanguinis* reinforces territoriality by excluding the offspring of immigrants and favouring those with family histories in the territory of the state. Nationality by descent may cut off when the link to the territory of the state becomes to tenuous, for example, upon the marriage of a woman to a non-national or multiple

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[524] Gilbert, Nomadic, 2014 20-23; 61-62. See also Shaw, 2008 ,39, 49-54.

[525] Van Waas, Nationality, 2008, 32. See also Edwards, 16-17; Brownlie, Principles, 388-394, 397; Brownlie, Nationality, 302-303; P. Courbe, *Le nouveau droit de la nationalité* (Dalloz 1994) 4.

[526] *Jus soli* and *jus sanguinis* are the most common types of acquisition of nationality at birth. De Groot and Vonk, 42, 52. Stolcke discusses the use of *jus soli* in Germany and France to balance exclusion and inclusion of immigrants. Stolcke, 67. For more on residence as a "link" for the purposes of nationality, see Fransman 17. See also M. Verwilghen, *Conflits de nationaltiés, Plurinationalité et apatridie* (Brill 1999) 62 (hereinafter Verwilghen); Maury ,14; Stilz 188; Shaw 2008 647-648; Verzijl, 7; Larkins 47 (discussing the symbolic value of territory); Montevideo Convention; Habermas, 63; Van Waas, Nationality, 2008, 32-33; Brownlie, Principles, 407, quoting the German government in 1929, 406-407. See also de Groot and Vonk ,9-10, 25.

[527] There are other pathways to a nationality that are not territorial, including naturalization through military service, financial investment, and, in modern times, asylum.

[528] "The automatic change principle (of the transfer of nationality) is rooted in medieval theories of land conveyance, according to which people were appurtenances to land - quite literally corporeal hereditaments - title to which was disposed together with title to the territory." G. van Ert, 'Nationality, State Succession, and the Right of Option: The Case of Québec' 36 *Canadian Yearbook Int'l L.* 151, 156.

[529] See for example Calvin's Case (1608) 7 Co Rep 1a, as an early attempt to define British nationality. See also the British Nationality and Status of Aliens Act of 1914; Verzijl, 16; Baynes, 434; Stilz, 576; Maury, 13; Van Waas, Nationality, 2008, 32-34.

generations born abroad.[530] *Jus sanguinis* helps to build and retain close ties between populations and territories.[531]

The territorial nature of nationality law is not an accident but reflects the political realities of Europe during the 17th, 18th and 19th centuries. It is, as Arendt put it, a key part of the "trinity of European statehood"[532] and closely linked to the theories of state formation described in the proceeding section. "The modern concept of nationality...is primarily related to power over territory."[533] In this way, nationality law came to reinforce the theories of statehood described above.

Reflecting this territorial approach, habitual residence emerged as a major means of establishing nationality. It became one of the most employed requirements for naturalization under both the British and French systems.[534] Under French law, the system of *double birth* meant that two generations of residence could create a nationality "link." Residence also became crucial to establishing nationality for persons who had never before had a nationality status. Habitual residence in the territory of a state would also become the key way to create what this dissertation will call "the first body of nationals" of a new state during decolonization. As Brownlie points out, for cases where a state, "has no nationality legislation...(t)here is interesting evidence of reliance on settlement together with the existence of the political and diplomatic protection of a particular sovereign..." to create a presumption of nationality.[535]

Territoriality is therefore a key feature of nationality law. Another key feature of nationality law that is important to the nationality of nomads is the concept of an exclusive relationship, one of exclusive allegiance, between state and citizen.[536] Because, as the above sections established, one of the main goals of colonization was the establishment of exclusive territorial sovereignty in the colonies, particularly against the claims of other colonial empires,[537] the exclusive allegiance of colonized peoples became a key issue in both the British and French empires.[538] Britain and France had encouraged the settlement

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[530] Maury, 13 cf Zimbabwe Citizenship Act 2001, 2003. See also Van Waas, Nationality, 63.

[531] Kymlicka, 1. See also Habermas, 64; C. Dumbrava, 'Bloodlines and Belonging: Time to Abandon Jus Sanguinis?' in C. Dumbrava and R. Bauböck *Bloodlines and Belonging: Time to Abandon Jus Sanguinis?* (European U. Institute 2015); Arendt, 1976, 272-273; Stilz ,575.

[532] Arendt, 1976, 282.

[533] De Groot and Vonk, 7. See also Longva, Citizenship, 179; Weil, 11.

[534] Donner, 279-280. See also Crawford, 210.

[535] Brownlie, Principles, 407. See also Van Panhuys, 139.

[536] Brownlie, Principles, 406.

[537] Conklin ,121-122.

[538] Brownlie, Principles, 318-319.

of their colonies by Europeans.[539] The question of nationality for colonized peoples, however, remained under contention. Empires attempted to claim jurisdiction over colonized populations, often through systems of indirect rule, while limiting their rights.

As nationality in Europe developed into a status affording important rights, such as voting, holding office and access to the courts, colonial empires like Britain and France began to face the question of whether or not these rights should be extended throughout their empires.[540] The idea of nationality granting civil rights gained ground across the Europe, [541] but was totally at odds with the goals of the colonial project, chief of which was to claim colonized peoples for the purposes of creating territorial sovereignty, not to grant colonized peoples political rights.[542]

The question of the rights of colonized peoples would come to dominate the late colonial period in both British and French colonies. During this period, nationality developed to be more than a system of laws, it came to encompass a moral element. The 19th century saw the development of the philosophy of romantic nationalism,[543] which emphasized the natural link that developed between populations, governments and territories. A community based in a particular territory, a homeland, had the right to exclude outsiders.[544] As Arendt puts it, in order for nations to function as states, they require "homogeneity of population and rootedness in the soil."[545]

In this idealized, European model of the nation-state, the link between individual and homeland, a link of "blood and soil," is a natural phenomenon.[546] As Miller puts it, a nation "...connects a group of people to a particular geographic place...a nation *must* have a homeland."[547] Under this theory of state legitimacy, as people grouped together on specific

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[539] « Le droit positif en vigueur dans un État est un baromètre de l'état de l'opinion, favorable à l'immigration ou protectionniste, parfois dominée par des courants xénophobes. » Jault-Seseke, 1.

[540] Jault-Seseke correctly points out that « (l)a nationalité évolue donc constamment. » S. Barbou des Places, S. Corneloup and F. Jault-Seseke, *Droit de la nationalité et des étrangers* (Presses universitaires de France 2015) 46. See also M. Martignoni and D. Papadopoulos, 'Genealogies of Autonomous Mobility' in *Routledge Handbook of Global Citizenship* (Routledge 2014) 42.

[541] Donner, 137. See also Verwhilgen, 63; Edwards, 24.

[542] R. Brubaker, 'Citizenship Struggles in Soviet Successor States' 26 *Int'l Mig. R*. 269 (1992) 38 (hereinafter Brubaker). See also Koessler, 4; Maury, 13, 16.

[543] Van Panhuys, *The Role of Nationality in International Law: An Outline* (A. W. Sythoff 1959) 59, 150 (hereinafter Van Panhuys).

[544] Miller, 68.

[545] Arendt, 1976, 270.

[546] Z. Bauman, 'Soil, Blood and Identity' 38 Sociological Review 675 (1992) 684. See also Kymlicka 1; Habermas 64.

[547] Miller, 24. My italics.

areas of land, geographical features influenced their culture and development, binding them together in a common way of life that necessitate common government.[548] The nation nurtures a group of people over generations, imbuing them with their particular character.[549]

The moral element of nationality would come to shape the development of nationality as a system of laws in the colonies. European philosophers such as John Stuart Mill believed that nations were best expressed as political states, and, conversely that states containing multiple nations were doomed to failure.[550] Natural law principles provided European states with a moral argument against extending full nationality rights to colonized persons.[551] Yet, it also increasingly begged the question of whether and to what extent colonies should have their own nationalities.

The concept of romantic nationalism, of nations expressed as states, [552] remained controversial in Europe, but perhaps even more so in the colonies. Numerous wars, colonial occupations and successions constantly shifted borders, both in Europe and abroad, confusing the issue of which nations supposedly lived in which homelands.[553] As well, the question also became to what extent colonies should be their own states. While romantic nationalism helped to justify the exclusion of colonized peoples from colonial nationality, it also seemed to conflict with the concept of indirect rule and raised the question of the nationality status of colonized peoples.[554] The purpose of this section is not to argue the legitimacy of nationalism as a concept, but merely to point out its influence on nationality law during the crucial period when the question of nationality and rights in the colonies was most acute.

By the early 20th century, the spread of nationality to the colonies would be plagued by contradictions. Was, for example, the British Empire an "extension of the nation state, a

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[548] Courbe refers to « la proximité géographique. » Courbe, 5. See also N. Thrift, 'Taking Aim at the Heart of the Region,' in *Human Geography: Society, Space and Social Science* in D. Gregory, R. Martin and G. Smith (eds.) (U of Minnesota Press 1994) 202-203, summarizing the work of geographer Paul Vidal de la Blache. See also G. Benko and U. Strohmayer, *Human Geography: A History for the 21st Century* (Arnold 2004) 28 on *de la Blache* and the French School. Sack, 59.

[549] Van Panhuys, 59, 150.

[550] Kymlicka, 52.

[551] Miller, 17. "...the political community has remained distinct, and being a member of a political community has remained a unique form of belonging." P. Cole, 'Introduction: "Border Crossings" - The Dimensions of Membership' in G. Calder, P. Cole and J. Seglow (eds.) *Citizenship Acquisition and National Belonging: Migration, Membership and the Liberal Democratic State* (Palgrave 2010) 1.

[552] Kymlicka, 124.

[553] Arendt, 1976, 277-278.

[554] A. Smith, *National Identity* (U. of Nevada 1991) 17 (on the difficulties of defining national identity and self-determination) (hereinafter A. Smith); Donner, 127; Weis, 3; Verzijl, 7; Miller, 19; Maury, 11-12; Jault-Seseke, 32 .

separate entity in itself, or a type of 'world state'?"[555] Confusion about the nature of the Empire versus the state led to confusion about nationality and the level of status of colonized peoples.

> (The) unofficial, rhetorical, and localized nature of citizenship gave rise to great discrepancies among imperial subjects in rights, benefits, and duties.[556]

Such philosophical tensions drove enormous changes in nationality law as it was applied in the colonies. In the early colonies, those who had a nationality were almost exclusively European settlers and their descendants.[557] By the end of the colonial period, many colonized peoples had also begun to receive a status, but this status was often not the same as that given to Europeans. Meanwhile, many colonized peoples receive no status. Nationality came to mean something very different in Europe than it did in many colonies and different statuses were granted to different classes of people within the colonies, creating a system of tiers.

The colonial period also saw the mass introduction of paper identity documents in places where no such systems of identification had existed before. Registration and the issuance of identity documents are today used under the western model as vital *evidence* of nationality and can be the mechanism by which nationality is established in some cases.[558] The widespread use of documents as evidence of nationality also means that a lack of documents can be used as evidence of non-national status. Registration of nationality developed as an area of administrative law during the colonial period and came to be of vital importance in the colonies. The introduction of the registration of nationality would divide colonized populations by type of documentation.

Registration of nationality included not only the issuance of national IDs, but of other forms of documentation like birth certificates and voter registration cards.[559] All of these forms of documentation would be issued during colonization to some colonized persons, alongside attempts to take a census and in other ways document the persons under colonial jurisdiction. The system of registration of nationality would come to be highly influential in the post-colonial period. The absence or presence of state issued personal identification

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[555] D. Gorman, *Imperial Citizenship: Empire and the Question of Belonging* (Manchester UP 2006) 2 (hereinafter Gorman).

[556] Gorman, 20.

[557] Gorman, 20, 164.

[558] Handbook, 2014, discussing the importance of identity documents to establishing nationality or statelessness. See also Fripp, 2016, 75. See also P. Brett, 'Discrimination and Childhood Statelessness in the Work of the UN Human Rights Treaty Bodies' in Institute on Statelessness and Inclusion, *The World's Stateless: Children* (Wolf 2017) 177.

[559] L. López, T. Sejersen, N. Oakeshott, G. Fajth, T. Khilji and N. Panta, 'Civil Registration, Human Rights, and Social Protection in Asia and the Pacific' 29 *Asia-Pacific Population Journal* (2014) 77. Manby stresses the importance of other civil documentation, such as marriage certificates. Manby, Legal, 319.

can be an important factor in proving nationality, particularly in places where it is contested.[560]

During the colonial period, the standardization of identity documents also emerged, with the widespread use of birth certificates, nationality certificates and passports. In many systems of civil registration in Europe employing *jus soli,* the birth certificate became the key document for proving nationality. Proof of nationality in the French system came to require the acquisition of a *certificat de nationalité française*, which must be issued by a court or embassy of France.[561] Today, passports, birth certificates and ID cards may all be used as evidence in obtaining a *certificat de nationalité*, but they are not in and of themselves proof of nationality.[562]

Other documents, however, such as title to land, registration of the payment of taxes, licenses issued by the state, school registration and others may serve as evidence today in cases where an individual is trying to establish their long-term residence in a territory. During the colonial period, a variety of documents and forms of registration not related to nationality, but in some cases establishing jurisdiction, were available to some colonized persons during the colonial period. These documents would help to establish the legal identity of colonized persons during the colonial period and, as subsequent sections will show, at decolonization. The colonial administrative state, therefore, came to exercise enormous control over huge numbers of people, often delegating power to certain privileged, local rulers under systems of indirect rule.

How was this emerging system of nationality in the colonies applied to nomads? First, enormous powers were vested with particular settled and urban rulers in regions under indirect rule, including the power to issue documents. As the above sections on colonial policy towards nomads demonstrated, colonial administrators believed nomads to be incapable of political allegiance outside of being members of their tribes, a fact which would greatly influence the registration, or non-registration, of nomads.[563]

Civil and administrative functions were often based in towns and the power to issue documents often vested with settled and urban rulers, rather than nomadic leaders. Colonial administrators viewed nomads as a problem, as a source of criminality and the creators of a vacuum of state sovereignty. These views on nomadism, described in the previous section, would intersect with the system of nationality in the colonies, as described in this section.

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[560] Weis, 204-236, discussing proof of nationality before international tribunals. See also Van Waas, Nationality, 2008, 153; De Groot and Vonk, 21; Bingham, Reddy and Kohn, 5.

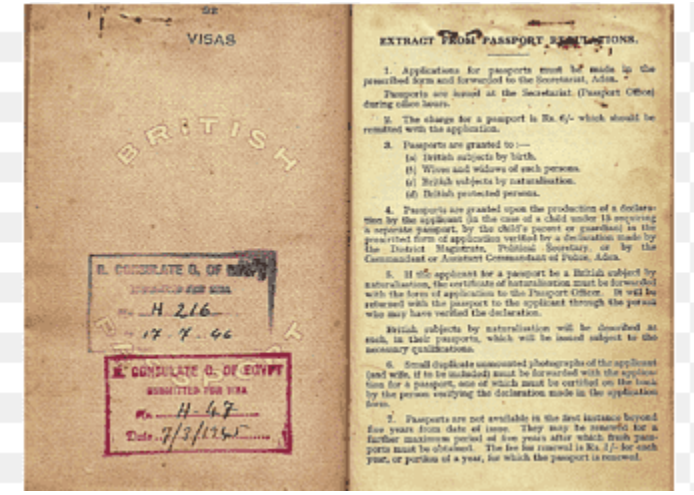
[561] Weil, 265.

[562] See for example the Code de la nationalité française (1994) arts. 149-151. See also Weis, 216. Exchange with Bronwen Manby.

[563] Bloom discusses the effects of exclusive membership on colonized peoples. Bloom, Members, 2017, 160.

The next sections will explore in more detail how the development of European nationality played out in particular cases, looking at the particular laws and policies enacted by colonial governments in Kuwait, French Soudan and British North Borneo, and how these laws and policies were applied, or not applied, to nomads. When reading this section, it is important to keep in mind the negative views of nomads described in the previous section, which influenced how the laws were applied, or not applied, to nomads.

Nationality in the British Empire: Kuwait and North Borneo



Passport from the Aden Secretariat of the British Empire

> Gulf States have found themselves at odds with the normative language of the international community that has tended to territorialise citizenship.[564]

Today, there is a strong correlation between being related to certain Bedouin tribes and being stateless in Kuwait..[565] While most local people in the Gulf lived without an official nationality status during this period under the colonial system, this did not mean that all local populations were afforded the same status or treated in the same way. The seeds of statelessness in Kuwait were sowed during this period. Similarly, many Sama Dilaut in Malaysia are now stateless, as there was a high correlation between civil registration in North Borneo and being settled in a coastal town or water village. This section will trace the origins of this exclusion by looking at how local populations were classified and afforded status during the British protected state period, when Kuwait and Malaysia were first configured as territorial states with civil registration regimes.

The British had a wide variety of types of colonies, all of which employed the concept of "indirect rule" to varying extents. Both the Bedouin and the Sama Dilaut lived in a type of British colony called British Protected States, which in the case of Kuwait, more resembled a strategic alliance between the Emir and the British government than a colonization.

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[564] Beaugrand, Stateless, 2018, 10.

[565] Conversations with an expert.

Under this system of indirect rule, local rulers like the Emir had jurisdiction over internal matters while the British administration dealt with matters of foreign policy, including consular affairs.[566] British administrators could offer informal 'advice' on internal matters which could be taken or ignored, given the circumstances.[567]

The purpose of this system was to limit British responsibility for the local population while simultaneously ensuring British sovereignty over colonized territories.[568] Types of British territories included Crown Colonies, Protected States, Protectorates, Dominions and Dependencies. As Crawford points out; "the variety of dependent status in practice has been considerable: almost every permutation of rights and powers can be instanced from near-independence to practical absorption in another State."[569]

In the dominions, the 1914 Nationality and Status of Aliens Act applied the principle of *jus soli* in the granting of nationality.[570] As decolonization progressed and many dominions became independent, the British Nationality Act of 1948 converted the status of British subject to that of "Citizen of the United Kingdom and Colonies," and applied to colonies and to certain persons in the protectorates via naturalization or registration. This status maintained the right for citizens abroad to enter the UK until the law was changed in 1962, but this right was not extended to the holders of BPP status.[571]

Both Kuwait and North Borneo went through periods when they were administrated as Protected States. North Borneo also spent a short time as a Crown Colony, during which it had a nationality law based on *jus soli*, discussed below. British Protectorates and Protected States granted the colony the right of protection from outside aggressors while leaving nationality and local governance up to the traditional rules of the local leader, such as the

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[566] This was not always the case for Protectorates. J. Harding, 'Matters Colonial, Consular and Curious' in P. Hinchcliffe, J. Ducker, and M. Holt (eds.) *Without Glory in Arabia: The British Retreat from Aden* (Tauris 2013) 282.

[567] Harding, 280.

[568] Shachar, 113-115.

[569] Crawford, 284. See also Van Panhuys, 197; Maury, 30-31; Weis, 4-9; Verzijl, 1, 6-7, 13-14; Habermas 65; de Groot and Vonk, 12.

[570] British Nationality and Status of Aliens Act, 1914, 4 & 5 Geo. V, c. 17, s. 10(1). The term dominions was never defined in British law. For a discussion of how nationality law affected the indigenous population in North America, see Bloom, Members, 2017, 161-165.

[571] Weis, 13-14. See also Cole, 12; R. Hansen, *Citizenship and Immigration in Post-war Britain* (Oxford UP 2000) 5-6, 29. After 1962, increased migration from its former colonies encouraged Britain to slowly restrict immigration. J. Hampshire, *Citizenship and Belonging: Immigration and the Politics of Demographic Governance in Postwar Britain* (Palgrave Macmillan 2005) 16-19.

Kuwaiti Emir.[572] Protected States had supposedly internal administrations.[573] In colonies retaining internal sovereignty, such as Protectorates and Protected States, determinations of status for the non-British population were left up to the rules of the local authorities,[574] but they were also considered to be under British protection and, therefore, British sovereignty.[575]

As Fransman notes, the Protectorate system was something of a fiction, as they were for practical purposes more like Crown Colonies than independent states.[576] But the Protectorate system allowed Britain to limit the application of British nationality, or British Subject status, to Britain and the crown colonies, while preserving jurisdiction over its protectorates and Protected States. The result of the Protectorate system was to create British territorial sovereignty while limiting the rights and status of colonized peoples.

While there was no formal nationality law for most colonized peoples in the British Empire, the ways in which various colonized groups were treated arguably led to important differences in their status at decolonization. As the Empire developed, the British began to grapple with the question of nationality in their colonies, coming up with a variety of different levels of status for different classes of people living in different types colonies. In 1774, *Campbell v. Hall*[577] established that the inhabitants of a British Dominion or Crown Colony were automatically British subjects. Later, subject status was codified under the Nationality and Status of Aliens Act of 1914 and subsequent amendments.[578] Neither this principle of common law nor later statutes, however, applied to Protectorates or Protected States.

Instead, as Protected States under the British Empire system, all inhabitants of Kuwait and North Borneo were technically under British "protection," though they remained the subjects of their Emir or Sultan.[579] In this way, the status of local peoples in British Protectorates and Protected States remained vague and ill-defined, as the British Empire

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[572] Crawford, 284, 317.

[573] British Protectorates had administrations established by the Crown. Shaw, 2008, 216-217. See also Fransman, 69-71. For an overview of Protected States, see Crawford, 292.

[574] Crawford, 284.

[575] Crawford, 317.

[576] Fransman, 69.

[577] *Campbell v. Hall,* 1 Cowp. 204, 98 ER 1045 (1774).

[578] Weis ,18-20. See also Shachar, 113-115. For details on the evolution of British Subject status, see British Home Office, 'Historical background information on nationality, Version 1.0' 21 July 2017. At this point, Britain used a system primarily based on *jus soli.* The switch in British law to a predominately *jus sanguinis* system of nationality would not fully occur until 1981. British Nationality Act, c. 61, 30 October 1981. See also Maury, 39-40; Stolcke, 71.

[579] Gorman, 19, 164. For example, see the British The Foreign Jurisdiction Act of 1890.

had not extended nationality to them, but their local rulers lacked the political independence to develop nationality systems of their own.

By the early 20th century, the British had begun to develop a sort of pseudo-status for the occupants of British protectorates and protected states, that of British Protected Persons (BPP). This status, however, only offered diplomatic and consular protection abroad. It offered far fewer rights than that of British subject status afforded to other classes of persons under British rule. Nevertheless, BPP status was a type of personal status and it did provide some persons with an internationally recognized identity document.

Originally, British Protected Persons status was determined on an ad hoc basis for people who needed travel outside of their protectorates or protected states, or for other specific reasons. In 1934, the British Protected Persons Order codified BPP status. The law replaced vague references to "indigenous persons" with *jus soli*.[580] By 1949, BPP status had become a statutory status. BPP status now applied to all persons born in the Protectorate or Protected State or, if born outside, to a father born in the state.

Crucially, however, BPP status only applied for international purposes. It allowed persons from Protectorates and Protected States to claim British protection while traveling abroad. This made BPP status for all intents and purposes a type of derivative status that did not confer rights to persons within their protectorates and protected states, where they remained under the jurisdiction of their local leaders, whatever that might mean.[581] In some cases, holders of BPP status could obtain the right to live and work in the UK more easily than other aliens,[582] but in practice, they were often prevented from doing so by local laws preventing them from leaving their colonies.[583] Meanwhile, most indigenous persons were without a formal status provided by their local rulers, meaning that they remained in a grey zone. As a result, BPP status fell well short of providing the rights usually associated with nationality, yet for some, it provided an identity and some rights vis a vis the British government.[584]

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[580] For an overview of BPP status, see Brownlie, Nationality, 318-319. See also Fransman, 60-70; Weis, 18-20. BPP status was only one of several alternate British types of status created to deal with colonized populations that in essence offered few of the benefits of British Subject status.

[581] Weis, 19-20. See also H. Lauterpacht, *International Law* (vol. 3 Longmans, Green and Co 1955) 30. In recognition of the fact that BPP status is not equivalent to full nationality, the 2002 UK Nationality, Asylum and Immigration Act resolved the issue for many of those without an alternative nationality. UK Nationality, Asylum and Immigration Act. BPP status was mostly replaced by the nationality of individual states at independence.

[582] Weis, 18-20.

[583] C. Parry, *Commonwealth Citizenship with Special Reference to India* (Indian Council of World Affairs 1954) 4.

[584] For a discussion of whether or not BPP status qualifies as a nationality, see H. Alexander and J. Simon, *No Port, No Passport: Why Submerged States Can Have No Nationals Wash. Int'l L.J. 26.2* (2017) (hereinafter, Alexander and Simon). In recognition of the fact that BPP status is not equivalent to full nationality, the 2002

As a result, BPP status was primarily for the purposes of identifying persons as under British jurisdiction for international purposes. It failed to offer the same rights as British subject status. Today, lesser forms of national status like BPP status are often viewed as inherently unjust, sometimes referred to as "second class citizenship."[585] The effect of BPP status was to place people under British jurisdiction without giving them as many rights as persons of British descent.[586] Most importantly, because BPP status was only used when traveling abroad, very few people ever actually obtained it. As a result, few local people were registered or received identity documents, creating yet more problems at decolonization.[587]

Essentially, this left the vast majority of people in Kuwait and North Borneo (during its period as a protected state in a grey zone. While in theory they had BPP status for international travel purposes, their nationality was to be determined by local laws. A BPP travel document was usually available from a consular officer, often located in a large, coastal trading city in places like Kuwait and North Borneo under the control of a Sultan or Emir. This meant that access to BPP status even for elite members of local society was limited to people who were in good standing with the Sultan, Emir or other favoured local authority.

The process by which BPP status was verified by local authorities and travel documents were issued shows the extent to which it localized power in the hands of a few Sultans and Emirs. According to the memoir of a British consular officer in Aden, in what is now Yemen, the representative of the Sultan would verify the applicant's identity for the British officer, who would simply issue the document. This meant that the Sultan essentially held the authority over who was granted this document. The Sultan's office, however, was also issuing travel documents that could be used for travel to other states in the region, setting up a competing authority for travel documents. At the same time, a rival Sultan in Yemen was also issuing his own travel documents.[588] This example is illustrative of the deep flaws

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UK Nationality, Asylum and Immigration Act resolved statelessness for some of those who ended up British Protected Persons without another nationality.

[585] Kymlicka, 124. See also Fripp, 2016, 10. BPP status, however, should be distinguished from *de facto* statelessness, which is defined as persons outside of their country who lack diplomatic or consular protection. UN High Commissioner for Refugees (UNHCR), Expert Meeting - The Concept of Stateless Persons under International Law (Prato Conclusions), May 2010. See also L. Bingham, J. Reddy and S. Kohn, 'De Jure Statelessness in the Real World: Applying the Prato Summary Conclusion' (Open Society Justice Initiative 2011). More will be said on second-class citizenship and the human right to a nationality in Part 3. For more on tiers of nationality, see L. van Waas and S. Jaghai, 'All Citizens are Created Equal, but Some are More Equal Than Others' 65 *Netherlands International L. R.* 413 (2018).

[586] Crawford, 292.

[587] Weis, 4, 6, 19-20. See also Verzijl, 6-7, 14; Habermas, 65; Lauterpacht, 30.

[588] Harding, 283. Harding lists the BPP Passport, a one-time travel document, or an internal pass as documents he was empowered to issue.

with the protected state system, where the lack of a clear authority created a vacuum of state sovereignty and cases of overlapping sovereignty.

It also shows one of the many ways in which the power over civil administration became vested in the person of the Emir or Sultan as the favoured local authority under the Protectorate system. In this way, the inhabitants of the protected states began to be divided by the British into two groups: those with standing and access to the colonial bureaucracy and those who existed outside the system. As well, rulers were divided between those who had standing with the British to issue documents and validate membership, whereas other rulers were left out, regardless of the political realities on the ground.

In the Gulf, the tendency to favour some rulers over others would have long-standing consequences. In his memoir, the consular officer in Aden acknowledged that his role in issuing BPP passports was "problematic" because he relied almost entirely on the judgment of the local Sultans and Emirs whom the British had identified as the local authorities.[589] As the consular officer put it, determining who qualified for travel documents required a complex process of verification with these coastal authorities based on their pre-existing clan alliances. As few locals "had birth certificates... (and a)pplicants had to provide guarantors" from the local administration. This gave certain Sultans and Emirs the status of gatekeepers, determining who could access the British administration and who was excluded.[590]

While BPP status enabled some elites to obtain a travel document,[591] such a document was wholly unnecessary to cross colonial borders within the Gulf region and this dissertation was unable to uncover any evidence that applications for BPP status were common amongst the Bedouin. The British made no effort to ensure that members of the general population in Kuwait were issued documents. As the consular officer put it, discussing the situation in what would become Yemen;

> (A) problem which was never satisfactorily settled was the issue of passports to British Protected Persons of the Mahra state (in Yemen.) 'State' in this case was a misnomer, for Mahra...inhabited by fiercely independent tribes, was under the control of neither the British nor its titular ruler, (the) Sultan..."[592]

In truth these Bedouin tribes were not independent from colonialism, or even if they could have been considered independent at this point, they would not long remain so. According to official British policy, the Bedouin were the inhabitants of a British Protected State being

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[589] Harding, 280.

[590] Harding, 281-282.

[591] For an example of a travel document issued in Kuwait under the BPP system, see Passport Collector, 'Kuwaiti Travel documents' (2012) at http://www.passport-collector.com/kuwaiti-travel-documents/ (accessed July 28 2020).

[592] Harding, 282.

administrated from Aden, or, in the case of Kuwait, from Kuwait City. This fact would come to be enormously important for the Bedouin in the decades to come.

The creation of a nationality in former British Protected States brought about the automatic termination of BPP status for those who qualified for the new nationality.[593] Technically, those who did not gain a new nationality were entitled to continue to hold BPP status,[594] but a lack of BPP documents by most Bedouin made this impossible.

Meanwhile, under the protectorate system, local leaders began to pass their own nationality laws. In the Saudi desert, Ibn Saud granted a nationality to certain Bedouin tribes in order to assert his sovereignty over their lands. Ibn Saud's consolidation of Bedouin support, in part accomplished through the granting of nationality, was viewed with hostility by both the British and the inhabitants of Kuwait Town. As Beaugrand puts it,

> This idea of the desert as a hostile environment subject to foreign influence and manipulation was deeply anchored in the minds of the Kuwaiti townspeople by the time of the definition of nationality.[595]

In Kuwait, the protectorate agreement between the British government and the Emir also invested the Emir of Kuwait with the authority to pass a nationality law.[596] Kuwait's first nationality law took the form of an official decree in 1948.[597] It cemented in Kuwaiti law a distinction between original and naturalized citizens, a system of tiers of nationality that granted more rights to original Kuwaitis. This created a type of second-class citizenship.[598] Kuwaiti law would also adopt a territorial-based approach.[599]

"Original" (*asil*) Kuwaitis were defined in the 1948 official decree as members of the ruling family, residents of Kuwait since 1899, the children of Kuwaiti fathers, or children born in Kuwait of an Arab or Muslim father.[600] Naturalization was granted in a separate decree for persons residing in Kuwait for at least ten years who could also speak Arabic and meet

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[593] Alexander and Simon, 8-9.

[594] See Fransman, 244.

[595] Beaugrand, Stateless, 2018, 67.

[596] Casey, 21. See also Beaugrand, Stateless, 2018, 80.

[597] Kuwait Order n. 3, 23-30 (1948).

[598] Heater, 262.

[599] Longva, Citizenship, 185. See also Parolin, 77, 89 115; M. Lund-Johansen, *Fighting for Citizenship in Kuwait* (University of Oslo 2014) 24 (hereinafter Lund-Johansen).

[600] Kuwait, Law n. 2, 35-49 (1948). See also Kuwait, Order No. 3, 23-30 (1948). See also Fransman, 1055-1056; Parolin, 89; Longva, Citizenship, 185; Commins, 186; A. N. Longva, 'Neither Autocracy nor Democracy' in P. Dresch and J. Piscatori (eds.), *Monarchies and Nations: Globalisation and Identity in the Arab States of the Gulf* (Tauris 2005) 121 (hereinafter Longva, Autocracy).

certain other requirements.[601] As a result of this law, the authority to determine nationality in Kuwait was now vested in the hands of the Emir.

Kuwait's nationality law therefore complied with principles of Islamic law, as nationality flowing by descent from the father, but was also compatible with *jus sanguinis.* But in keeping with British legal principles, it also employed *jus soli*. These decrees were quite inclusive, in compliance with British law, while promoting Kuwait's identity as a Muslim and Arab state.[602] Given the lack of clarity around Kuwait's borders, however, this law must be seen as mainly favouring Kuwait's urban centres, particularly Kuwait City, and members of the urban community. This fact would have a huge impact on nationality in Kuwait in the future.

Naturalization in Kuwait would go through a number of important changes during the protectorate period. In 1959, the years needed for naturalization increased to fifteen years of residence for non-Arabs and ten years for Arabs. Naturalized citizens could not vote for twenty years following their naturalization, nor pass on nationality to their children.[603] In 1960, the number of naturalizations was limited to 50 individual applications. As naturalization became more limited, the concept of being a resident of Kuwait became increasingly critical.

Unlike Kuwait, North Borneo would eventually become a Crown Colony following World War II. Unlike in Kuwait, however, North Borneo would be incorporated into the larger Malaysia Federation, a process which would greatly affect the ways in which nationality law was applied during the late colonial period and decolonization. Ethnic and religious divisions between Britain's Malay colonies meant the problem of a single nationality status became a pressing political issue during the colonial period.

From the beginning of the process to create a unity state in Malaysia, both the British and the Sultans struggled with the configuration of the new federation and the nationality status of its members.[604] Until the 1930s, immigration to Malaysia was unrestricted and encouraged by the British.[605] In the 1840s and 1850s, the British brought large populations of foreign workers to the Malay colonies from India, China and Indonesia to work on the rubber plantations.[606] As a result, the British and the Sultans struggled to determine the eventual status of so-called immigrant populations in what would become Malaysia,

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[601] Kuwait, Law n. 2, 35-49 (1948). See also Kuwait, Order No. 3, 23-30 (1948).

[602] For a discussion of this law, see C. Joppke, 'Citizenship in Immigration States' in A. Shachar, R. Bauboeck, I. Bloemraad, M. Vin (eds.) *The Oxford Handbook of Citizenship* (Oxford 2017) 390.

[603] Ismael, 118-119.

[604] Some examples of possible forms the unity state could have taken include confederation with Indonesia and the inclusion of Singapore. Hooker, 209.

[605] Clark and Pietsch, 168.

[606] C. Hirschman, 'The Meaning and Measurement of Ethnicity in Malaysia,' *46 Journal of Asian Studies* 555 (1987), 558 (hereinafter Hirschman).

particularly the Chinese population. In 1909, the Manchu government in China had declared all overseas Chinese descended via the male line to be citizens of China unless they opted out, regardless of where they had been born.[607] This policy immediately called into question the status of overseas Chinese around the world, including the Malay colonies.[608] North Borneo remained somewhat removed from these discussions, but would come to be affected by the question of nationality in Malaysia following Malaysian Federation. As a result, the development of nationality law in Peninsular Malaysia would come to have an indirect effect on nationality in the Borneo states.

In 1867, the Straits Settlements, consisting of the larger city-states on the Malay Peninsula, now Crown Colonies, passed a Naturalization Act based on residence.[609] Persons born in the Straits Settlements were therefore British subjects.[610] In 1904, the Federated Malay States, which were Protected States on the Peninsula under separate British rule, introduced the Uniform Naturalization Laws based on *jus soli* or five years of residence.[611] The remainder of the Peninsula was made up of the Unfederated Malay States, which were British Protected States, but which had no formal nationality law.[612] As a result, Malaysia would enter the post-colonial period with the urgent need for a single, unifying status for its population, but with great ethnic and political challenges as to who would qualify for that status.

Several decades after these laws were passed on Peninsular Malaysia, the British passed a nationality law in North Borneo, the North Borneo Ordinance No. 1 of 1931.[613] Nationality at birth was granted to,

> (a)ny person born within the State of North Borneo unless and until he proves that at the time of his birth he possessed under the law of some other State the nationality of such State, and…Any person born out of the State of North Borneo whose father was a citizen of the State at the time of that person's birth and either was born within the State or was a person to whom a certificate of naturalization had been granted under the provisions of this

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[607] Andaya, 207.

[608] Ko Swan Sik, (ed.) *Nationality and International Law in Asian Perspective* (Martinus Nijhoff 1990) 33-34 (hereinafter Ko Swan Sik).

[609] V. Sinnadurai, 'Nationality and International Law in Asian Perspective' in Ko Swan Sik, (ed.) *Nationality and International Law in Asian Perspective* (Martinus Nijhoff 1990) 312 (hereinafter Sinnadurai).

[610] Andaya, 243.

[611] Sinnadurai ,313.

[612] H. Ting, 'Malaysian history textbooks and the discourse of ketuanan Melayu' in Daniel Goh, Matilda Gabrielpillai, Philip Holden, Gaik Cheng Khoo, *Race and Multiculturalism in Malaysia and Singapore* (Routledge 2009) 42 (hereinafter Ting).

[613] Fransman, 697.

> Ordinance, and…Any person born on board a ship registered in the State of North Borneo unless and until he proves at the time of his birth he possessed under the law of some other State the nationality of such State.[614]

Under this law, everyone born in North Borneo automatically acquired the nationality of British North Borneo. When North Borneo became a Crown Colony in July 1946, following three years of Japanese occupation, this nationality was automatically converted to British Subject status. According to the North Borneo Cession in Council of 1946,

> all persons who on the fifteenth day of July, 1946, are citizens of the State of North Borneo by virtue of the provisions of the North Borneo Naturalisation Ordinance, 1931, shall, on that day become British subjects.[615]

Unlike in Kuwait, the inhabitants of North Borneo entered the decolonization period with British subject status which later converted to Citizen of the UK and Colonies (CUKC) status.[616] But the reality of implementation meant that few inhabitants of the Borneo colonies received documents or any official acknowledgement of their status.[617] The British had only begun issuing identity cards in Malaya in 1948, a process continued by the Malaysian government after independence.[618] The short period between Japanese occupation and political independence left no time for the proper registration of the population. While the passage of these laws meant that on paper, the CUKCs of North Borneo should have been automatically converted to Malaysian nationals at the creation of Malaysia's nationality law, the lack of registration of North Borneo's population during the colonial period meant that these laws were not implemented, with serious consequences at decolonization.

Meanwhile, the territories that would become Malaysia were preparing for independence and a large amount of attention was devoted to the vexing question of a uniform Malaysian nationality. The British pushed for a uniform nationality law for all of their former colonies that would apply to all groups including the immigrant Chinese and Indian populations who had been brought to the region as workers, as well as indigenous, non-Malay groups, like the Bajau populations living in what was now Sabah.[619] But the Sultans worried about Chinese dominance on the peninsula, while the question of Malay dominance would remain a concern in the Borneo states. The tension created over the inclusion of non-Malay

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[614] Fransman, 697.

[615] The North Borneo Succession Order in Council 1946, Buckingham Palace, the Tenth day of July, 1946.

[617] Fransman, 141.

[617] Fransman, 141.

[618] T. Mathews, 'Is Malaysia's Mykad the 'One Card to Rule Them All'? The Urgent Need to Develop a Proper Legal Framework for The Protection of Personal Information in Malaysia' 28 *Melbourne University Law Review* 474 (2004) 474.

[619] Clark and Pietsch, 161. See also L. Hong Hai, 103; Ting, 42.

populations would greatly influence both Malaysia's nationality laws and their implementation. Meanwhile, the lack of registration, particularly of rural and ocean-dwelling communities in Borneo, would leave the status of those communities open to question. While discussions about Malaysian nationality were ongoing between the British and the Sultans both on the Peninsula and in Borneo, nomads were left entirely out of these discussions.

Nationality in French Soudan

Postage stamp from the Soudan Français

Unlike for the majority of Bedouin in Kuwait and Sama Dilaut in Borneo, the registration and enfranchisement of the Tuareg began during the colonial period as the French moved towards establishing nationality and registering the population in their colonies, including French Soudan, the territory now called Mali.[620] The French would develop tiers of membership in the French Empire. But the French system suffered from arbitrary adjudication that left nationality and the issuance of identification documents up to the whims of individual administrators and a pernicious vagueness in the law that left critical categorizations open to interpretation and manipulation.[621] The application of nationality to many French colonies would never be properly implemented among nomadic groups like the Tuareg.

Meanwhile, as in Borneo, despite an attempt at registration in colonies like French Soudan, many Africans living in French territory ended colonial rule as French nationals under the law, but the lack of registration, or *état civil*, meant that many of them could not access or

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[620] C. Coquery-Vidrovitch, 'Nationalité et citoyenneté en Afrique occidentale français : Originaires et citoyens dans le Sénégal colonial,' 42 *The Journal of African History* 285 (2001) 286 (hereinafter Coquery-Vidrovitch).

[621] Coquery-Vidrovitch, 287.

prove their nationality. This became most true for persons living in so-called "remote" areas away from the centralized bureaucracy created by French administrators and, in particular, many Tuareg. As colonization moved towards decolonization, issues in French Soudan like borders, exclusive sovereignty, nationality and the role of nationalism would preoccupy both colonial and post-colonial governments, influencing how nationality was applied.

French nationality law developed into three separate systems, with one nationality law applicable in France, one in certain privileged colonies such as Algeria and cities in Senegal, and one in the rest of France's colonies. This system of tiers somewhat resembled the British system, which distinguished between British subject status and BPP status. France's first codified nationality laws were the Civil Code of 1804, during the post-revolutionary period, and the Napoleonic Code, which established French nationality by *jus sanguinis*.[622] Nationality in France had developed based on the concept of the *citoyen* holding important civil rights like voting, but this status was not extended to indigenous persons in the colonies.[623] A redraft of French nationality law in 1851, partly to resolve the cases of statelessness that were arising out of the previous laws, introduced the principle of double-birth whereby a person is French if born of a father himself born in France.[624] Double-birth provided nationality to the descendants of immigrants.[625] The government benefited from the unity created by the idea of a common French homeland and common, uniform nationality in France. Nationality in the colonies, however, continued to develop along a separate track.

Despite the supposed universality of *citoyenneté* the French created a system of tiered nationality, distinguishing between the holders of so-called "active" and "passive" nationality.[626] By the 20th century, however, the fact of limited civic rights in the colonies came increasingly into conflict with the ideals of the revolutionary period and the supposed universal nature of the *citoyen*.[627] Belonging in the colonies, including French Sudan, went through a drastic series of changes, culminating in the granting of French nationality to all.

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[622] P. Lagarde, *La nationalité français* (Dalloz 2011) 41 (hereinafter Lagarde). See also Maury 30, 86-87; Weil 12, 37; D. McGovney, 'French Nationality Laws Imposing Nationality at Birth,' 5 *Am. J. of Int'l L.* 325, 329; Jault-Seseke, 95; De Groot and Vonk, 9.

[623] P. Decheix, « Le Code de la nationalité Malienne » 697 Penant 300 (1963) 301. See also Maury, 15; Courbe, 23.

[624] McGovney, 334. See also Legarde, 50; Maury, 87. Weil, 12, 60. French nationality law went through a series of revisions, most particularly in 1880, 1889 and 1927, when efforts were made to unify and simplify the nationality code, but retained the basic principles of jus sanguinis and double-birth and continued to exclude indigenous persons in the colonies. During the Vichy period during WWII, there was an increase in government control of nationality in line with the increase in xenophobia in France, including denationalization of the Jews.

[625] Weil, 60, 211.

[626] Cooper, 14. See also Weil, 14; de Groot and Vonk, 9.

[627] Jault-Seseke, 28-29.

At the heart of the conflict over identity in the French Empire was the lack of clarity over whether or not the colonies were to remain separate nations, distinct from France, with their own nationalities, or if the ultimate goal of French colonization was the incorporation of the colonies into a type of "greater France."[628] Colonial nationality law would reflect this tension throughout the colonial period.[629]

By about 1890, the inhabitants of French Soudan, the territories that are now Mali, were technically under the jurisdiction of France as French subjects, not as citizens.[630] French Soudan was governed as a protectorate,[631] but the French administrators welded an enormous level of control over the local population, including the Tuareg. *Haut Sénégal* was established as a protectorate in 1887 by a treaty between representatives of France and certain chiefs. *Haut Sénégal,* after many territorial changes, was later separated from Niger and renamed *Soudan Français*.[632]

In 1833, the rights that attached to the French Civil Code had been granted to some French colonies, including certain cities in Senegal,[633] but not to others. By 1905, however, the French government officially abandoned the goal of assimilating colonized peoples and adopted instead the policy of "association," whereby the majority of French colonies would be part of the Empire, but not granted the same rights as Metropole France, or even the departments of Algeria.[634] "Association" was a form of indirect rule that in theory allowed colonies to maintain their pre-existing local government structures and rules of belonging and membership, including adherence to Islamic law.[635] In reality, however, the French made all the important decisions in Africa regarding land use, government, the economy and military. Only personal relations like marriage and inheritance were governed by local law, including Islamic law. This was also true in French Soudan. What the policy of association really accomplished was to keep most Africans excluded from the rights associated with French citizenship, such as voting.

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[628] Coquery-Vidrovitch, 285. The debate over association versus assimilation dominated the French colonial period. For a summary, see Cooper, 15.

[629] Coquery-Vidrovitch, 285. See also Foltz, 10; Chipman, 56; Cooper, 7.

[630] Decheix, 300.

[631] France, Décret du 18 avril 1890, 350 JORF (1890). See also Decheix, 300.

[632] Decheix, 300.

[633] Coquery-Vidrovitch, 288.

[634] Territorial France was defined as the *metropole,* Algeria, and departments of the *outre-mer.* Jault-Seseke, 101. See also Chipman, 57; Foltz ,11. The *metropole* refers to French territories in Europe that had been centrally controlled by Paris since the mid-1500s.

[635] Cooper, x.

Importantly, some colonies had access to French nationality. The French created a system of tiers of belonging based mainly on location.

> The French by the end of 1945 had developed 6 distinct layers of sovereignty: 1) the metropole (European France), 2. Algeria, with Muslim non-nationals and non-Muslim nationals, 3. older colonies in the Caribbean and Senegal with a kind of French nationality, where slavery had been abolished in 1848, and new colonies in French Africa and the pacific islands, where most people were merely subjects.[636]

After World War One, France was accorded certain Mandate Territories and Protectorates and retained many of her other colonies. Under this sprawling and complex system, most of the inhabitants of French overseas departments and Algeria could not vote and were not officially French citizens, but were nevertheless considered to be French nationals.[637] Meanwhile, the inhabitants of other French colonies like the French Soudan had few rights of any kind[638] and the French Civil Code did not apply to them as *les indigènes*.[639] In 1887 and 1928, decrees reaffirmed that indigenous persons in the colonies were excluded from French nationality.[640]

In 1912, however, the French government introduced laws by which certain persons in the colonies could become naturalized French citizens.[641] According to Coquery-Vidrovitch, an expert on French nationality law in the colonies, at this moment France had established a system that drew a distinction between French citizenship and French nationality.[642] Naturalization took two forms, naturalization as a change of nationality and *accession à la nationalité*, for persons without another nationality. The Decree of 5 November 1928

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[636] Cooper, 21. See also Foltz, 73.

[637] For example, the Algerian descendants of ethnically French immigrants, or *colons* as they were called, were granted full rights and representation in government and paid lower taxes, while persons of Arab descent in Algeria did not. Maury, 90.

[638] Jault-Seseke, 102.

[639] Maury, 15. The Civil Code of 1804 did not contain specific provisions for the colonies and subsequent codes did not adequately address the issue. The colonial period was marked by confusion and disagreement over the status of colonized populations in the Empire. For example, the Decree of 7 February 1897 in Art. 17 explicitly stated that "nothing was changed" in regards to the nationality of indigenous people in the colonies. This article is usually interpreted to mean that indigenous persons were not covered by French nationality law.

[640] Decheix, 301.

[641] Coquery-Vidrovitch, 289.

[642] Coquery-Vidrovitch, 290.

reaffirmed that French nationality law was not applicable to indigenous persons in the colonies who lived in colonies like French Soudan, unless the person was naturalized.[643]

Colonized peoples were subject to forced labour, fines and punishments, often with recourse only to poorly implemented customary courts despite their lack of clear status, as the French government retained sovereignty over them and their territories. During this period, the French set up special courts or separate administrative bodies to deal with indigenous affairs. Personal status, such as it was, was regulated not by French nationality law, but by special laws and decrees, including the *Code de l'Indigénat*, which subjected indigenous people to forced labour and arbitrary punishment by special courts.[644] Importantly, the term *indigène* was never defined. The *indigénes* were not subject to the French Civil Code, but rather to local law or custom, including Islamic law.[645] Africans were banned from politics[646] and under the jurisdiction of a French administrator.[647] French courts were for French nationals, primarily of European descent, and other immigrants and the adjudication of criminal offenses affecting the peace. All other matters were treated by customary law by local leaders, though African courts were subject to colonial oversight.[648]

Though there was an elected legislative body representing the colonies, *Le Conseil Supérieur des Colonies*, it represented only French nationals in the colonies, French nationals with holdings or businesses in the colonies, and those few Africans with French nationality or citizenship.[649] As a result (with a few exceptions) there was almost no African participation in government until after World War II.[650] Those Africans who were French nationals or holders of French citizenship, many of whom lived in Senegal, were called *les évolués* and were mostly African notables and urban, educated elites.[651] While some Africans in certain territories were citizens while also being exempt from the French

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[643] Décret du 5 novembre 1928, Fixant, sauf en ce qui concerne les indigènes, les conditions de jouissance des droits civils d'acquisition, de perte, et de recouvrement de la qualité de français dans les colonies autres que la Guadeloupe, la Martinique et la Réunion*, J.O.R.F.* du 15 novembre 1928. See also Decheix, 301.

[644] Maury, 91.

[645] African Commission, para 54.

[646] Stewart, 20.

[647] Cooper, 7.

[648] Young, 6. See also B. Kamian, « La dynamique des intégrations, de la période coloniale à nos jours » in L. Moudileno, *Les États-nations face à l'intégration régionale en Afrique de l'Ouest - Le cas du Mali* (Karthala 2007) 64.

[649] Foltz, 18.

[650] Foltz, 20.

[651] Foltz, 18-20. See also Cooper, 6. Africans could become French nationals by performing extraordinary duties for the French state or by become professionally accredited under the French system, for example, the medical system. Zatzepine, 8; Cooper, 28; Coquery-Vidrovitch, 295.

Civil Code, most had to abandon other forms of law, such as Islamic law, and adopt French marriage and inheritance law under the Civil Code in order to qualify for nationality.[652]

According to Coquery-Vidrovitch, naturalizations were deliberately difficult to obtain and arbitrary, as the law vested great powers in the whims of colonial administrators to decide when an African person had achieved mastery of the French language, or to what extent that person had good morals.[653] In the 1940s in French West Africa, (*Afrique occidentale française - AOF*), out of a total population of fifteen million people, there were 15,000 Europeans with full French citizenship, but only 5,000 Africans.[654] In French Soudan, the number of naturalized French citizens or persons who had achieved French nationality between 1946 and 1949 was only four.[655]

Throughout this period, the *état civil* remained almost non-existent in most parts of Africa. As Ruth Dickens describes it:

> (r)egistration of births, marriages, and deaths on the *état civil* was so routine in France that metropolitan officials though it a perfectly reasonable expectation for the colonies.[656]

Though civil registration had been provided by law since the 1930s, prior to 1945, it had not been compulsory for the African population and few saw the need of it. Certain events, such as traditional marriages, were often seen as outside the scope of French administration and were not recorded. Only those few individuals holding French citizenship were required to register. In 1944, the French had made only about 100,000 entries in the *état civil* for indigenous persons in the AOF, mostly for births.

This system of tiers of nationality proved unsustainable, particularly given that many Africans had fought for France in two World Wars. In the early 1900s, the demand for African nationality with full citizenship rights in the French empire was considered to be revolutionary; by the 1950s it had begun to look inevitable.[657] Over the next few years, the French government and African notables like Léopold Sédar Senghor and Félix Houphouët-Boigny would attempt to bring greater representation to the colonies while keeping the

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[652] Coquery-Vidrovitch, 291. See also Cooper, 5, 16-18; Chipman, 57. Numerous differences also existed between the rights of nationals in Algeria and the departments like Guadeloupe, Martinique or Reunion and citizens in the Metropole, including the fact that the principle of "double-birth" did not apply in the departments, even though the departments were considered to be part of France. Décret du 7 février 1897, referenced in Jault-Seseke, 102. See also Maury, 87-90; Weil, 225-227.

[653] Coquery-Vidrovitch, 293. For example, Coquery-Vidrovitch points to at least one case where an African family was allowed to naturalize despite being in a polygamous union. Coquery-Vidrovitch, 291.

[654] Cooper, 27, 46; Chipman, 88.

[655] Coquery-Vidrovitch, 300.

[656] R. Dickens, *Defining French Citizenship Policy in West Africa* (doctoral thesis, Emory U. 2001) 255.

[657] Chipman, 59, 72. See also Young, 7; Cooper, 7.

relationship with France intact.[658] The process of enfranchisement in the AOF came in stages: in the period before 1945, the vast majority of Africans were French subjects but not nationals; 1946-1955 was the period of the application of the 1946 Constitution and the creation of the French Union with limited voting rights for many Africans; 1956 and after saw the implementation of the *Loi Cadre* granting universal suffrage, though not necessarily equal representation, and the creation of the French Community, a type of federation, and 1958-1962 was the transition to full independence.[659]

After WWII, the French attempted to expand nationality status throughout the Empire.[660] Despite these attempts at what Coquery-Vidrovitch calls "imperial nationality," however, confusion over the status of different colonized peoples would plague the French government until colonial independence and would influence the ways in which nationality was applied during decolonization.[661] Beginning with the Brazzaville Conference in 1944, this process eventually produced a new Constitution in 1946 creating the French Union,[662] but the Constitution only passed because the issue of nationality in the colonies was left somewhat vague.[663] The *Loi Lamine Guèye* of 1946, named after a prominent African politician, gave universal suffrage and French citizenship, in theory, to all the *ressortissants* of France's overseas colonies.[664] The group to whom this law would apply was not clear as the term *ressortissant* may refer to citizens, nationals or inhabitants depending on the context.

The 1946 Constitution would be used as the basis for the nationality law of many of the newly independent colonial states. Under it, all subjects of the French empire now automatically had French nationality, but the question of who qualified as a subject was not answered by the law.[665] The Constitution read:

> Tous les ressortissants des territoires d'outre-mer ont la qualité de citoyen, au même titre que les nationaux français de la métropole ou des territoires d'outre-

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[658] Lecocq, Desert, 2002, 32-33.

[659] K. Panter-Brick, 'Independence, French Style' in Gifford and Louis, *Decolonization and African Independence* (Yale 1988), 75. See also Lecocq, Desert, 2002, 32.

[660] Cooper, 7, 14. Cooper cites the example of the struggle for nationality in the West Indies. See also Decheix, 300.

[661] Coquery-Vidrovitch, 293. See also Cooper, xi. African Commission, para 54; Legarde, 50; Maury, 31.

[662] French Constitution of 27 October 1946. See also Boilley, Les Touaregs, 1999 272; Cooper, 9-12, 27, 40, 86, 91-93; Chipman, 82, 88, 92-97; C. Diarrah, *Vers La IIIe République Du Mali* (L'Harmattan 1991) 26; Foltz, 22; Hal,l 273.

[663] Coquery-Vidrovitch, 293.

[664] Loi n° 46-940 du 7 mai 1946, tendant à proclamer citoyens tous les ressortissants des territoires d'outre-mer. See also Coquery-Vidrovitch, 292.

[665] Lagarde, 43. See also Coquery-Vidrovitch, 296.

> mer. Des lois particulières établiront les conditions dans lesquelles ils exercent leurs droits de citoyens. (All '*ressortissants*' (nationals) of the overseas territories have the quality of a citizen on the same basis as French citizens of the metropole or of the overseas territories. Specific laws will establish the conditions under which they will exercise their rights as citizens.)[666]

It was not clear under the Constitution who qualified as a *ressortissant*. This term is usually translated as "national," or sometimes "subject," depending on the context, but here, it is not clear if the law was meant to apply to all persons who had French nationality or all persons under French jurisdiction, regardless of whether or not they had received an official status. It is not likely to have meant all inhabitants or residents, leaving the status of those persons somewhat unclear. It is also not clear what was meant by having the quality of a citizen as opposed to simply being a citizen.

Article 82 allowed Africans to exercise some of their rights without adopting French Civil Code, but the Constitution did not resolve the issue of how polygamous marriages or other conflicts between the French civil code and local practices were to be treated by French institutions.[667] The Constitution also limited the political rights of African citizens. It split the French General Assembly into two bodies, the double college, with Africans able to vote only for the second, consultative body. As a result, the Constitution inserted more vagueness into a system of laws that already suffered from excessive vagueness.

The new Constitution did accomplish some things, including immediately voiding discriminatory legislation for the *indigènes* in the colonies, as this class of people no longer existed.[668] Nevertheless, the structural problems with the Union became apparent almost immediately. The French government faced the monumental task of registering millions of new nationals under the *état civil*, each living under different local systems of government with different customary practices.[669] The French had realized they urgently required an *état civil indigène*, but there was not time to register persons before the next election.[670] The first elections reflected the limited electorate. In French Soudan from 1945-1957, writer and influential politician Fily Dabo Sissoko and his *Parti Progressiste Soudanais* (PSP) represented French Soudan on a traditional, conservative and pro-French platform, also showing the dominance of non-Tuareg politicians at that time.[671] France's colonies in

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[666] French Constitution of 27 October 1946 Art. 80 (my translation). Cooper 21, 121. See also African Commission, para 57; Coquery-Vidrovitch, 297.

[667] Constitution, Art. 82. See also Cooper 8-9, 121, 163; Coquery-Vidrovitch, 303; Dickens, 383.

[668] Cooper, 123-125, 134, 163.

[669] Cooper, 130.

[670] Dickens, 255. See also Foltz, 17, 22-23; Cooper, 28, 33, 61, 137.

[671] Diarrah, 27. See also Gaudio, 1988, 95.

Africa were being split between a francophone, urban elite and the rural population, which included many nomads, who remained unregistered and unable to vote.

Eventually, the French Union proved unsustainable and the Empire moved inexorably towards decolonization.[672] This period was dominated by a confusing series of laws that attempted to identify persons who qualified for French nationality and expand their civil rights. Article 81 of the Constitution states:

> All French nationals (*nationaux français*) and nationals/subjects (*les ressortissants)* of the French Union have the quality of citizenship of the French Union.

It is clear that the French government meant to expand citizenship beyond the narrow class of persons who had previously been so defined but the grounds on which one qualifies as a *ressortissant* under the law remained extremely vague. Would a nomadic family who only spent a few months out of the year in French territory qualify as a *ressortissant* of France? Once again, it is not clear what was meant by having "the quality of citizenship." Meanwhile, the voting rights of Africans continued to be difficult to enforce, due to poor registration and the dismal state of the *état civil,* particularly in so-called remote areas where the Tuareg lived.[673]

A new law also cemented the individual colonies as separate territories with their primary ties to France, rather than federated with each other.[674] In Cooper's view, this was the beginning of the separation of West Africa into separate states.[675] Léopold Sédar Senghor lamented what he called the "balkanization" of Africa[676] and the ability of some persons to cross internal borders that typified the colonial period began to come to an end. Africans accustomed to move easily between colonies now found themselves facing international borders.[677] Perhaps no group would be more affected by the so-called balkanization of Africa than the Tuareg.

Changes to France's nationality laws in the colonies came rapidly in the 1950s. The decree of 1953 applied a single status to all French nationals regardless of their previous status as citizens or nationals by extending the application of the French Code of Nationality to the

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[672] Diarrah, 28. See also Cooper, 75-80.

[673] Lecocq, Desert, 2002, 42.

[674] Loi n. 56-619 du 23 juin 1956 autorisant le gouvernement à mettre en œuvre les réformes et à prendre les mesures propres à assurer l'évolution des territoires relevant du ministère de la France d'outre-mer (Arrêté de promulgation n° 1059 APA du 10 août 1957). See also Chipman, 100; Diarrah, 26, 30; Gaudio, 1988, 98; Cooper, 215.

[675] Cooper, 215.

[676] Quoted in Cooper, 279.

[677] Cooper, 74, 333-338, 352.

outre-mer, simplifying the confusing rules under the 1946 Constitution.[678] Once again, the exact population to whom this law applied remained vague due to the lack of civil registration in many parts of the *outre-mer*. In 1956, the *Loi-Cadre Defferre,* named for French politician Gaston Defferre, created a new administrative structure that devolved more authority to the colonies, elected by universal suffrage. Finally, after much politicking by all sides, the French Constitution of 1958 created the French Community, which granted limited independence to the colonies in a federated system.[679] According to most French jurists, there was now only one nationality, that of the Community.[680]

But questions remained both over the content of Community nationality and over its territorial scope. Some African leaders saw French nationality operating for Africans' relations external to their states, but a sort of local, common *patrie*, as Senghor put it, for internal matters, particularly social and cultural matters.[681] As well, it was not clear how Community nationality should be determined for those who had never qualified for, or received, a status of any kind before. Ultimately, the French Community failed to solve the issues of nationality and belonging for Africans, just as the Union had failed.[682] Nevertheless, the move towards greater autonomy was well received in Africa among those who could vote. In French Soudan, over 800,000 people voted in the referendum for the Constitution, with an overwhelming vote in favour of the creation of the Community.[683]

In the struggle to register people and issue identity documents, the same issues came up again and again, among them polygamy, Islamic customary law and discrimination against women, reflecting the difficulties in registering people to vote without universal application of a Civil Code.[684] As well, registration was left up to local administrators and varied widely by region.[685] The lack of clarity around who qualified as a national, given that huge numbers of people had no official status at all prior to 1946, remained a serious

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[678] Décret n° 53-161 du 24 février 1953 déterminant les modalités d'application du code de la nationalité française dans les territoires d'outre-mer, 50 *J. O.R. F*. 1984 (27 Fév. 1953). See also Decheix, 301.

[679] Constitution de la Ve République, du 28 septembre 1958, promulguée par le président de la République le 4 octobre. French Soudan entered this period as part of a federation with Sénégal. Cooper, 284-306, 325. See also Diarrah, 32; Decheix, 301.

[680] "The 1958 Constitution stated that there was only one nationality of the Community. According to most French jurists, the colonies did not have their own nationality, only French nationality." Cooper 306-311, 349. See also African Commission, para 58.

[681] Cooper, 349.

[682] Cooper, 363-368.

[683] Diarrah, 33. See also Cooper, 316, 321, 324. Guinea, alone in West Africa, voted no, leading to its full independence.

[684] Cooper, 270-273.

[685] Some French officials tried to get around the issue of registration by arguing that voting itself should be used as proof of nationality, but this approach was not employed on the ground. Cooper, 155.

problem. The French government began to focus on one particular aspect of nationality registration: voter registration. The efforts to register voters give a window into the challenges of issuing nationality documents to all eligible people in France's African colonies. In particular, voting records clearly demonstrate that many Tuareg had received French nationality and were now voting, while many others likely remained unregistered. In 2018, the International Criminal Court prepared a report on documentation in Mali, finding:

> The civil status registration was introduced in Mali by the French colonial administration in the late 19th century and beginning 20th century. During that period, the registration and documentation system was *generally poor and access was limited to large cities*. There was a lack of means and of verification/control by the civil registry officers as well.[686]

Despite the slow start and continuing problems with voter registration, voting greatly increased in the AOF during the 1950s, particularly after the *Loi Cadre*.[687] Voting was limited, however, by the lack of registration and failure to issue civil documents.[688] Registration remained up to the whims of local administrators and many people lacked the necessary documents.

How did these developments in access to nationality and voting in the French Soudan affect the Tuareg? Despite the momentous changes taking place in French Soudan and in West Africa more generally, northern Soudan and the Tuareg remained largely uninvolved, though there is evidence that many Tuareg were registered and participated in elections.[689]

As the above sections have shown, the territorial organization of the AOF meant that it was far easier for sedentary farmers to register, as they were organized in cantons and districts headed by a *chef de canton* or district chief, while pastoralists were organized into non-

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[686] International Criminal Court, Annex I: Public Registry's Report on Proof of Identity Documents Available in Mali and Transmission of Proposed Application Forms for Rule 85(b) RPE Victims and Groups of Victims, No. ICC-01/12-01/18 18 May 2018 (my italics).

[687] Cooper, 139, 236. See also Foltz, 24. In the first election of 1946, 800,000 people registered out of an approximate population of 15 million. In 1951, 3 million had registered, and by 1956, 6 million had registered. Following the *Loi Cadre* in 1956, ten million people registered to vote in the AOF, over half the population. Actual voting also increased. In the January 1956 elections for the Assembly National, before the *Loi Cadre*, 3.3 million people in West Africa voted out of the 6 million who were registered. In the first elections after the *Loi Cadre* passed, for territorial assemblies in March 1957, 4.8 million voted out of the ten million who registered. Africans had gained nationality and they were exercising their rights. A broader African electorate brought a new group of more radical African politicians to the National Assembly, like Soudanese socialist Modibo Keïta.

[688] Cooper, 61-62.

[689] Foltz, 119.

territorial family groups or fractions subjected to a separate taxation system.[690] This system of separate administration allowed for a more hands-off approach to the nomadic population, but meant that it was harder for nomads to access registration and obtain documents. Registration was more common in urban and coastal areas, becoming less common in the interior and away from towns in areas like the Sahel. The preferences for an urban, francophone elite, particularly in coastal cities, meant that registration and voting came to disfavour rural and nomadic populations like the Tuareg, who became increasingly marginalized and excluded from political participation during the late colonial period.

Pierre Boilley provides extensive information on the voting patterns of the Tuareg during this critical period. Voter registration in the French Soudan increased from one million to two million between 1958 and 1959, even in the northern Kidal province. But voter turnout among the Tuareg in Soudan's first elections was low,[691] and the rate of participation in elections by the nomadic population, Tuareg and Arab, decreased as time went on.[692] 1956 was the year of the *Loi Cadre* and the setting up of a more representative government in the colonies, a watershed year for elections in French Africa, but the Tuareg mostly sat it out.[693] In 1958, during the vote that created the French Community, more than 90% of the nomadic population in Adagh abstained from voting in a decline from earlier elections.[694] Nomad political participation therefore declined right at the moment when African participation overall was increasing. While more research is needed, it is likely that a lack of participation in voting was closely related to a lack of registration. Nevertheless, it is important to note that some Tuareg were registered and did vote during this period. Clearly, some Tuareg had begun to exercise their nationality rights.

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[690] Leonhardt, 9.

[691] Boilley, Les Touaregs, 1999, 272, 279. See also Benetti, 53-54.

[692] In the 1946 election, only persons considered to be sedentary and of sufficient note in the community, such as persons in the French administration and shop owners, were eligible to vote, amounting to less than 1% of the total population. By 1951, the number of nomads registered to vote had increased to 4,599, and the number of sedentary voters to 287. This represented about 29% of the total sedentary population and 33% of the nomadic population. While the number of sedentary voters would continue to increase with time, this was to be the high point of Tuareg participation. By 1956, Tuareg participation in elections had fallen off sharply, with only 28 persons voting out of those registered as nomadic, or less than .6% of the voters in northern Soudan.

Boilley takes this as evidence that by this point the Tuareg had become "totally disinterested" in colony-wide political life in the Soudan. The most complete numbers on Tuareg voting in northern Soudan come from Pierre Boilley's book on the Kel Adagh Tuareg in Kidal. The French kept records of voting in northern Soudan, dividing the electorate into sedentary voters, including sedentary Tuareg, Songhai and others, and nomadic voters, including Tuareg and Arabs. Boilley, Les Touaregs, 276. Lack of interest in voting was not limited to the Tuareg in Soudan. Féral reports that the nomads in Agadez in Niger were similarly uninvolved in the elections. Féral, 110.

[693] Boilley, Les Touaregs, 1999, 278.

[694] Diarrah, 33, 35. See also Boilley, Les Touaregs, 277-280.

If the rest of West Africa was slowly beginning to vote, why did turnout among the Tuareg decrease? Low turnout among Tuareg voters was due to a number of factors, including ongoing problems with the *état civil* and registration in remote areas, as well as lack of awareness among the Tuareg of the importance of both voting and registration.[695] The French did not make an effort to bring voting to the nomadic Tuareg; polling stations were located in distant cities and registration was done by residence in an administrative region.[696] But perhaps most importantly, the Tuareg arguably did not feel a sense of common purpose with the rest of the Soudan, a point made by Foltz in his book on the period.[697] The French made no effort to create a common national identity in French Soudan, in fact, they had administrated the nomadic Tuareg separately and under military rule.[698]

Yet it is important to note that the colonial system had made civil registration a fraught experience for the Tuareg, who were divided by borders, transformed into a minority in the colonies, and discouraged from registration. Colonial registration for the Tuareg had usually meant unfair taxation, forced schooling and coercive settlement policies. Under such circumstances, this dissertation does adopts the view that the Tuareg did not so much reject civic participation, but were rather placed by the French administration in an impossible situation with only bad options.

Registration was done mostly for the sedentary population. According to the governor of French Soudan; "such tasks (registration)...could be accomplished only for the sedentary part of his population, step by step, and at high cost."[699] Boilley argues as well that the nomads in Kidal felt that the political options presented to them under the French Community were unpalatable and favoured the sedentary population.[700] Lecocq argues that the Tuareg were initially very interested in voting, but were only interested in voting for French, Tuareg and Arab candidates, distrusting the other candidates.[701] As a result of all of these factors, French nationality was mostly granted to the settled, urban population and voting was oriented towards these groups.

But even though political participation by the Tuareg in the French Community was low, some Tuareg were registering and voting nonetheless and, importantly, the French began appointing Tuareg into key posts in the military, police and administration as part of

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[695] Cooper, 132.

[696] Boilley, Les Touaregs, 1999, 280.

[697] Foltz ,94.

[698] Keller, 'The State, Public Policy and the Mediation of Ethnic Conflict in Africa' in D. Rothchild and V. A Olorunsola (eds.) *State Versus Ethnic Claims: African Policy Dilemmas* (Routledge 1983) 251.

[699] Cooper, 154, quoting the Governor.

[700] Boilley, Les Touaregs, 1999, 277-278.

[701] Lecocq, Desert, 2002, 43, 45, 47.

Africanization.[702] All this would change with independence, when hostility between the new government and the Tuareg would break out into armed conflict. According to Lecocq, for many Tuareg, colonization merely continued during the formation of Mali.[703]

Conclusion

> Territory, both socially and legally, is not to be regarded as an empty plot: territory...connotes population, ethnic groupings loyalty patters, national aspirations, a part of humanity, or, if one is tolerant of the metaphor, an organism.[704]

This section explored how nationality was applied, or not applied, to colonized peoples in the Sheikdom of Kuwait, French Soudan and North Borneo. While many colonized peoples received no nationality status during the colonial period, some nomads did obtain a nationality, while others were eligible for BPP status that did not grant the same rights as other nationality statuses and others may have been registered by colonial administrations, but not as nationals.[705] As a result, nomads entered decolonization with a patchwork of different types of status.

It is no accident that nationality as an area of law developed in tandem with colonial expansion, a time when European empires were scrambling to claim territory both in Europe and abroad. Nationality came to reflect a territorial conception of the world, where place of birth, long-term residence and historic ties to land were prioritized over other, non-territorial relationships and attachments. Place of birth and habitual residence became crucial to determining status under the colonial system, but colonial sovereignty remained fuzzy in the border zones where many nomads lived.

But while residence and place of birth became increasingly crucial to determining status during the colonial period, a lack of civil registration left the matter of individual cases, particularly in border regions, left the question of nationality for many nomads up for debate. There were particular problems with the vagueness of key terms like *ressortissant* and habitual residence in the colonial context. Even for laws based on place of birth, where the category of eligible persons was clearer cut, the lack of civil registration created a significant gap. While rural villagers might rely on a presumption of birth and residence in a particular place, nomads could not necessarily establish such a presumption.

Under the British system, Kuwait and North Borneo were Protected states and, in the case of North Borneo, a Crown Colony. As protectorates, nationality was determined by local rulers, but with much input from the British. Under this system, the determination of belonging and membership was taken away from nomadic leaders. In the case of Kuwait,

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[702] Lecocq, Desert, 2002, 170.

[703] Lecocq, Desert, 2002, 104-105.

[704] Brownlie, Principles, 658.

[705] Crawford, 264.

the British established a relationship with the Emir in Kuwait Town and, as a result, the power to determine nationality largely vested in the hands of the Al-Sabah family. In North Borneo, the British were preoccupied by unifying their Malay colonies. The inhabitants of North Borneo were eligible under the law for nationality, at least on paper, towards the close of the British colonial period, but a severe lack of civil registration meant that this nationality was not applied. In both cases, the British had also created British Protected Person (BPP) status, which granted a type of non-nationality, personal status to some persons without actually granting nationality itself.

The French government created multiple tiers of nationality in the colonies, differentiating between active and passive nationals. Nationality heavily favoured persons in urban areas and near the coast, particularly those who adopted French culture and civil law. In French Soudan, holders of French subject status were eventually transformed into nationals through a long and complex process that favoured settled persons living in urban areas.

Just as importantly, the colonial period imposed a worldview on post-colonial states that would deeply affect nomad-state relations. The colonial period created tiers of membership, with some persons receiving more rights than others.[706] It favoured settled and urban peoples. Finally, colonization entrenched the nation-state system in colonized regions, bringing hard borders and zones of exclusive sovereignty, which required exclusive nationality. These changes would hit nomads very hard. In all three locations, the lack of fixed borders, particularly within colonies, made the application of concepts like residence, *ressortissant* and even place of birth very difficult to apply.

As a result, while urban and settled communities benefited from increased access to documents, registration and even some rights as nationals of empire, nomads were often completely excluded from these developments. While this may have appeared as quasi-independence at the time, in reality, state systems were growing up around nomads without their participation or input. As European-style states began to develop in urban and coastal areas, nomads were often not included in this system, or came to reject it as irrelevant or even harmful to their way of life. This mis-match, the mis-match between nomadism and the needs and requirements of the nation-state system, would only worsen during decolonization.

Once crucial point seen in all three examples is that under systems of indirect rule, Europeans often signed agreements and imbued with administrative authority local leaders with little regard to the complex political systems existing on the ground. Often,

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[706] "The modern concept of nationality... is primarily related to power over territory." De Groot and Vonk, 7, 18. See also Bloom, Members, 2017, 157; Bader, 1; Van Panhuys, 32; J. Salmond, 'Citizenship and Allegiance' 18 LQR 49, 274, 278 (1902). Lesser forms of national status should not be confused with other, supplemental forms of status, such as federal citizenship or EU citizenship. Lauterpacht, vol. 3, 11.

In the later cases, the individual holds multiple types of status. Brownlie, Principles, 397. Lesser forms of nationality were a common tactic used during the 19th century to avoid giving full nationality rights to the inhabitants of colonized territories. See for example L. Kerber, 'Toward a History of Statelessness' 57 *American Quarterly* 727 (2005) 734, for a discussion of lesser forms of nationality used by the United States.

nomadic rulers were overlooked in favour of settled, urban rulers. These leaders then became the governments of post-colonial states and the arbitrators of nationality policy. This fact can be seen in Kuwait, with the elevation of the Al-Sabah family over Bedouin leaders of interior tribes. It can also be seen in the privileging of non-Tuareg leaders in Mali and the Malay kingdoms in Malaysia. While some groups, like the Tuareg, pushed for a reconsideration of colonial borders and state authority at decolonization, these efforts were mostly ignored. Colonialism therefore created a shift of power away from nomad leaders and into the hands of urban elites. This shift would have an enormous effect on the status of nomads at decolonization and beyond.

2.2 Nationality Law and Nomads During Decolonization

Introduction

> It can sometimes be difficult for theorists in the liberal tradition to examine citizenship divorced from the mythology of emancipation surrounding its development…The new forms of political membership in France, for example, have been described as born of nationality, blood, family and land, and so in direct rejection of serfdom. The Indigenous peoples discussed here did not share this history.[707]

The proceeding section, above, identified the origins of a bias against nomads that formed during the colonial period. It also explored how this bias created a mismatch between the requirements to establish nationality, including civil registration and habitual residence, and the practice of nomadism. This bias would place nomads at a severe disadvantage in establishing their nationality in three important ways. First, it meant that the nomads who survived the colonial period were often divided by fuzzy and disputed borders and lived in zones of disputed sovereignty. Second, nomads were often cast as the source of disputed sovereignty, labelled as criminals and problems. Third, nomads were often administered separately under military, rather than civilian, rule and their nationality status was decided by laws and procedures written by urban outsiders, rather than nomad leaders.

The policies of colonialism towards nomads would mostly be continued and enlarged upon by post-colonial governments in Kuwait, Mali and Malaysia. But the process of state formation and the development and implementation of nationality would take centre stage during decolonization as weak colonial structures became post-colonial states. Meanwhile, colonial nationality was extinguished and, in theory, replaced by post-colonial nationality. Yet the roll-over of nationality that should have occurred was hampered by poor civil registration, discrimination against minority groups and a lack of attention paid to the problem of statelessness by the international community, post-colonial states and former colonial powers.

This section will look at how the nationality regimes established during colonization were continued, altered and expanded during decolonization. This section begins as a work of legal analysis, charting the changes and developments made to the nationality laws in Kuwait, Mali and Malaysia and the ways in which these laws were applied to nomads by the administrative state through civil registration.

This section will also look at the context surrounding the enactment of nationality laws in Kuwait, Mali and Malaysia and how these laws were applied, or not applied, to nomads. As UNHCR explains in the Handbook on the Protection of Stateless Persons, it is important to look at "not just legislation but also...practice" when analysing the creation of

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[707] Bloom, Members, 2017, 161.

statelessness.[708] The UNHCR Handbook goes on to say, "a state may not in practice follow the letter of the law, even going so far as to ignore its substance."[709] This section will look therefore not only at nationality laws, but also at how they were implemented, both in the immediate post-colonial period and in the decades following.

An analysis of how states applied nationality to nomads, however, cannot be fully understood without the larger context of the decolonization period. In many ways, for nomads, decolonization would simply mark a continuation and worsening of their exclusion. This section will next look at how concerns over identity, immigration and state control of territory and natural resources influenced the development and implementation of nationality laws in the three new states, particularly in relation to nomads. Finally, this section will end with a summary of the current status of nomads as nationals, stateless persons or persons of undetermined nationality in their states.

Nomads and Nationality during Decolonization

Decolonization, a long process sometimes taking decades, was sometimes begun by treaty and these treaties often contained provisions on nationality.[710] While each former colony went through a slightly different process, in the former British Protectorates and Protected States, a Royal Proclamation or Order in Council usually stipulated nationality provisions which were mirrored in the Constitutions of many of the new states.[711]

Post-colonial states like Kuwait, Mali and Malaysia adopted laws based on principles of European nationality law described above. As this section will discuss, statelessness may result from both deliberately discriminatory nationality laws, but also from the discriminatory application of facially neutral nationality laws, which employed fuzzy concepts where nomads were concerned, easing the path of discriminatory treatment, and from the widespread lack of civil registration, which made transitional laws impossible to apply.[712] One important question in many post-colonial states was the extent to which colonial-era nationality, such as it was, should roll-over into post-colonial nationality. To solve this problem, many states drafted transitional laws based on residence and birth in the territory of the state[713] to establish what this dissertation will call the state's "first body of nationals."

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[708] Handbook, 2014, 12.

[709] Handbook, 2014, 13.

[710] Weis, 153.

[711] Weis, 153.

[712] R. Razali, R. Nordin and T., 'Migration and Statelessness: Turning the Spotlight on Malaysia' 23 Pertanika *J. Soc. Sci. and Hum.* 19 (2015) 22-23, 28-29. See also Fripp, 2016, 320. In some cases, such discrimination may amount to persecution. Handbook 2014 5; Van Waas, Nationality, 2008 20.

[713] Donner, 278-280. See also Brubaker, 278.

But concepts like *ressortissant,* "habitual resident" and "domicile" were ill defined under colonization and hard to apply in border areas and zones of fuzzy or disputed sovereignty.[714] This was particularly true for nomads, who frequently found themselves in border zones and whose migrations made concepts like habitual residence hard to apply. While nationality laws were enacted based on supposedly hard borders and robust civil registration, the reality for many nomads was quite different.[715] The lack of civil registration during the colonial period meant that post-colonial states had to accomplish large-scale registration exercises in these zones, yet it was difficult to register nomads or prove they qualified under nationality laws. As Conklin puts it,

> members of nomadic and travelling groups generally lack fixed addresses, which are needed to qualify for nationality documentation.[716]

As well, colonial-era anti-nomad policies had often blamed nomads for the problem of unclear borders and fuzzy sovereignty. Nomads were perceived as having ties to multiple states, loyal only to their tribes and lacking the exclusive allegiance needed for nationality. Arendt highlighted the particular vulnerability to statelessness of peoples who are perceived as lacking fixed ties to any country.[717]

This section will also explore the increasing important of documents, something that was mostly unimportant during the pre-colonial period and of middling importance to nomads during the colonial period. The post-colonial period would see an explosion in the importance of ID. Passports, ID cards, and birth certificate are all relatively recent inventions, dating to the 19th and 20th centuries, yet they have quickly become vital in the post-colonial period to proving nationality, legitimacy and belonging.[718]

Finally, this section will also highlight how the international community and the former colonial powers mostly ignored the problem of statelessness at decolonization, with catastrophic results. Even as the problem of statelessness came to be viewed with increasing seriousness in Europe, few decolonized states ratified the Convention on the Reduction of Statelessness of 1961. Article 10 provides that no one should become stateless as a result of a transfer of territory, which is highly relevant to the status of nomads at

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[714] Jault-Seseke notes that the term domicile continues to be difficult to define and "the evaluation of domicile has fluctuated." Jault-Seseke, 111.

[715] Bloom, Members, 2017, 160. See generally Koessler.

[716] Conklin, 124.

[717] Arendt, 1976, 289. Border populations during decolonization often ended up stateless. For an example, see Thai villagers who ended up in Burma after the separation of the two countries in 1893, but who now live in Thailand. Bangkok Post, 'Stateless Fight for their Thai Identity' 19 March 2016 at http://www.bangkokpost.com/news/special-reports/903200/stateless-fight-for-their-thai-identity (Accessed July 2020).

[718] The international passport system, for example, came into being after World War I. Weis, 223; Maury, 18-19.

decolonization,[719] yet statelessness was extremely low on the decolonization agenda. The extent to which the ratification of this treaty might have provided a solution to nomad statelessness at the time will be discussed at greater length in Part 3, below.

The next sections will explore the decolonization period, looking at the nationality of the Bedouin in Kuwait, the Tuareg Mali and the Sama Dilaut Malaysia as transitional nationality laws were enacted and rolled out, then replaced by permanent nationality laws. It was during this critical period that many nomads became stateless.

[719] UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, 175, Article 10 (hereinafter Convention on the Reduction of Statelessness).

The Bedouin Under Kuwait's Nationality Law

> Statelessness in the MENA (Middle East and North Africa) can be seen to have initially arisen following the creation of the modern states in the region.[720]

This section will discuss nationality during the creation of Kuwait's "first body of nationals" and the drafting of Kuwait's nationality law. Many stateless people in Kuwait, labelled the *bidoon jinsiya,* or those without status, can trace their family history back to a Bedouin grandparent or great-grandparent who, for reasons explored in this section, remained unregistered during the crucial post-colonial period.[721] As this section will show, the failure to register many Bedouin at decolonization opened the door to later statelessness.[722]

Kuwaiti independence was achieved by the termination of the protectorate agreement by the Kuwaiti Emir and Britain over a number of years ending in 1961.[723] One of the Kuwaiti government's first tasks was to draft a nationality law in 1959.[724] This law drew on previous decrees, discussed above, and was influenced by the western concepts of nationality and sovereignty. The law also incorporated descent from a Kuwaiti father, a core principle of belonging under Islamic law.

> Original Kuwaiti nationals are those persons who were settled in Kuwait prior to 1920 and who maintained their normal residence there until the date of the publication of this Law. Ancestral residence shall be deemed complementary to the period of residence of descendants. A person is

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[720] Z. Al Barazi and J. Tucker, 'Challenging the disunity of statelessness in the Middle East and North Africa' in T. Bloom (ed.) *Understanding Statelessness* (Routledge 2017) 87.

[721] See for example the applicant in Refugee Appeal No. 74467, No. 74467, New Zealand: Refugee Status Appeals Authority, 1 September 2004:

"The appellant is a single man aged 22 years. His parents and eight younger siblings remain living in Kuwait. He and his family are bidoons meaning 'without nationality'. His grandparents, he believes, and their forebears were desert-dwelling bedouins who moved with their flocks of sheep within the area between Jahra and Al-Ahmadi some 50 kilometres south of Kuwait city. He understands from his father that his grandparents had a permanent house – the location of which he is uncertain – though they would move with their sheep during springtime, living in their tents. They sold their sheep in Kuwait City. His parents, from the time of their marriage, have lived a settled life in the city though his father has always traded in sheep."

[722] Across the Middle East, registration exercises after colonial independence often created stateless populations by failing to register certain groups, or purposefully excluding them. Manby, Legal, 324.

[723] Crawford, 319. See also Casey, 21.

[724] Fransman, 185.

> deemed to have maintained his normal residence in Kuwait even if he resides in a foreign country if he has the intention of returning to Kuwait.[725]

The law adopted a clearly territorial approach. The law was considerably more restrictive than the 1948 decree, removing belonging based on religion and ethnicity. It got rid of the provision allowing the children of Muslim and Arab fathers born in Kuwait to be Kuwaiti nationals, centring Kuwaiti nationality even further around territoriality, rather than religion and ethnicity. It instead elevated settlement in Kuwait at the time of the Battle of Jahra (1920) to be a key determinant of Kuwaiti belonging.[726] Under this law, the defence of Jahra and Kuwait Town from so-called Bedouin invaders was made central to Kuwaiti nationality. Most of the Hathar population clearly qualified as original Kuwaitis under the law.[727] Tribal politics, however, would continue to play a role in Kuwaiti naturalization, as will be discussed, below.

The increasing reliance on residence to determine Kuwaiti nationality was widely accepted at the time as a way to avoid statelessness. Weis, speaking of the example of Burma, states that by using residence, "statelessness is thus normally avoided although cases of statelessness have occurred..."[728] In Kuwait, however, many persons became stateless as a result of gaps in this process of determining the first body of nationals because (1) serious gaps in civil registration in Kuwait meant that only a very few inhabitants of the colonies had ever obtained identity documents to prove their residence, (2) the power to determine nationality had been centralized under the authority of the Emir who did not regard some Bedouin clans in Kuwait as his allies and (3) the vague concept of residence and the fuzzy nature of Kuwait's borders meant that determining who qualified under the transitional law was an arbitrary process rife with discrimination. This was particularly true of the Bedouin.

The older system of clan and family alliances that determined belonging in Kuwait before 1962 would come into play in how the new nationality law was implemented, however. This is because while Kuwait's nationality law appeared neutral on its face, in reality it was vague when applied to the Bedouin. It would also play a large role in the process of naturalization, a process which would occur in stages over the next decade. Because the law was vague when it came to the Bedouin because it was not clear what it meant to be 'settled' in the Bedouin context, this opened the door for discrimination. It is important to note the significance of the Battle of Jahra for some Bedouin, who were now framed as attackers of Kuwait, rather than as nationals. Beaugrand argues that Kuwait's nationality

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[725] 1959 Nationality Law of Kuwait, art. 1 (translation on Refworld). See also Beaugrand, Stateless, 2018, 2; Ismael, 188.

[726] Lund-Johansen, 24.

[727] Al-Nakib, 11-12.

[728] Weis, 153. He goes on to mention Uganda.

law has led to a nationality system that is based more on "networks of proximity" than the provisions in the law.[729]

Registration would be crucial for Bedouin attempting to prove Kuwaiti nationality under this vague, territorial law. As a result, the committees tasked with registering the population had enormous discretion to determine which Bedouin should qualify, leaving room for considerations of clan and family alliances that were not written into the law, but were suggested by the focus on the date 1920. Beaugrand highlights what she calls the "hyper-localized" process by which the committees made their decisions.[730]

Because the law appeared neutral on its face and complied with European norms, it did not trigger the sort of push-back that might have occurred had Kuwait adopted strictly tribal criteria in determining its first body of nationals. As the above sections explored, predicating nationality on settlement was not considered to be discriminatory under European law, but rather a natural expression of state formation. The idea that Kuwait's law was inherently discriminatory against the Bedouin seems to not have been raised at all at the time, though more research is needed.

To register Kuwaitis during the post-colonial, transitional period, the government created committees to asses who qualified under the law. The process, however, was very biased. Even when evidence of nationality was produced by Bedouin, it was often ignored.[731] Some Bedouin with documents showing, for example, that they owned property in what was now Kuwait were often prevented from registering.[732] As well, the work of these committees, based in Kuwait City, was probably unknown to many Bedouin.

Many more Bedouin likely did not have any documentation to prove that they owned land in what was now Kuwait.[733] It was not clear what other forms of documentation might be used to prove residence. Beaugrand notes the committees often had "almost no documentary records to prove settlement before 1920" and sometimes may have discounted oral testimony.[734] Most committees were based in urban areas[735] and, as with Mali, registration was often performed by members of the urban population. Beaugrand notes that "(s)imilarity of culture, traditions, appearance, dialect and costume" may have

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[729] Beaugrand, Stateless, 2018, 75.

[730] Beaugrand, Stateless, 2018, 81-82.

[731] Beaugrand, Transnationalism, 2010, 124-125.

[732] Beaugrand, Transnationalism, 2010, 124. See also Lund-Johansen, 25, where she calls the process "arbitrary." See also Al-Nakib, 12.

[733] Al-Nakib, 12.

[734] Beaugrand, Stateless, 2018, 83-84.

[735] Beaugrand, Stateless, 2018, 83.

confused committees trying to determine the legitimacy of Bedouin claims.[736] Failure to register the Bedouin was therefore likely a mixture of deliberate exclusion, ignorance and the total mismatch between Bedouin forms of belonging, discussed above, and the paper-based, territorial system introduced during colonization.

The registration of the Bedouin was also complicated by the location of the border. The division of nomad lands had left many clans divided between what were now separate nation states, giving further cause for the Kuwaiti government to exclude them as non-residents. No mechanism was put in place during decolonization to force adjacent states like Kuwait and Saudi Arabia to negotiate to find a solution for the nationality of cross-border populations. In this way, the lack of compatibility between nomadism and the requirements of territorial nationality allowed for rampant discrimination, despite the law appearing neutral on its face.

More research on the process of registering the Bedouin during this crucial period is needed to fully understand this process, but it is clear that a system based on settlement and habitual residence and reliant on documentation was not helpful for Bedouin attempting to establish Kuwaiti nationality. As well, a long history of problems between the Bedouin and the British administration left many Bedouin with lacklustre views about participating in registration activities. Some Bedouin may have seen no need for official Kuwaiti nationality, though the Bedouin point of view of this registration process is somewhat lacking.[737] Once again, the perspectives of the Bedouin are lacking. It is possible that some Bedouin misunderstood the importance of the decisions being made by the Kuwaiti government regarding their nationality status, or what these decisions would mean for their children and grandchildren.

As one descendant of a Bedouin family explained;

> The appellant believes his paternal grandfather would have applied for citizenship under the 1959 Citizenship Law. However, as there was a limited period in which to do so and the grandfather was an illiterate nomad, possibly with little appreciation of the significance of such legal requirements, he cannot be certain of the actual situation.[738]

In short, the registration process favoured the urban population, those with documentation, those who owned land or had settled, and those with family connections or who came from certain tribes.

In Kuwait, however, lacking a nationality did not mean the Bedouin were to remain unregistered. Quite to the contrary. Between 1960 and 1987, Bedouin in Kuwait who had

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[736] Beaugrand, Transnationalism, 2010, 83.

[737] Gilbert, Nomadic ,2014, 161. See also Country Information and Guidance: Kuwaiti Bidoon, Home Office, UK, 3 Feb 2014.

[738] Refugee Appeal No. 74467, No. 74467, New Zealand: Refugee Status Appeals Authority, (1 September 2004).

no nationality papers from another country were issued identity documents with the official status of *bidoon jinsiyya*, or "without nationality" under a special administrative process.[739] Importantly, this status did not fall under Kuwait's nationality law, but was instead an administrative designation. The registration process for issuing these documents, those establishing *bidoon* status, appears to have been a great deal more successful than the registration of nationality and many former Bedouin, now frequently settled in shanty towns near urban areas, receiving these documents. The next section will explore in greater detail the settlement of the Bedouin and how their settlement interacted with their nationality status.

The decades following the enactment of Kuwait's nationality law would see a steady tightening in registration procedures. In 1965, the government made issuance of a birth certificate compulsory, meaning that it became almost impossible to avoid the *bidoon* designation.[740] Bedouin children were now issued birth certificates certifying their birth in Kuwait and, if applicable, their *bidoon* status. These documents would become their only form of identification.[741] Meanwhile, in 1965, Kuwait conducted a census, but some *bidoon* were excluded and, as a result, missed out on an opportunity to prove their ties to Kuwait by showing birth or residence in Kuwait's territory.[742]

According to Beaugrand, however, some *bidoon* were registered in the census, though this has not resulted in their recognition as nationals.[743] Nevertheless, registration as part of a census may be key to establishing nationality for some *bidoon* in the future. For the most part, however, these registration processes began the transformation of the unregistered population of now-settled Bedouin into the *bidoon,* as people received identity documents establishing not their nationality, but their statelessness.

Until the 1970s, the government of Kuwait was not overly concerned with the non-naturalized Bedouin living in shanty towns outside of urban areas. They were mostly outside Kuwait City and, where employed, were usually used as low-level members of the military, police force, and as border guards or guards at the oil fields. As government jobs became increasingly restricted to naturalized persons, the *bidoon* population was increasingly restricted to the informal employment sector. In keeping with the creation of tiers of nationality that had been so central to the colonial period, the Kuwaiti government did not make all Bedouin *bidoon*. Bedouin fighters from certain tribes continued to serve in the Kuwaiti military and, increasingly, as guards in the oil fields. The next two decades would see a steady erosion in the rights and status of the *bidoon*.

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[739] Longva, Citizenship, 187. See also Al-Nakib, 12.

[740] Beaugrand, Stateless, 2018, 88.

[741] Beaugrand, Transnationalism, 2010, 129.

[742] Amnesty International 'The Withouts of Kuwait: Nationality for Stateless Bidun Now' (September 16, 2013).

[743] Beaugrand, Stateless, 2018, 199.

During the 1960s, the Emir and his advisers decided to "naturalize" a certain number of Bedouin from friendly tribes. Naturalization was done on an ad-hoc basis, making it a type of extra-legal process with no appeals process or judicial review.[744] The selected Bedouin received naturalization (*bi-l-tajannus*) by decree, as opposed to the status of "Kuwaitis at birth" (*bi-l-asl*) under the nationality law.[745] There was no question that naturalization was inferior to being an "original" Kuwaiti, a fact which would perpetuate the idea that Bedouin were not really Kuwaiti in some fundamental way. Naturalized citizens could not vote for 15 years, they could not pass on their nationality to their children, and naturalization could be revoked by the government at any time.[746] For the government, selecting which Bedouin to make Kuwaiti nationals was a delicate decision, highly political at the time, and remaining so today.[747] The political, cultural and historical factors that influenced the implementation of this law will be discussed in the next section.

In 1965, the process of registering as an "original Kuwaiti" was closed.[748] As a result, naturalization became the key process by which Bedouin in Kuwait could obtain a nationality. In 1968, the government passed a law that all police officers had to be nationals, shutting out all *bidoon* who did not have a Kuwaiti birth certificate.[749] In 1969, the committee in charge of registrations was dismantled and registration would now occur on an ad-hoc basis. At the same time, the rules for naturalization became more and more restrictive; the law was amended seven times adding additional restrictions.[750]

In 1974, the government created a new police college that would not admit *bidoon* except on a case by case basis. One of the few avenues for employment for *bidoon* was quickly closing.[751] Many only had birth certificates but no other documentation.[752] As the *bidoon* did not in any way agitate for greater representation, this status quo suited the government. As a result of these factors, holders of the status of *bidoon* have transformed

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[744] Beaugrand, Stateless, 2010, 84.

[745] Partrick, 56-57. See also Ismael, 118-119; Longva, Autocracy, 121.

[746] Parolin, 97. Kuwait was not the only Gulf state to employ tiers of nationality. For example, Qatar created two tiers of nationality with native citizens and naturalized persons with fewer rights. Partrick, 55-56. The creation of classes such as *bidoon,* or those with no nationality, and *ajam* (which means persian), which has become synonymous with naturalized nationals, has become the norm in Gulf States.

[747] Longva, Citizenship, 188.

[748] Lund-Johansen, 26.

[749] J. Crystal, 'Public Order and Authority: Policing Kuwait' in P. Dresch and J. Piscatori (eds.) *Monarchies and Nations: Globalisation and Identity in the Arab States of the Gulf* (Tauris 2005), 176 (hereinafter Crystal).

[750] Longva, Autocracy, 121. See also Longva, Citizenship, 185.

[751] Crystal, 176.

[752] Commins, 122, 185.

into a separate, distinct community, no longer primarily identified by their nomadic past, but rather by their outsider status.

The naturalization program came to an end in 1980. Any families who had not been included would now remain without a nationality.[753] Also in 1980, a rarely used provision providing nationality to children who would otherwise be stateless was removed, ending the only protection against statelessness in Kuwaiti law. This provision had only benefited a small handful of people, but it coincided with the gradual reduction in *bidoon* rights.[754] Two new classifications were introduced into Kuwaiti law: that of "non-Kuwaitis" and that of "undetermined nationality."[755] In 1981, naturalization was limited to Muslims.[756] This legacy of increasingly exclusionary laws would lead to the creation of a permanently stateless population of former Bedouin and, in much smaller numbers, migrants, living on the margins of Kuwaiti society.

In the 1980s, the toleration of the *bidoon* in Kuwait began to change. The regional security situation and the constant threat Kuwait was under from its larger neighbours began to rival the problem of internal power balances. As was described above, many *bidoon* in Kuwait had long standing connections and loyalties to Saudi Arabia, Iraq and even Syria and Jordan, but perhaps more importantly, were perceived as having these connections.[757] In fact, these ties were part of the reason some Bedouin tribes had been excluded from naturalization in the first place. Yet now, the failure of the Kuwaiti government to regularize the status of its *bidoon* population had become a security threat. Meanwhile, the question of the status of the *bidoon* became increasingly political as activists agitated for change.

By 1985, during the Iran-Iraq war, the government declared all *bidoon* illegal residents, cutting them off from all legal employment, schooling and welfare.[758] The government expelled all remaining *bidoon* from the police force and military.[759] As Beaugrand puts it, "the fact that the *biduns* stemmed from tribes, stretching into Iraq, that included both Sunnis and Shiites...made the government particularly worried..."[760] Thousands of bidoon

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[753] Longva, Autocracy, 122.

[754] Beaugrand, Transnationalism, 2010, 128.

[755] C. Beaugrand, 'Framing Nationality in the Migratory Context: The Elusive Category of Biduns in Kuwait' (Author's Manuscript) 6 Middle East Law and Governance 1 (2014) 10.

[756] Longva, Autocracy, 121.

[757] U. Fabietti, 'Facing Change in Arabia: The Bedouin Community and the Notion of Development' in Chatty (ed.) *Nomadic Societies in the Middle East and North Africa: Entering the 21st Century* (Brill 2006) 573. See also Janzen 3 (discussing similar views of Bedouin in Oman).

[758] Lund-Johansen, 32. See also Beaugrand, Stateless, 2018, 124-125.

[759] Crystal, 176. See also Lund-Johansen, 2, 32.

[760] Beaugrand, Stateless, 2018, 120.

were fired from their jobs in the army and oil fields. When *bidoon* attempted to apply for naturalization, the Minister of the Interior stated that "90%" of *bidoon* applicants were lying about qualifying. The government would sometimes deport individual bidoon by dropping them off at the Iraqi border, evoking the Alien Residence Act.[761] In 1986, the government restricted *bidoon* access to passports, then made it a federal offense not to have a passport. Hostility against naturalization for the *bidoon* now rivals that of the hostility against naturalizing immigrants.[762]

The role of documentation and its power to legitimize, or de-legitimize, nationality claims cannot be understated in the case of the *bidoon.*[763] Kuwait has issued security cards granting five years of residence to registered *bidoon*, but though these cards prevent deportation, they require that the individual state a "true nationality," such as Saudi Arabia. Most *bidoon* refuse to do so as this can lead to being branded as a foreigner for the purposes of gaining birth certificates and other documents.[764] The government has even, allegedly, taken to issuing fake foreign passports to *bidoon*.[765] Recently, the Kuwaiti government has begun issuing all *bidoon* with a "security ID" dividing *bidoons* into those considered to be security risks and those who may have their nationality status reviewed at some unspecified point in the future.[766]

Kuwait has not ratified the Statelessness Conventions, but in 1993 it set up a procedure for the adjudication of cases of statelessness called the Central Committee.[767] This Committee has decreased the *bidoon* population by about half, mostly through deportation to Iraq.[768] Some *bidoon* have been granted residency, while others have been given documents which label them as foreign. Meanwhile, the Kuwaiti government has recently proposed a solution for the *bidoon* to purchase a nationality for the *bidoon* in the Comoros or Sudan.[769]

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[761] Crystal, 178. See also Refugees International, 'Without Citizenship, Statelessness, Discrimination and Repression in Kuwait' (2012).

[762] Partrick, 57.

[763] Crystal ,174-175.

[764] Human Rights Watch, 'Prisoners of the Past, Kuwaiti Bidun and the Burden of Statelessness' (13 June 2011). See also Refugees International, 'Without Citizenship, Statelessness, Discrimination and Repression in Kuwait' (2012); Beaugrand, Transnationalism, 2010, 149.

[765] Refugees International, 'Without Citizenship, Statelessness, Discrimination and Repression in Kuwait' (2012).

[766] Lund-Johansen, 45-46.

[767] Beaugrand, Stateless, 2018,, 127.

[768] Beaugrand, Stateless, 2018, 130.

[769] 'Are Sudanese passports the Bidoons' solution?' *Al Jazeera* (11 March 2018) at https://www.aljazeera.com/news/2018/03/sudanese-passports-bidoons-solution-180311153502061.html (Accessed July 2020).

As this section has shown, many *bidoon* missed the window of registration following the enactment of Kuwait's nationality law because they were not able to prove residence in Kuwait before the 1920 Battle of Jahra. Those who were not granted naturalization were subsequently locked out of a nationality by *jus sanguinis*. There is evidence of widespread discrimination against certain Bedouin tribes, combined with a lack of clarity by what is meant by "residence" for the Bedouin population at the time of decolonization. Below, this dissertation will explore the political and social forces that drove Kuwait's increasingly restrictive nationality laws and the exclusion of some Bedouin tribes. The next section, however, will look at Mali's nationality law and how it was applied to the Tuareg.

The Tuareg Under Mali's Nationality Law

> The Committee wishes to particularly stress the risk of becoming stateless for unregistered children of nomadic indigenous parents who frequently move across the borders of different countries.[770]

In 1960, French Soudan, renamed Mali, became fully independent under the socialist Modibo Keïta.[771] Mali became independent by proclamation.[772] Nationality was not transferred by treaty provisions in Mali,[773] but were instead set by a transitional law.[774] Like in Kuwait, decolonization and the drafting of nationality laws took place over a relatively short period of time. Malian nationality law was heavily influenced by French nationality law.[775] This section will explore how Mali's nationality laws developed and were applied, or not applied, to the Tuareg. As the above section showed, many Tuareg entered the decolonization period as nationals of French Soudan. Yet, as this section will discuss, this nationality did not roll over into Malian nationality. In particular, this section will show how Mali's law came to contain powerful protections against statelessness, including the principle of double birth, where some children born in Mali to non-nationals also born in Mali are eligible for nationality. Yet, as this section will discuss, the law has not protected the Tuareg from statelessness.

Unlike in Kuwait, most West Africans entered decolonization as nationals of France, at least on paper, but due to the weakness of the French *état civil,* most did not have proof of nationality. As well, the laws on the *état civil* had not been applied equally to all Africans, so while many urban and coastal groups had registered and begun voting, some rural populations, including many Tuareg, had not. All *ressortissants* of French Soudan were now eligible to become Malian nationals under the transitional laws. But this meant that even

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[770] African Committee of Experts on the Rights and Welfare of the Child, 'General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child' ACERWC/GC/02 (2014) adopted by the Committee at its twenty-third Ordinary Session (07 - 16 April, 2014) 6, 29-30.

[771] Diarrah, 37. See also Gaudio, 1988, 107; Crawford, 330. It should be noted that for 2 months in 1960, Mali was to be part of a Federation with what would become Senegal. The Federation dissolved in August of 1960 under the Constitutional Law of 4 June. See also Decheix, 302.

[772] Loi n. 60-14 du 20 juin 1960 « proclamant solennellement l'indépendance nationale de la fédération du Mali » *Journal Officiel de la Fédération du Mali* (22 juin 1960) 383.

[773] Donner, 281.

[774] Ordonnance n. 55 du 24 novembre 1960 « relative à l'attribution de la nationalité malienne à tous les ressortissants de la République du Mali » *Journal Officiel de la République du Mali* (*J.O.R.M.*) 15 décembre 1960 p.986. Decheix, 302.

[775] As Christophe Wondji puts it, "the first generations (of African leaders) were...inspired by the principles and the methods of the European political philosophy," including the philosophy of nationality and national belonging. C. Wondji, *Symbolismes Culturels Traditionnels et Indépendances Africaines* (Institut d'histoire du temps présent 1990) 1.

where registration been carried out, it was not clear who would qualify in border areas or amongst nomadic and mobile populations, leaving the door open, as in Kuwait, to discrimination.

Mali's nationality law adopted many principles from French law, including the principle of double birth, by which qualifying children born in Mali to parents who were themselves born in Mali were automatically attributed nationality.[776] Nevertheless, it was not possible to automatically transfer French nationality to Malian nationality without a major registration program by the state. Even for those certain classes of nationals under colonial-era laws who qualified for automatic transfer under the transitional laws,[777] registration in Tuareg areas was interrupted almost before it began by civil war. As stated above, many Tuareg leaders entered the decolonization process intent on political independence. Yet, despite the push by some Tuareg nobles and French politicians to create a *Sahara Français*, many African governments supported existing borders during decolonization under the doctrine of *uti possidetis*.[778] The political situation would come to a head shortly after colonial independence, all but preventing large scale civil registration in Tuareg areas.

One of the first tasks of the Malian government was to replace French Community nationality with Malian nationality.[779] Drafting a nationality law would be a critical part of defining Mali's "first body of nationals" and who would now be the nationals of foreign states, including ones with close ties to Mali, such as Senegal. As the African Commission put it, states at independence had to determine who would make up their "human capital" and who would not.[780] Temporary provisions to create Mali's first body of nationals were passed in 1960.[781] Article 1 of the temporary Ordinance stated that all *ressortissants* of Mali

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[776] Ordonnance n. 55 du 24 novembre 1960 « relative à l'attribution de la nationalité malienne à tous les ressortissants de la République du Mali » *Journal Officiel de la République du Mali* (*J.O.R.M.)* (15 Décembre 1960) 986.

[777] Ordonnance n. 55 du 24 novembre 1960 « relative à l'attribution de la nationalité malienne à tous les ressortissants de la République du Mali » *Journal Officiel de la République du Mali* (*J.O.R.M*.) (15 Décembre 1960) 986. Provisions in French law for retaining French nationality may be found in Loi n. 60-752 du 28 juillet 1960 « portant modification de certaines dispositions du code de la nationalité ».

[778] See for example Organization of African Unity, Resolution 16(1) (1964). See also Shaw, Boundaries, 1997, 478.

[779] African Commission, 96-97.

[780] African Commission, para 96. See also Diarrah, 86. See also Young, 5.

[781] Ordonnance n. 55 du 24 novembre 1960 « relative à l'attribution de la nationalité malienne à tous les ressortissants de la République du Mali » *Journal Officiel de la République du Mali* (*J.O.R.M.)* (15 Décembre 1960) 986. Zatzepine, 20.

were now Malian nationals,[782] excepting French citizens and those with "French civil status," meaning those who had opted into the French civil code, and their spouses and descendants.[783] It was not clear, however, what it meant to be a *ressortissant* of Mali, a country that had only begun to exist months before and had been originally conceived of as being in a federation with Senegal. Article 1 of the Ordinance went on to state that the exact class of people to whom Article 1 would apply would be determined by a future law based on descent or place of birth.

The law then went on to automatically grant Malian nationality to various specific classes of persons holding French colonial nationality, unless Malian nationality was refused.[784] Qualifying persons included those holding French nationality under various colonial-era laws, including under the Constitution of 1946. The law also covered the holders of French nationality from the four *communes* in Senegal. The status of many other in Mali, however, remained somewhat unclear.[785] Finally, under this Ordinance, the Malian government could grant nationality to individuals who had been residents in Mali for two years. The term "resident" was not clearly defined.

Registration should have been the process by which the Tuareg would be sorted into Malian Tuareg and foreign Tuareg. Those Tuareg who held a nationality in French Soudan should have received Malian nationality automatically, but Mali failed to put into place a widespread civil registration process. The authorities in charge of what was now northern Mali had been elevated by the French administrative system and were often not Tuareg themselves. The centralization of the administrative state, with its focus on urban centres and the settled population, made registration difficult among the Tuareg, who had been used to separate administration by the French.

As Odinkalu puts it, "(t)he African political, educated and urban elite emerged as a new class ripe with economic and social mobility, while uneducated, rural peoples remained locked in extended postcolonial exclusion."[786] Many Tuareg families, used to weak French administrative structures and the relative lack of importance of internal colonial borders, were accustomed to migrating and traveling back and forth across what were now international borders, complicating the question of their residence. At the same time, registration and nationality were associated with oppressive French rule, and now, with rule from distant Bamako. Most importantly, however, Tuareg leaders found themselves targeted as enemies of the state due to fears over Tuareg separatism. The question of

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[782] Ordonnance n. 55 du 24 novembre 1960 « relative à l'attribution de la nationalité malienne à tous les ressortissants de la République du Mali » *Journal Officiel de la République du Mali* (*J.O.R.M.)* (15 Décembre 1960) 986.

[783] Loi n. 60-752 du 28 juillet 1960 portant modification de certaines dispositions du code de la nationalité (28 juillet 1960). See also Weis, 154; Decheix, 302.

[784] Donner, 281.

[785] Decheix, 303.

[786] Odinkalu, 113. See also Heater, 133.

Tuareg nationality would soon become subsumed into the larger question of Tuareg political independence.

Mali enacted a permanent nationality code in 1962.[787] It was updated in 1995 and replaced by the *Code des Personnes et de la Famille* in 2011.[788] Article 68 of the 1962 Code contained the following transitional provision:

> (a)ll persons resident in Mali at the time of the enactment of the nationality code are presumed nationals of Mali unless proven otherwise. Nationality certificates should not be issued unless residence can be proven or local public officials such as the *chef d'arrondissement* attest that the individual has the *de facto* status of being Malian.[789]

Critically, the law relied heavily on the concept of residence, just as Kuwait's nationality law had done. Zatzepine argues that "residence" in article 68 meant habitual residence.[790] What this meant for nomadic Tuareg, however, was not clear. While many slaves and *haratin* had settled and been granted land during the colonial period, as discussed above in the section on the Tuareg in French Soudan, noble Tuareg remained largely nomadic and split across borders, greatly complicating the question of their residence and/or their treatment as nationals.

This presumption in favour of nationality is more liberal than the laws of some other African states though, in principle, the nationality laws of post-colonial Francophone Africa commonly favoured recognition of nationality for those who had always behaved as nationals and been accepted as nationals.[791] The Malian *Circulaire d'application n. 331* defines "possession of the state of being Malian" as anyone who is constantly considered to be Malian and was constantly treated as such by the authorities and public opinion.[792] It is not clear how this clause might have been interpreted in the case of the Tuareg.

It is important to note that the *chef d'arrondissement* had been a middle-level functionary under the French system and was often not Tuareg. The French administrative structure, centralized, urban and agricultural-focused, had now been adopted by the Malian

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[787] Code de la Nationalité Malienne Loi No. 6218 of 3 February 1962 as modified by the Loi No. 9570 of 25 August 1995 and replaced by the Loi 2011-087 of 30 December 2011. See also Cooper, 419.

[788] Code de la Nationalité Malienne Loi No. 6218 of 3 February 1962 as modified by the Loi No. 9570 of 25 August 1995 and replaced by the Loi 2011-087 of 30 December 2011.

[789] Code de la Nationalité Malienne Loi No. 6218 of 3 February 1962 as modified by the Loi No. 9570 of 25 August 1995 and replaced by the Loi 2011-087 of 30 December 2011. See also Cooper, 419 art. 68. See also Decheix, 309.

[790] Zatzepine, 20-21.

[791] B. Manby, 'Trends in Citizenship Law and Politics in Africa Since the Colonial Era' in E. Isin and P. Nyers (eds.), *Routledge Handbook of Global Citizenship Studies* (Routledge 2014) 174.

[792] Zatzepine, 21.

Constitution as the administrative system of Mali. While some functionaries in northern Mali were drawn from the local population, it was not uncommon for southerners to be sent to northern Mali as administrators. It is not at all clear to what extent the *chef d'arrondissement* was the proper authority to determine Tuareg residence.

As it was, the question of Tuareg registration would be all but forgotten in coming armed conflict over Tuareg independence. 1962 was the year that war broke out in northern Mali between the Tuareg and the government, the effects of which were devastating on every aspect of Tuareg life and which will be discussed at length below. It is likely that widescale registration for many nomadic Tuareg was never attempted.[793]

Meanwhile, Tuareg leaders who had received a nationality from the French were to be intensively persecuted by the Malian government during the civil war, rendering their nationality largely ineffective and preventing a transfer of nationality for many noble Tuareg. The government's concerns over separatism is reflected in Art. 43(bis) of the Malian nationality code, which provided for the denationalization by decree of "any Malian national serving in or helping a foreign army or foreign public service provided the host country is, with his help, engaged in hostilities against Mali."[794] The extent to which noble Tuareg were stripped of their French documents during the 1963 war is unknown and awaits further study.

Following the transitional provisions establishing Mali's first body of nationals, the new law adopted the principle of *jus sanguinis* and *double birth* for the future establishment of Malian nationality. Article 8 of the 1962 Code begins: "Malians are all persons born in Mali or abroad who...are legitimately born of a Malian father..."[795] The Malian Code contained several important exceptions to *jus sanguinis* that made the law more liberal than many nationality laws of the time,[796] including Kuwait or, as will be discussed below, Malaysia. For example, Article 12 of the Malian Code provided nationality to "natural or legitimate children born in Mali to a father or mother of African origin also born in Mali...;" limited double birth that would extend Malian nationality to any families of African origin who had not registered under the transitional provisions.[797]

According to Decheix, an expert on Mali's early nationality laws, the provision on double birth was retained over some objections because of questions over the nationality of

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[793] According to an interview with noted Mali specialist Arsène Brice Bado of the Centre de Recherche et d'Action pour la Paix (CERAP) in Abidjan, Cote d'Ivoire in fall 2018.

[794] My translation.

[795] Code de la Nationalité Malienne Loi No. 6218 of 3 February 1962, art. 8 (my translation).

[796] Zatzepine, 143.

[797] Code de Nationalité Malienne Loi No. 6218 of 3 February 1962, art. 12 (my translation). See also Decheix, 305; Zatzepine, 32. For more on Mali's nationality law, see H. Alexander, 'Report on Citizenship Law: Mali' (GlobalCit, European University Institute 2020.)

communities in border areas.[798] While racially discriminatory, this provision might have provided protection against statelessness for some border communities. Nevertheless, in addition to discriminating based on gender, the double *jus soli* provision granting nationality to children "of African origin" was clearly racially discriminatory in keeping with the pan-Africanism of the day.[799] This discrimination is not irrelevant to the Tuareg, who as the next section will explore, below, have often been labelled as white by Malian government officials and, as well, by members of their community.[800] As Lecocq notes, even "the name of the new republic reflected the dominance of its core populations: the Mande and Bambara."[801] African origin is not defined, leaving it vague and open to political interpretation.

While this dissertation could uncover no evidence of a Tuareg person being refused nationality because of this provision in the law, its inclusion shows the importance of race to the concept of being Malian. The concept of being of African origin, as opposed to being of foreign origin, would come to play a large role in the Malian government's general policies towards the Tuareg and may be seen as a reflection of their thinking of who belongs in the Malian state.[802] The issue of race would become a dominate feature of inclusion and exclusion in northern Mali in the decades following independence, as will be discussed at length below.

The 1962 law also contained several provisions specifically to prevent statelessness, provisions which remain in force today.[803] The law provided automatic nationality to children born to unknown parents (foundlings).[804] The law also allowed children born to foreigners to naturalize after five years under certain conditions.[805] As well, persons born in Mali who had their habitual residence in Mali may, at the time of their majority, have opted for Malian nationality.[806] As Decheix concluded, they were "modern law(s) conforming to the principles of international human rights law inspired by the profound

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[798] Decheix, 305.

[799] Decheix, 300. See also African Commission, paras. 110-113, 147.

[800] For a general exploration of the issue of race in northern Mali, see Hall. Cooper, 414.

[801] Lecocq, Desert, 2002, 73.

[802] Cooper, 419. See also Decheix ,305.

[803] The Code de la Nationalité Malienne Loi No. 6218 of 3 February 1962 as modified by the Loi No. 9570 of 25 August 1995 and replaced by the Loi 2011-087 of 30 December 2011. Also relevant are the Ordonnance No 02-062/P.RM of 7 June 2002 of the Code of the Protection of the Child, and the Loi No. 06-024 of 28 June 2006 on Civil Registration.

[804] Zatzepine, 54.

[805] The Code de la Nationalité Malienne Loi No. 6218 of 3 February 1962 as modified by the Loi No. 9570 of 25 August 1995 and replaced by the Loi 2011-087 of 30 December 2011, art. 27.

[806] Zatzepine, 56.

sentiments of the African and informed by the political concerns of the hour to realize the union of the continent."[807]

Following amendments in 1995,[808] the Malian government passed a new nationality code in 2011, the *Code des personnes et de la famille*.[809] Among other changes, the Code replaced the provision granting Malian nationality to children born to a parent "of African origin' with a provision granting Malian nationality to children born to a parent with nationality in another African country.[810] Arguably, this change, which occurred just prior to the renewed conflict between the Tuareg and the Malian government, discussed below, removed racially motivated language from Mali's nationality law and reflected an acknowledgement of the diversity of ethnicity that made up Mali, including the Tuareg. It replaced racial language with language based on nationality.

Under Malian law, the Certificate of Nationality is the foundation of Malian nationality documentation. The Malian Nationality code of 1962 dedicated three articles to the certificates of nationality and an entire title to the issue of adjudication.[811] As a matter of daily use, the identity card, the *Carte Nationale d'Identité (CNI),* issued pursuant to a decree in 1988, [812] is usually sufficient to establish nationality in most cases and it, or a *carte consulaire* if abroad, is now obligatory.[813] In 2006, Mali rolled out a new law providing for a universal ID number, called the "NINA" and obligatory for all Malian citizens, residents and others on Malian territory and under its legal jurisdiction.[814] Some changes to help nomads were also part of reformed to the laws on civil registration that were made in 2006. Article 1 of the 2006 law on civil registration specifically provided for mobile clinics to register nomads.[815] NINA cards began to be issued in the period preceding the 2013 election and

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[807] Decheix, 304, 314. The Malian nationality code was drafted by a group of judges, government officials, union leaders and an adviser from Europe.

[808] Among other liberalizing amendments, the 1995 law made it more difficult for persons residing abroad to lose their Malian nationality. Law No. 95-098, Portant modification code de la nationalité (1995).

[809] Loi n. 11-080 portant code des personnes et de la famille, *Journal Officiel de la République du Mali (J.O.R.M.)* Spécial (31 Jan 2012) Titres IV, V (2011 Code).

[810] Loi n. 11-080 portant code des personnes et de la famille, *Journal Officiel de la République du Mali (J.O.R.M.)* Spécial (31 Jan 2012) Titres IV, V (2011 Code).

[811] Zatzepine, 101. Title V regulates the issuance of nationality documents. See also Decheix, 309.

[812] Décret n. 014/PG- RM du 09 janvier 1988 portant institution et règlementation de la délivrance de la carte d'identité et de la carte consulaire.

[813] Mali Décret N. 55-014/PG-RM du 9 Janvier 1988.

[814] Loi no 06-040 du 11 août 2006 portant institution du numéro d'identification nationale des personnes physiques et morales (2006).

[815] Loi No. 06-024 du 28 juin 2006 régissant l'État civil (2006).

required a National ID Card.[816] Other forms of ID in Mali that are relevant to proving nationality include the birth certificate, the *Jugement supplétif d'acte de naissance,* and the Family Book, issued to the head of household.

Despite these developments in the law, however, problems with civil registration would continue into the post-colonial period to this day. In particular, ongoing cycles of conflict in northern Mali meant that many Tuareg continued to be administered under military rule and continue to be unregistered. Time spent in refugee camps abroad has not improved Tuareg registration. According to the government, nomads are now registered using mobile registration teams, though there is not much information on this project.[817]

The Committee on the Rights of the Child urged the government to go further by setting up mobile registration clinics, noting there remained a large gap between registration of urban children and children in rural areas.[818] As of yet, these recommendations have not been implemented, though the 2011 law does allow for the creation of special birth registration centres in nomadic areas.[819] According to interviews conducted as part of a recent study by UNHCR, most registration centres in Tuareg regions in northern Mali are not functioning.[820] In 2014, a UNICEF study showed that over 120,000 children in Gao and Timbuktu regions had not been registered.[821]

An argument may be made that the Tuareg are not *de jure* stateless, but are rather at risk of statelessness, or of unknown nationality. Lack of civil registration is common in Africa, particularly among rural populations. A report by the African Commission on Human and Peoples' Rights has shown that lack of registration is common throughout rural Africa, with nomads like the Tuareg particularly at risk.[822] This lack of registration may amount to statelessness in some cases.[823] African nations more generally tend to suffer from low birth

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[816] Canada: Immigration and Refugee Board of Canada, Mali: 'NINA card, including date and circumstances of its introduction; method used to collect data on future cardholders, including data collection period; opportunity to correct or update card information, such as place of residence and occupation; procedure to correct or update card information' (2009-September 2016), 26 August 2016.

[817] M. Offermann, « Les risques d'apatridie au Mali et pour les Maliens vivant à l'étranger en application des législations et pratiques relatives à la nationalité, au Mali et dans les pays d'accueil de Maliens » (UNHCR 2020) 14, 33 (hereinafter Offermann).

[818] Committee on the Rights of the Child, Consideration of the Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Mali, CRC/C/MLI/CO/2 3 May 2007.

[819] Loi n. 11-080 portant code des personnes et de la famille, *Journal Officiel de la République du Mali (J.O.R.M.)* Spécial (31 Jan 2012) Art. 84.

[820] Offermann, 28.

[821] Offermann, 29.

[822] See generally African Commission.

[823] In the West Africa region, as Manby points out, "(a)mong the undocumented and partially documented there is an undoubtedly large number of people who would fit the definition of stateless person under

registration, particularly in rural areas. As Manby has argued, there is a "crisis of nationality" in Africa.[824]

> In Africa, those most affected by statelessness include the descendants of colonial-era migrants, nomadic pastoralists, populations divided by arbitrary colonial borders or affected by more recent transfers of sovereignty, and those displaced by conflict.[825]

According to research compiled by various United Nations agencies, up to 90% of children are not registered in rural areas in many parts of Africa.[826] According to UNICEF, Mali has a 50% birth registration rate, fairly average for African countries.[827] In Mali, UNICEF estimates that only 50% of children are registered immediately, and only 80% of Malian children are registered at all.[828] The Malian government conducted a mass registration exercise in 2015 targeting returning refugees and IDPs with the assistance of international organization PLAN, [829] yet nomads and rural populations in particular face real challenges with registration in Mali.

Poverty, illiteracy and weak government structures all play a role in the lack of civil registration among the Tuareg. Zatzepine, writing at the time, pointed out the problems with providing proof amongst an illiterate population where much of the population does not follow a formal calendar.[830] As well, cultural aspects of life in rural Africa, like the Tuareg system of naming, makes registration difficult, as the Tuareg did not traditionally use a family name.[831] Meanwhile, fraud and fake Malian documents continue to be a real problem across Mali.[832]

Yet the statelessness of the Tuareg goes beyond a lack of documents. As Manby puts it, writing of Africa more generally, "an undocumented person who is a member of the

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international law." B. Manby, 'Who Belongs? Statelessness and Nationality in West Africa' Migration Policy Institute (7 April 2016) (hereinafter Manby, Belongs).

[824] Manby, Belongs, 1-2, 18. See also Manby, Citizenship, 2018, 330.

[825] Manby, Belongs, 1-2. See also Manby, Citizenship, 2018, 330.

[826] African Commission para 186. The Commission estimates that as many as 20 million children in African lack birth; registration. African Commission para. 4.

[827] UNICEF, 'Strengthening Birth Registration in Africa: Opportunities and Partnerships Technical Paper' (2010) 3, 7.

[828] UNICEF Mali, 'Child Protection' http://www.unicef.org/mali/3934_4097.html.

[829] Reliefweb, 'Thousands to receive birth certificates in Mali' (18 Feb. 2015). See also OHCHR, 'Birth registration and the right of everyone to recognition everywhere as a person before the law' (2013).

[830] Zatzepine, 30.

[831] Zatzepine, 32. See also Keenan, Resistance, 69.

[832] Offermann, 32.

dominant ethnic or religious group and comes from a settled community and stable family is far less likely to be refused when applying for a nationality document."[833] The Tuareg were also subjected to discriminatory policies during the colonial period and during the decolonization period which arguably impacted their registration.

Perhaps most importantly, however, the civil war that broke out in northern Mali in 1962 became an enormous factor, perhaps the key factor, in the statelessness of the Tuareg. 1962 began a continuous cycle of war, draught and state persecution that has left Tuareg communities shattered and huge numbers of people living abroad. This dissertation argues that lack of documents combined with civil war and widespread persecution have left many Tuareg stateless or at risk of statelessness.

To understand why northern Mali devolved into civil war so soon after independence, it is necessary to look at Malian government policies from the time and how they impacted the Tuareg, which this dissertation will do, below. Before discussing the political and social factors that lead the Tuareg into a military conflict with their government, however, the next section will first analyse the nationality laws of Sabah, Malaysia.

[833] Manby, Belongs, 1-2. See also Manby, Citizenship, 2018, 314; Fripp, 2016, 320.

The Sama Dilaut Under the Nationality Laws of Sabah, Malaysia

Like both Kuwait and Mali, the Federation of Malaysia, and Sabah as a Federal State within that Federation, needed to draft a nationality law at independence. Like in Kuwait and Mali, the Malaysian government had inherited a patchwork of laws from the colonial period. As in Kuwait, the process of drafting a law was heavily influenced by the British government. Once again, a poor to non-existent civil registration meant that many local people entered the decolonization period with no status even though they had technically qualified as nationals under colonial law. This section will draw on academic and non-academic sources to explore how Malaysia's nationality laws were applied, or not applied, to the Sama Dilaut.

In 1946, in anticipation of independence and during the formation of the Federation of Malaya (which at that time did not include the Borneo states),[834] the British proposed a nationality law based on *jus soli* and 15 years of residence.[835] This proposal was rejected by the Sultans because it would have automatically granted nationality to the Chinese population, who the Sultans and many Malays considered to be foreign immigrants.[836] The British did not want to leave the Chinese population without Malaysian nationality and the Chinese population themselves wished to have the option.[837] Right from the start, therefore, the issue of who would be nationals of the federation proved contentious. The struggle to balance Malaysia's various ethnicities, an important context to Malaysian nationality that will be discussed at length below, would come to dominate Malaysian politics and nationality policy.

The resulting compromise nationality law created a complex, layered nationality. As in Kuwait, Malaysia would adopt the principle of tiers of nationality to grant different statuses to different persons born in Malaysia. Instead of universal nationality, the 1948 Federation of Malaya Agreement[838] created federal citizenship as a status derived from being a subject of a Sultan of each particular state, making Malaysian citizenship a derivative status that was dependent upon state nationality. Under the Agreement, most non-Malays would not automatically be counted as the subjects of their Sultans but instead had to apply to be

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[834] Sinnadurai, 313. See also Fernandez, 55; Lim Hong Hai, 101. The Federation of Malaya came into existence in 1948.

[835] Ting, 42. See also Clark and Pietsch, 161.

[836] Sinnadurai, 313. See also K. Young, W. Bussink, P. Hasan, 14; Lim Hong Hai, 103.

[837] K. Young, W. Bussink, P. Hasan, 14. See also Lim Hong Hai, 103.

[838] Federation of Malaya Agreement, 1948, made between His late Majesty King George VI and Their Highnesses the Rulers of the Malay States.

naturalized.[839] In this way, Malaya would come to have two tiers of nationality, similar to Kuwait, that of subjects of the Sultan and that of naturalized citizens.

This left the Chinese and Indian populations on the peninsula in a precarious and somewhat unclear position as to nationality.[840] In 1952, a committee was set up to address the issue of nationality of non-Malays in the new federation, particularly the Chinese.[841] The eventual Federation of Malaya Agreement,[842] passed in 1952, opened up the possibility of federal citizenship for non-Malays.[843] But the law was complicated and poorly implemented. According to one historian, at the end of 1953, almost two million non-Malays were still without nationality in the new Federation, including many Chinese.[844]

As well as discrimination in the nationality law itself, non-Malays faced discrimination by other laws.[845] These favourable laws and status for Malays would lead to riots in 1969 and continue to be a bone of contention for ethnically Chinese and Indian Malaysians up to the present day, contributing, among other things, to statelessness for Malaysians of Indian descent.[846] Thus began a long history of statelessness and disputed nationality for those labelled as immigrant populations in Malaysia, context to Malaysia's nationality laws that will be discussed at length below.[847] In this way, statelessness and exclusion from nationality became embedded in Malaysian civic life.[848] The link between statelessness and

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[839] Ko Swan Sik, 314-316. See also Ting, 43; Z. Cowen, 'The Emergence of a New Federation in Malaya' 1 *Tasmanian U. L.R.* 53 (1958).

[840] As Ko Swan Sik puts it, "(t)here was a constant need for reference to other laws, particularly the state nationality laws, to determine whether a person was a citizen or not." Ko Swan Sik, 316. See also Ting, 43; Sinnadurai, 315; Hooker, 223.

[841] Ting, 43. See also Sinnadurai, 314.

[842] Federation of Malaya Agreement (Amendment) Ordinance (1952).

[843] Ko Swan Sik, 317. See also Ting, 43; Sinnadurai, 314; K. Young, W. Bussink, P. Hasan, 16.

[844] Ting, 51.

[845] Clark and Pietsch, 160. See also F. Holst, *Ethnicization and Identity Construction in Malaysia* (Routledge 2012) 45.

[846] For an in-depth look at the link between statelessness and immigration in Malaysia, see generally R. Razali, R. Nordin and T. Duraisingam, 'Migration and Statelessness: Turning the Spotlight on Malaysia' 23 *Pertanika J. Soc. Sci. and Hum.* 19 (2015).

[847] Ting, 42. See generally UN High Commissioner for Refugees (UNHCR), 'Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Malaysia' (March 2013).

[848] Besides the Sama Dilaut, three of Malaysia's largest stateless populations today include Rohingya, Tamils brought to Malaysia by the British, and the children of former refugees and migrants in Sabah. Allerton, Lives, 2014, 27. See also T. Duraisingam, 'Chronology of Policies affecting potentially Stateless Persons and Refugees

the "immigrant" label would become a common one in Malaysia, including, later, in Sabah, as civil society organizations have documented.[849]

In 1957, the new Federal Constitution finally created a federal nationality at birth, removing the requirement that federal citizenship be derived from state nationality.[850] Article 14(1) contains the transitional provisions for the Peninsula. Like in Kuwait and Mali, though less inclusive, these provisions creating Malaysia's "first body of nationals" were territorial and based on *jus soli.* They granted nationality to all persons born in Malaysia before Malaysia Day (16 September 1963) who qualified as nationals under the 1948 Agreement. Also, nationality was granted to all persons born in Malaysia after Mereka Day (31 August 1957) and before October 1962.

For persons born after September 1962, nationality would be granted via *jus sanguinis* to those with one parent who was either a national, a stateless person, or a legal permanent resident.[851] Unlike in Kuwait and Mali, establishing nationality in Malaysia was dependent on place of birth, not residence. As in Kuwait and Mali, however, determining place of birth would prove difficult due to the lack of civil registration in rural Malaysia. Also, like Kuwait and Mali, nationality thereafter is passed via *jus sanguinis*.[852]

As in Kuwait and Mali, Malaysian nationality law was influenced both by western nationality law, but also by Islamic principles.[853] Unlike Kuwait, however, there were strong protections against statelessness written into the law, providing Malaysian nationality to every person born on Malaysian territory who "is not born a citizen of any other country..."[854] This stop-gap provision to prevent statelessness is arguably stronger than the laws of either Kuwait or Mali, though Malaysia lacks the double *jus soli* provisions of Mali's law. The Malaysian Constitution also provided for a nationality for persons born in

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in Malaysia' Statelessness Working Paper Series No. 2016/07, Institute on Statelessness and Inclusion (December 2016).

[849] See generally Development of Human Resources in Rural Areas (DHRRA) 'Citizenship and Statelessness Fact Sheet 2' (January 2015).

[850] Constitution of Malaysia, Art. 14, Second Schedule (1957). See also Immigration and Refugee Board of Canada, Malaysian nationality law, and the case of M. Navin, Goh Siu Lin, 'In the Case of M. Navin, the Guiding Criteria for Article 15A' Association of Women Lawyers (18 April 2016). Malaysia's federal nationality laws do not allow for dual citizenship. Sinnadurai, 332.

[851] Constitution of Malaysia, Art. 14, Second Schedule (1957).

[852] Constitution of Malaysia, Art. 15, Second Schedule (1957).

[853] Under Malaysian law, parents must be lawfully married in order for the mother to pass on Malaysian nationality to her children.

[854] Constitution of Malaysia, Second Schedule, Part II (1957).

Malaysia who would otherwise be stateless, but this provision has never been successfully invoked.[855]

As in many countries, including Mali and Kuwait, the issue of nationality registration in the decades following decolonization would become closely linked to the issue of voting. On the advice of the Reid Commission, an independent, international commission tasked with advising the new government on the Constitution, the first elections in Malaysia were delayed two years to 1959 to give non-Malays who had not gained a nationality until the enactment of the Constitution the chance to register.[856] Despite this precaution, many non-Malays were not registered as nationals by the time of elections and would remain unregistered into the future.[857]

During this formative period, the Borneo territories were joined with the rest of the Malaysian Federation. The Cobbold Commission, a commission of inquiry, surveyed public opinion in north Borneo and concluded that the majority of the population favoured joining Malaysia.[858] In 1963, the Malaysia Act amended the Constitution to include Sabah, Sarawak[859] and separate transitional laws were written to establish nationality in the newly added states.[860] To preserve their semi-autonomy and prevent immigration from what was now known as West, or Peninsular, Malaysia, Sabah and Sarawak were given independent control over immigration from other states.[861] This power over immigration was the result of the Borneo states' concerns over Malay domination. Such fears would continue to colour the debate over nationality in Sabah, creating a complex debate over ethnicity that will be discussed below.

The laws creating the first body of nationals in Sabah and Sarawak, however, were different than those of Peninsular Malaysia. Most importantly, nationality in the Borneo states was based, initially, on residence as well as on place of birth. Under the 1957 Constitution, persons "ordinarily resident" for seven years prior to Malaysia Day in Sabah and Sarawak were nationals of Malaysia if they were either born, registered or naturalized in the Borneo territories and satisfied certain other requirements, including knowledge of Malay, English

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[855] Constitution of Malaysia, Second Schedule, Part 2I (1957). See also R. Razali, 'Addressing Statelessness in Malaysia: New Hopes and Remaining Challenges' Statelessness Working Paper Series No. 2017/9 (Institute on Statelessness and Inclusion 2017).

[856] See also Lim Hong Hai, 107.

[857] See also Lim Hong Hai, 103.

[858] 'Report of the Commission of Enquiry, North Borneo and Sarawak' (1962) (Cobbold Commission) (1962).

[859] Singapore would end up not becoming part of the Federation.

[860] See also Lim Hong Hai, 109. The Constitution was later amended to remove reference to Singapore.

[861] See generally Cheah Boon Kheng, *Malaysia: The Making of a Nation* (Institute of Southeast Asian Studies, 2002). See also Asia Pacific Refugee Rights Network, 'The Vulnerability of Sama Dilaut (Sama Dilaut) Children in Sabah, Malaysia' Asia Pacific Refugee Rights Network (2015) 3.

or "any native language currently in use in Sarawak."[862] The provision was clearly intended to ease registration in the Borneo territories, a region with less of a history with formal registration in comparison to the Peninsular states.

Once again, this law adopts a territorial approach based on "ordinary residence," a concept that is arguably vaguer than place of birth. While place of birth is a clearly defined event, residence is a slippery concept that can be hard to prove, particularly for a nomadic or mobile population like the Sama Dilaut. As with Kuwait and Mali, proving birth and/or residence could be made difficult or easy, depending on who was applying.[863]

Under the Constitution, Sabahans had ten years within which to register as Malaysian nationals.[864] The Federal Constitution provided for the creation of a national registration department (NRD) to issue birth certificates and other documentation.[865] As in Kuwait and Mali, however, while the laws for Sabah were facially inclusive, the vague language around residence in Sabah left a great deal of room for interpretation in the application of the law when it came to nomadic and border populations. According to Sather, and expert on the Sama Dilaut, many Sama Dilaut could not prove they qualified for nationality under the law.[866]

Of particular relevance to the Sama Dilaut has been the sponsorship program for non-citizens in Sabah, initiated at colonial independence, whereby temporary workers have to obtain a Malaysian national as a sponsor in order to remain in Sabah.[867] While today this program applies to any non-national working in Sabah, when the program began, many Sama Dilaut were defined as enemy aliens, meaning that they had to register as temporary workers in order to remain legally in the area. As a result, many Sama Dilaut were required to find a guarantor from among the settled population, often Bajau peoples themselves, and pay their guarantor a tax.[868] Carol Warren calls the modern version of this work permit system, which is descended from the traditional patronage arrangements dating from the pre-colonial period described in Part 2, to a type of indentured labour for the Sama Dilaut,

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[862] Malaysia Constitution, Art. 16(a) and Second Schedule Parts I-III (1957). See also Sinnadurai, 317; Asia Pacific Refugee Rights Network, 'The Vulnerability of Sama Dilaut (Sama Dilaut) Children in Sabah, Malaysia' (2015) 3.

[863] See generally Cheah Boon Kheng.

[864] Sinnadurai, 317. See also Sather, Adaptation, 1997, 87; Mathews, 474.

[865] Constitution of Malaysia 1975, Second Schedule Parts I-III. For a history of IDs in Malaysia, see the Malaysian National Registration Department website at http://www.jpn.gov.my/en/maklumatkorporat/sejarah/.

[866] Sather, Adaptation, 1997, 87.

[867] C. Warren, Consciousness, 1980, 228.

[868] C. Warren, Consciousness, 1980, 88.

former Filipino refugees and other marginalized undocumented persons, who must work for their settled neighbours or face arrest.[869]

This program could be said to mark the beginning of formal statelessness for many Sama Dilaut families because it was the beginning of their official classification as aliens rather than as nationals.[870] The work permit system is yet another example of lack of documentation being used as evidence of foreign status, a practice common in both Kuwait and Mali, as shown above. In particular, it resembles the *bidoon* status given to many former Bedouin in Kuwait, though it is not strictly a nationality status.

Sather's work provides what might be the clearest picture of Sama Dilaut registration. He argues that the failure to register the Sama Dilaut in the region of Semporna town was due to the "arbitrary" exclusion of nomadic families from registration.[871] A divide appears to have emerged between more land-based populations and groups pursuing boat nomadism, though more research is needed on this point. As with other nomads, the problems with Sama Dilaut registration were clearly linked to their mobility and perceptions of that mobility. While Sather labelled this division as "arbitrary" it clearly reflected a continuation of colonial policies towards mobility and mobile peoples.

Lack of registration created a "major division" at independence in Semporna between those who were now nationals of Malaysia and those who were not, a division that corresponded to a great degree with who remained nomadic as opposed to who were now settled and had a fixed residence.[872] As with other nomads like the Bedouin and the Tuareg, other factors likely contributed to the lack of registration among the Sama Dilaut. The Sama Dilaut had mostly negative experiences with government registration, as seen by the efforts of the BNBC to institute a boat licensing program.[873] At the same time, however, Sather points out that the Sama Dilaut had become "accustomed to travel...across national boundaries" and that they were not unfamiliar with the importance of registration to facilitate this travel.[874] It is probably therefore incorrect to say the Sama Dilaut had no idea of the importance of registration.

Unlike many rural, land-based Sabahans, the Sama Dilaut did not have a recognized village headman who could vouch for their residence. In other words, existing Sama Dilaut

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[869] C. Warren, Consciousness, 1980, 228.

[870] Sather, Adaptation, 1997, 332. More research is needed on this topic, particularly in terms of if and how the work permit system is applied to rural Sabahans who lack documents.

[871] Sather, Adaptation, 1997, 87.

[872] Sather, Adaptation, 1997, 87. Much of the information on the Sama Dilaut during this period comes from Clifford Sather, who was an anthropologist studying the Bajau Laut/Sama Dilaut during that time.

[873] UN High Commissioner for Refugees (UNHCR), 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report: Universal Periodic Review: Malaysia,' (March 2013) 2.

[874] Sather, Adaptation, 1997, 87.

documentation and ties to northern Borneo were apparently discounted during the registration process, though more research is needed into this period in Sama Dilaut history. As in Kuwait and Mali, registration of the Sama Dilaut appears to have been approached in an exclusionary and discriminatory manor.

Like in Kuwait and Mali, lack of identity documents would emerge as a major issue for nomads, border populations and rural peoples, with many Sama Dilaut failing to register or receive ID.[875] Over subsequent decades, as in Kuwait, registration procedures in Malaysia have been tightened.[876] Many of those who did not register in the decade following independence found themselves locked out by *jus sanguinis*.[877] Unlike in Kuwait and Mali, there were few substantive changes to Malaysian or Sabahan nationality law during this period, but the tightening of registration procedures would shut many out of a nationality. Concerns over immigration, particularly from the Philippines, led to increasingly restrictive enforcement of the law around the registration of nationality in Sabah, including an increased focus on the use of IDs. Strict registration procedures have led to intergenerational statelessness.[878]

Starting in 1972, under the new National Registration Rules, nationals of Sabah were issued a blue card with a number and an "H" to signify Sabah. At the same time, local chiefs were empowered to issue "status" certificates as evidence towards nationality for those who did not previously have ID cards. This allowed people from rural villages to prove their identity by having someone in a position of authority vouch for their long term residence.[879] This procedure, which resolved the nationality status of many rural Sabahans who were not registered in the decade following independence, was ended in 1987.[880] This placed registration in the hands of village chiefs, usually from the settled, coastal population. This option was not available to most Sama Dilaut as in many cases they neither had a

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[875] Sather, Adaptation, 1997, 87.

[876] P. Blanche, *Nomades de la mer, Vezos, Bajaus, Mokens* (Ibis Press 2008) 78. See also J. Warren, Chartered, 1971, 26.

[877] Lim Hong Hai, 107. Voter registration in Malaysia is governed by the Elections Act of 1958 (revised 1971). See generally Malaysia Elections Act 1958 (Act 19, Ordinance No. 33 of 1958) (*Akta Pilihan Raya 1958)*. See also Sinnadurai 330. The Malaysian government has taken steps to resolve the issue for some groups, but has left others, like the Indian population, in a state of uncertainty. In 1972, for example, the Malaysian government attempted to resolve the issue of over 200,000 cases of ethnic Chinese who had not received Malaysian nationality. Cheah Boon Kheng, 29. Yet today, many Malaysians of Indian descent await a similar resolution.

[878] Helen Brunt calls the situation of the Sama Dilaut a "classic example of protracted and intergenerational statelessness." H. Brunt, 'Stateless at Sea' in in Institute on Statelessness and Inclusion (ed.) *The World's Stateless Children* (January 2017) 291.

[879] K. Sadiq, 'When States Prefer Non-Citizens Over Citizens: Conflict Over Illegal Immigration Into Malaysia' 49 Int'l Studies Quarterly 101 (2005) 155.

[880] Tan Sri Datuk Amar Steve Shim Lip Kiong (Chairman) and Commissioners, 'Report of the Commission of Enquiry on Immigrants in Sabah,' Royal Commission of Inquiry (2012) 302 (hereinafter Royal Commission).

recognized village chief nor a recognized fixed residence in Sabah.[881] Once again, registration favoured the settled, rural population who were treated as presumptive nationals while nomads remained excluded.

In 1990, the registration process was tightened again. The government began issuing updated ICs with the code "12" for Sabah. Under the new procedures, applicants had to produce both a birth certificate for themselves, as well as their parents' ICs.[882] This made it virtually impossible for the children of undocumented persons to obtain cards. In 2002, these earlier cards were replaced with the MyKad, a so-called smart card containing biometric data.[883] At this point, Malaysia's documentation regime and reliance on *jus sanguinis* locked any unregistered Sabahan families out of a nationality, including unregistered Sama Dilaut.

Today, registration and issuance of identity documents, such as the MyKad, continues to be handled by the National Registration Department (NRD) of Malaysia under the National Registration Regulation of 1990. The identity documents to prove nationality in Malaysia today are the MyKad and the birth certificate. A birth certificate is necessary to register as a national with NRD.[884] But the current MyKad is much more than simply proof of nationality; it combines a national identity card, a driver's license, passport information, health information, banking features and other functions.[885] The chip contains information on the holder's race, status as a Muslim, gender, voting status, thumbprints, criminal and driving record, and health information.[886] Today, the application for a MyKad requires a birth, adoption, or citizenship certificate, or the passport of the applicant, in addition to identity documents of at least one parent or guardian. As a result, Malaysia now has one of the most sophisticated and restrictive personal identity systems in the world. Lack of documents is now itself viewed as evidence not only of foreign status, but of criminality.

Previously, Sabah did not require rural people living in villages to prove their nationality in order to access government services because they were assumed to be nationals,[887] so

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[881] More research is needed on the implementation of this program as it pertains to marginalized minorities like the Sama Dilaut.

[882] Royal Commission, 303.

[883] Royal Commission, 303.

[884] See generally the website of the Malaysian NRD at http://www.jpn.gov.my/en/perkhidmatan/kanak-kanak-bawah-12-tahun/.

[885] Mathews, 474.

[886] Mathews, 474.

[887] In 1999, a NRD official stated in a local newspaper, The Sun, that out of 2.8 million people in Sabah, as many as 2 million may lack birth certificates. Quoted in Sadiq, 86. See also Voice of the Children, 'Birth Registration, Briefing Paper for UPR, Malaysia' (2013). See also F. Barlocco, *Identity and the State in Malaysia* (Routledge 2014) 78 (hereinafter Barlocco).

many rural people did not need to be registered.[888] Today, the Malaysian government recognizes the problem among rural communities, particularly since the introduction of the MyKad and increased police scrutiny of the undocumented community, and has been taking steps to improve documentation among rural people. The recent outreach of NRD towards the rural, land-based highlights the extent to which the Sama Dilaut are actively excluded by the Malaysian government, rather than being simply passively unregistered.[889] For example, NRD has set up mobile documentation clinics in rural areas, but such efforts do not include the Sama Dilaut.[890] According to testimony given during the Royal Commission of Inquiry, a registration exercise for the Sama Dilaut was last conducted in the 1960s.[891] Some settled Sama/Bajau families were issued documents in the small village of Banga-Banga at that time. Today, only about 3,000 out of the 5,000 current inhabitants of Banga-Banga have documents. According to the Commission, the 2,000 Sama/Bajau without documents in Banga-Banga consider themselves to be Malaysian, yet have been unable to regularize their status. Meanwhile, in 2008, the government issued identity documents to some stateless persons in Sabah, but this program made no attempt to assist the Sama Dilaut.[892]

Accurate statistics of documentation among the Sama Dilaut community are unavailable, but civil society groups have noted that the Sama Dilaut generally suffer from low levels of documentation.[893] The Right 2 Identity Working Group stated that the Sama Dilaut are often unregistered because their parents lack documentation, leading to inter-generational statelessness.[894] The lack of identity documents has serious repercussions for the Sama Dilaut (as it does for other stateless people in Sabah.) For example, Sama Dilaut children cannot attend Malaysian government schools.[895]

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[888] Sadiq, 114.

[889] For an example of NRD outreach to rural communities, see A. Joseph, 'NRD mobile unit reduces number of 'stateless people'' Borneo Post (23 Sept. 2017).

[890] Documentation remains a problem for many people living in remote, rural areas, thought the government has shown willingness to fix the problem. See for example the situation of minority groups on the Sarawak/Indonesian border at S. Then, 'Still Stateless Despite the Sacrifices' The Star (20 March 2016). See also Daily Express, 'Mobile court brings citizenship to villagers' (20 May 2015).

[891] Testimony of a Sama Dilaut village leader, in Tan Sri Datuk Amar Steve Shim Lip Kiong (Chairman) and Commissioners, 'Report of the Commission of Enquiry on Immigrants in Sabah,' Royal Commission of Enquiry (2012) 219.

[892] I. Ali, 'Since Birth till Death, What is their Status? A Case Study of the Sea Bajau in Pulau Mabul, Semporna,' 1 *Journal of Arts, Science and Commerce* 156 (2010) 163 (hereinafter Ali).

[893] See for example the work of the local NGO Right 2 Identity Newsletter, Sabah, Malaysia (June 2015) (no longer available online).

[894] Right 2 Identity Newsletter, June 2015.

[895] Ali, 162, 163.

As in other parts of Malaysia and in Kuwait, lack of registration is often conflated with foreign status in Sabah. A recent Al Jazeera documentary pointed out that stateless Sama Dilaut are frequently deported to the Philippines, even though many Sama Dilaut families settled in Sabah decades ago and have not been to the Philippines since seasonal migrations ended during the colonial period, while others visit only infrequently for extended family events like weddings and funerals.[896] As the issue of documentation and statelessness in Sabah has been taken up as a human rights issue by civil society, the government has begun promising to address it.[897] Yet Sabah continues rounding up undocumented persons for detention or deportation and issuing different identity documents to non-citizens (for example, red certificates to "non-citizens" as opposed to the green certificates given to Malaysian citizens.)[898]

In this way, the current documentation regime in Sabah has increasingly come to resemble that in Kuwait, where certain classes of stateless persons are granted documents labelling them as such. These measures are often equally applied to the children of Filipino migrants and the Sama Dilaut. Meanwhile, lack of nationality registration for minority groups throughout Malaysia quickly become part of a larger political debate over national identity, borders and immigration, factors which will be discussed in detail in the next section.[899]

Yet, while registration as Malaysian has slowly been tightened, producing statelessness for many Sama Dilaut, Malaysia continues to have protections against statelessness written into its nationality law, including a provision guaranteeing nationality at birth to persons born in Malaysia who would be otherwise stateless.[900] Recent events, however, have shown why this provision is not being used more effectively to prevent statelessness in Malaysia. Beginning in 2010, a number of court cases have been brought to establish Malaysian nationality for stateless children adopted by Malaysian parents.[901] Yet, the procedures for establishing statelessness under Malaysian law are unclear.[902]

In 2017, a Federal Court in Malaysia granted the right of appeal to five stateless, adopted children, including two stateless foundlings, who were petitioning for Malaysian nationality

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[896] Chan Tau Chou and L. Gooch, 'Malaysia's Invisible Children' Al Jazeera (1 May 2015). I am indebted to Helen Blunt for her comments on this point.

[897] See for example, S. Sokail, 'Sabah Draws Up Plans to Tackle Stateless Kids' The Rakyat Post (9 March 2015).

[898] Barlocco, 70.

[899] Barlocco, 70.

[900] Art. 15(a) Malaysian Constitution.

[901] For an overview of these cases, see R. Razali, 'Addressing Statelessness in Malaysia, New Hope and Remaining Challenges' Institute on Statelessness and Inclusion, Statelessness Working Paper Series No. 2017 9 (2017).

[902] For an example of a press article discussing this problem, see Malaysian Insight, 'Stateless Children's Wait for Citizenship Must End' (4 June 2018).

under Article 15(a) of the Constitution. The court rejected the applications of the stateless foundlings on the grounds that while they had proven they were born in Malaysia, they had not proven they were stateless.[903] Some of the children were later granted citizenship because they were able to furnish documents demonstrating that they did not have access to another nationality.[904] Though it is difficult to speculate how such a precedent might be applied in other cases, these cases show the potential pitfalls of applying Malaysian nationality law to the problem of resolving statelessness. Such a solution will likely turn on the ability to furnish proofs that nomadic groups like the Sama Dilaut do not have.

Meanwhile, Malaysia has not created a clear, national procedure by which cases of contested nationality can be easily resolved, though the problem of statelessness in Sabah continues to be much in the news and the government appears to be working towards a solution. Though Malaysia's law provides for nationality to be granted in "special circumstances" where nationality is unclear or contested, this vague provision does nothing to specify a mechanism or a set of standards by which Sama Dilaut families could successfully navigate an established and fair process to obtain a nationality.[905]

Events in Sabah are evolving quickly, however, and calls for a resolution to statelessness in Sabah keep getting louder and NRD has taken up several programs, including the registration of children and people in rural areas, alongside attempts to resolve the status of Sama Dilaut in the neighbouring Philippines as part of the Philippines National Action Plan to end statelessness.[906] There is also talk of a tripartite agreement between Malaysia, the Philippines and Indonesia to resolve the issue.[907] A recent Memorandum of Understanding between Malaysia and Indonesia may help to resolve the status of border populations in Sabah.[908] This exercise may finally provide a resolution to stateless Sama Dilaut.

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[903] For a summary of the case, see I. Lim, 'Apex Court to Rule on Citizenship for Five Malaysian-Born Stateless Persons' Malay Mail (6 March 2018).

[904] H. Kannan and Z. Mutalib, 'Two of five stateless children to be granted citizenship' New Straits Times (25 October 2018).

[905] Razali, 9.

[906] Recent press coverage of the issue includes, J. David, 'Statelessness a long-standing issue in states' Borneo Post (16 Aug 2018); J. Santos, 'Census records 60,000 stateless persons in Sabah' Malaysian Insight (30 Jul 2018); K. Bong, 'Minister gives special taskforce one year to clear 'stateless' student cases' (19 Dec 2017); R. Augustin, 'How to reduce stateless numbers in Sabah' (17 Apr 2018); E. Paulsen, 'The plight of the stateless in Malaysia' FMT News (12 Feb 2018); S. Tawie, 'Go deeper to register indigenous Sarawakians, NRD told' Malay Mail Online (10 Jan 2018); A. Joseph, 'NRD mobile unit reduces number of "stateless people"' (23 Sept. 2017); T. Patrick, 'Unwanted in the only place they can call home' FMT News (14 Oct 2017); Sun Star Philippines, 'CFSI validate Sama Badjaos status' 2 Sept 2017 (on attempts to register the Sama Dilaut in the Philippines).

[907] Daily Express, 'Stateless: Three-nation pact soon' 25 July 2018.

[908] The Star, 'Malaysia, Indonesia to tackle Sabah stateless issue' 24 April 2019.

Conclusion

> Statehood in itself might appear as a static concept antonymous with nomadism...[909]

This section looked at the creation of nationality regimes, including laws and civil registration procedures, in Kuwait, Mali and Malaysia. This section uncovered a number of important gaps in the nationality regimes in Kuwait, Mali and Malaysia, including the implementation of nationality, for nomads. For many, "(t)he achievement of independence did not automatically bring birth citizenship..."[910] As this section showed, while statelessness may occur as the accidental or negligent result of badly drafted nationality laws or gaps between nationality laws, it often contains at least an element of deliberateness and/or discrimination.[911] This was clearly the case for many nomads. During decolonization, the entire system of colonial law and registration was replaced, yet discrimination against nomadic communities simply continued and, in some places, arguably worsened.

This section has identified several serious *gaps* in both the nationality laws and their application to nomads during the decolonization process and in the decades following. First, borders divided nomads and transformed them into minorities. Decolonization presented an opportunity to revisit colonial borders, but this opportunity was, in most cases, not taken. Second, discrimination against nomads that began under colonization was extended into the decolonization period, aided by a bias against nomadism inherent in European nationality norms. The power to determine nationality often vested in the hands of settled, urban rulers and not with nomad leaders. Third, *jus sanguinis* was often adopted, locking many nomads out of a nationality and creating inter-generational statelessness. Finally, the international community ignored the risk of statelessness as a result of the decolonization process, instead focusing on consolidating states around colonial borders.

Nomads were Divided by Borders, Transforming them into Marginalized Minorities

As the Tuareg example showed most clearly, decolonization presented an opportunity to revisit colonial-era borders, yet this opportunity was not taken. Instead, decolonization entrenched existing borders, requiring nomads to establish their nationality in one state, even when they had ties to multiple states. Many nomads were left as minorities living in contested border zones. Often, they were seen as part of the problem with the border, weakening state sovereignty.

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[909] Gilbert, Nomadic, 2014, 63.

[910] Heater, 132.

[911] UNHCR, 'This is Our Home: Stateless Minorities and Their Search for Citizenship' (2017).

Porous administrative boundaries that had allowed nomadism to continue in places like the Gulf, the Sulu Sea and Sahel became hard borders between sovereign, and sometimes hostile, states. These states now had separate nationalities which put nomadic communities in a position of having to choose.

Exclusive allegiance, a concept adopted from European nationality law, was difficult for nomadic communities to satisfy. It imposed a requirement on cross-border populations that they demonstrate their allegiance to one state to the exclusion of all others. This was simply impossible for many nomads to do.

> Binarity in questions of membership and citizenship is problematic because of the complicated range of ways in which (indigenous) individuals in fact relate with existing States, not least in navigating the effects of colonization.[912]

Border zones were often contested at decolonization and nomads had a history of shifting allegiances or multiple allegiances that were viewed askance by government officials anxious to solidify their territorial claims. The spectre of dual, multiple or even shifting allegiances would plague questions of nomad legitimacy and belonging. The fact that individuals can maintain a nationality while simultaneously also holding other allegiances, including tribal or social allegiances, was treated, in the case of nomads, as a major problem to determining their nationality.

Nationality Laws Based on Residence Discriminated Against Nomads

As this section described, there remains a serious conflict between nomadism as it is lived and practiced and the requirements of European nationality, with its emphasis on fixed residence, exclusivity and paper documents. European nationality laws, while appearing neutral on their face, are actually biased against mobility and in favour of settlement. The requirement that one must register as a national ran contrary to the ways in which many nomads saw their alliances, as discussed in proceeding sections.[913]

While in some cases, there was genuine confusion over how to apply concepts like residence to nomadic populations who were now crossing international borders, historical claims by nomads to territory appear to have been largely ignored during decolonization. For example, Tuareg drum groups were often associated with specific regions inside what was now Mali, but Tuareg history was not employed to determine their nationality. Instead, residence and place of birth were employed. The creation of new nation-states failed to take into account how the system of European nationality law might not perfectly map onto non-European communities.

The issuance of personal identification proving nationality was part of a system of documents that was utterly foreign to many nomadic communities. Colonization had linked land registration, title documents and nationality law together. Documents, which had been

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[912] Bloom, Members, 2017, 166.

[913] Scott, 2009, x-xi.

unimportant in many nomad societies, now became critical. Older forms of proof described in Part 2, like oral agreements, patronage agreements, the maintenance of water points or grazing rights, were often ignored as insufficient to prove a nationality "link." Proving nationality therefore required proving settlement on land, either through title documents, birth certificates, leases or other documentation that nomads often did not have. Few efforts were made to take an accommodating position with regards to nomads. Even nomads with documentary proof of residence were sometimes excluded, as the Bedouin example showed. Other forms of proof that may have been easier for nomads to provide, including oral testimony, were not used.

It is critical to note that there emerged a major difference in how states treated rural, settled, unregistered populations and how they treated unregistered nomads.[914] Rural, settled populations were usually granted the presumption of nationality in Kuwait, Mali and Malaysia and often given the chance to register at a later date, as happened in Sabah with many rural peoples under NRD. They were presumed nationals and their loyalty and belonging were not questioned. Rather, their lack of registration was treated as a technical matter and a problem of state capacity. For those who remained nomadic or settled at a later period, the application of *jus sanguinis* nationality regimes in Kuwait and Malaysia would mean they had missed the window of registration and were locked out of a nationality.

The initial registration period was followed by the slow transformation of many nomads from unregistered persons with undetermined or contested nationality to active exclusion and statelessness. While the post-colonial experience of many settled, rural people included gradual registration as governments claimed the power of the rural vote, nomads were actively excluded from this process. A closer look at the experience of nomads shows that successive governments missed multiple opportunities to rectify nomadic statelessness, taking a harder and harder line against nomad inclusion as the decades wore on.

Negative colonial policies towards nomads affected registration in other ways as well during the post-colonial period. Sometimes nomads themselves did not wish to register, either because they did not see themselves as part of the post-colonial state that was now being run by urban or settled rulers, often from a capital located far away, or because of the history of violence and assimilation during the colonial period when registration was used as a tool of assimilation and forced settlement.

The Power to Draft Laws, Register the Population and Issue Documents Had Vested with Urban Elites, Opening the Door to Discrimination

Far from presenting post-colonial states with a blank slate, the patchwork and unequal colonial system meant that colonized peoples entered the post-colonial period with very different statuses and levels of political and economic power. For many nomads, the

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[914] This became true even in some *jus soli* countries. See for example Open Society Justice Initiative, 'Born in the Americas: The Promise and Practice of Nationality Laws in Brazil, Chile and Colombia' (2017).

colonial period had been marked by a long decline in status and economic power that would leave them in a poor position to assert their rights at decolonization. Vast powers to include or exclude were handed to urban rulers with little accountability to nomadic or other minority groups.

Registration was done quickly, with little input from nomadic groups, prioritizing settled and urban populations, as colonial administrations had done in the past. While the goal of decolonization did involve the enfranchisement and self-determination of many colonized peoples, in many ways, colonial structures and processes were continued into the post-colonial period for nomads.

The vesting of power over nomads with settled, rather than nomadic, leaders opened the door for discrimination. As Batchelor puts it, "(w)herever an administrative procedure allows for discretionary granting of citizenship, such applicants cannot be considered citizens until the application has been approved..."[915] As Gilbert points out, nomads often face a very high burden of proof when registering with the government.[916] Kuwait adopted tiers of nationality that allowed rulers to claim populations as subjects without granting them many rights, a common strategy during the colonial period.

In Mali, discrimination meant that otherwise inclusive nationality laws were not used to resolve Tuareg statelessness. Many Tuareg should have qualified for Malian nationality automatically under transitional laws. Double *jus soli* for those "of African origin" provided an ongoing, possible solution. Yet the outbreak of civil war combined with the targeting of Tuareg leaders meant that many did not receive a nationality, but were instead forced into exile or imprisoned.

Registration and Nationality Laws Became Steadily More Restrictive Over Time, Locking Nomads in jus sanguinis *Countries Out of a Nationality*

Following the transitional laws to create the first body of nationals, Kuwait and Malaysia adopted *jus sanguinis.* The adoption of *jus sanguinis* occurred even though the registration process was far from complete in either country. While in many ways *jus sanguinis* was a logical choice for many Muslim-majority countries, when imposed suddenly following a highly discriminatory transitional period, it served to lock many unregistered minorities, including many nomads, out of a nationality.

Rather than working to resolve the problem, discrimination against minorities, including nomads, continued into a self-reinforcing cycle, where lack of registration was used as evidence of foreign status. Access to nationality became ever more restrictive. Safeguards against statelessness in Malaysia's law were not applied, with Malaysia rather adopting the view that lack of documents is proof of foreign status, not of statelessness. In Kuwait,

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[915] Batchelor, 1998, 171.

[916] J. Gilbert and B. Begbie-Clench, 'Mapping for Rights: Indigenous Peoples, Litigation and Legal Empowerment' 11 *Erasmus L. R.* 6 (June 2018) 6-8 (hereinafter Gilbert and Begbie-Clench).

increasingly restrictive laws created a legal category of stateless persons, the *bidoon,* and then slowly restricted their rights, even as access to naturalization was slowly cut off.

The International Community Ignored the Problem of Nomad Inclusion

The United Nations and the former colonial powers were not concerned with nationality and statelessness during decolonization, but were instead very focused on preventing separatism and the breakup of existing colonial units. While much attention was played to avoiding conflict over borders, somewhat remarkably given its importance, there was a curious lack of attention placed on the possible creation of statelessness during decolonization among the Bedouin, the Tuareg and the Sama Dilaut.

In hindsight, the lack of attention on statelessness is surprising, as statelessness had been a major problem in Europe in the early part of the 20th century. It appears to have been widely assumed that transitional provisions based on residence and place of birth would solve the problem, though more research on this critical period is needed. Documents from the British administration in the Gulf region shows that the administration was aware that transitional laws in some Gulf states may lead to statelessness and some nationality questions received enormous attention, like the nationality of ethnic Chinese in Malaysia. The question of nomad nationality, however, was often entirely overlooked by departing colonial administrations. It may be that colonial beliefs that nomads cannot form states or hold a nationality apart from membership in their tribes played a role in the lack of attention paid to the chance of nomad statelessness, but more research is needed.

Importantly, as this section showed, colonial structures had clearly favoured settled and urban populations and rulers, meaning that nomads already entered the post-colonial period at a severe political disadvantage, divided by borders and lacking international representation and clout. Even in the Tuareg example, colonial policy had split the Tuareg amongst different states, weakened the noble class and greatly centralized power in the urban and agricultural south of Mali, meaning that the recognition and naturalization of a few Tuareg leaders ultimately did little to afford the Tuareg with a strong voice during decolonization. Whatever the reason, the political aspirations of nomads were almost entirely overlooked during decolonization.

In conclusion, in many ways, decolonization marked a deterioration, not an improvement, in the status of nomads. It may be tempting to see the exclusion of many nomads as simply an accident of the registration process due to understandable difficulties in the logistics of registering large numbers of people, particularly mobile peoples in so-called remote areas that were newly divided among sovereign states. This section weighs heavily against this interpretation, though negligence, lack of interest from the nomadic population and difficulties in accessing rural and mobile populations played their roles. While the examination of how nationality laws in Kuwait, Mali and Malaysia exposes rampant discrimination against nomads, in some cases, however, the term discrimination is frankly inadequate to describe the depths of the rights violations against nomads. The case of the

Tuareg goes far beyond what could reasonably be described as discrimination and crosses into active persecution.[917]

What is missing from this section is an examination of the underlying factors that drove many governments to leave their nomadic populations unregistered. While statelessness is often undesirable for states, this is not always the case. In some cases, statelessness may be a tool used by governments to exclude individuals or groups deemed undesirable to the state in some way.[918] The next section will discuss the forces that drive statelessness and exclusion for nomads in more detail, including an examination of how both nationality and statelessness have been used by states to accomplish certain goals with respect to nomads.

The next section will look at the economic, social and political context surrounding the inclusion of nomads to show how larger forces shaped the implementation of nationality law in Kuwait, Mali and Malaysia. This context is critical to understanding why nomad statelessness was not resolved in the decades following decolonization, even though methods were available under the law to do so.

[917] Azarya, 259-262.

[918] Maury, 50. See also the Handbook, 2014, 3.

2.3 State-building and the Exclusion of Nomads

The desire of new territorial states to control and sedentarise (nomads) took different ideological forms, from coercive administration to more lenient incorporation.[919]

Introduction

The last section explored the nationality laws and policies of colonial and post-colonial states, explaining how many nomads ended up unregistered and often stateless under the laws and policies of Kuwait, Mali and Malaysia. It also documented how registration and nationality were tightened to create inter-generational statelessness in some nomad communities. But while the legal analysis of the last section touched upon the discrimination and sometimes persecution suffered by many nomads during the post-colonial period, it did not explore the deeper drivers of this exclusion. It did not explore the political, social and economic factors that drove the creation and implementation of more restrictive nationality polices from decolonization to the present day.

The contested status of nomads and cases of statelessness among nomadic peoples could have been resolved over the decades. Yet, for many nomads, this did not occur. Rather, their statelessness became entrenched over multiple generations. Given that statelessness is usually understood to be destabilizing and undesirable for states,[920] the question becomes, why didn't successive post-colonial administrations take steps to resolve the status of nomads in the decades to follow?

As this section will show, the reasons why nomad statelessness was not resolved can be grouped into two interrelated post-colonial goals. The first goal was the perceived need to unify post-colonial states around a founding myth and shared history. This was difficult to do in the post-colonial context of multi-ethnic populations with diverse histories and recently fixed, disputed borders. As minorities, many nomads found themselves the target of discrimination. Yet discrimination against minorities is not the only factor at play. Second, important economic transformations overtook many post-colonial states during the 20th century. The ongoing statelessness of the Bedouin, Tuareg and Sama Dilaut is closely linked to the discovery of natural resources and the growth of tourist parks in lands occupied by nomads and the measures taken by states to exclusively control these resources and parks. Forced settlement and the removal of nomads from their lands therefore continued to be important goals during the post-colonial period.

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[919] Beaugrand, Stateless, 2018, 44-45.

[920] For an overview of some of the destabilizing and negative consequences of statelessness for Mali see H. Alexander, 'Statelessness and the Crisis in Northern Mali: Looking Beyond 'Islamic Extremism' as the Driver of Conflict' (unpublished paper 2016).

To accomplish these goals, post-colonial governments would adopt the rhetoric and policies towards nomads of the colonial period. As anthropologist Dawn Chatty put it:

> Administrators regard pastoral populations as sources of trouble, backward entities that stand in the way of national progress. The only overall solution then suggested is the enforced settlement of the pastoral populations...[921]

[921] D. Chatty, 'The Pastoral Family and the Truck,' in Salzman (ed.) *When Nomads Settle* (Praeger 1980) 80. See also Gilbert, Nomadic, 2014, 69.

National Unity and the Exclusion of Minorities as Drivers of Nomad Exclusion

> All of us relate to states, the political units into which the world is divided, by means of both law and emotion.[922]

This section will explore how the nationality laws describe in the last section were used by the governments of Kuwait, Mali and Malaysia to achieve national unity, a major problem for post-colonial states, and the need in many states to balance power between different political and ethnic groups. While as Part 2 explored, unifying the population in the colonies was decidedly not a goal of colonization, it would become a major goal of post-colonial governments.

> Many post-independence political leaders have consequently been faced with the hard task of welding into a nation peoples diverse in language, ethnicity and religion.[923]

This section explores some of the underlying factors that led to the drafting and implementation of nationality laws. It accepts that crucial to understanding statelessness is moving beyond an examination of,

> strictly legal responses to...statelessness in the light of state resistance to legal reform, discrimination, or other political factors (for example institutional weakness, conflict, or political instability).[924]

During decolonization, the governments of newly formed states like Kuwait, Mali and Malaysia began ambitious programs of state-building. Forging a common national identity around a unified nationality was a key part of this project. As a result, places where colonial administrators had used a more hands-off approach towards nomads would now be subjected to aggressive centralization and assimilation. This section will explore how the goal of national unity influenced ongoing discrimination against nomads in the granting of nationality and the resolution of statelessness.

The status of nomads would also continue to be influenced by scholarship on nomadism.[925] Where relevant, this section will mention how scholarship on nomads and statehood also influence nationality laws and policies.

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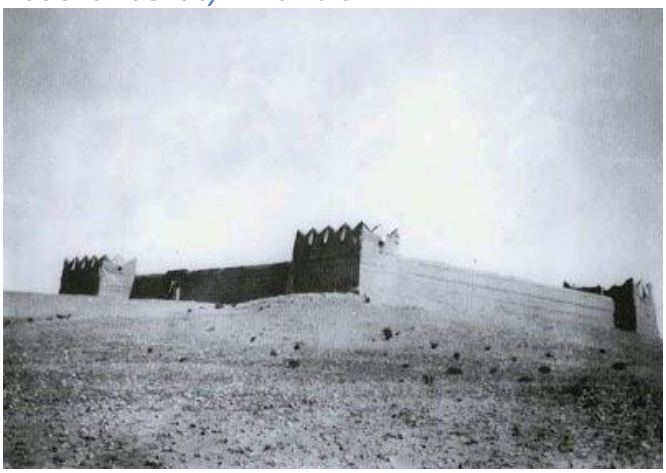
[922] N. G. Schiller, 'Transborder Citizenship: An Outcome of Legal Pluralism within Transnational Social Fields' in F. von Benda-Beckmann, K. von Benda-Beckmann and A. Griffiths, *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World* (Ashgate 2005) 30.

[923] Heater, 133.

[924] Staples, 173.

[925] For a summary of some of these views, see E. Isin and P. Wood, 'Citizenship and Identity' in H. Gulalp, *Citizenship and Ethnic Conflict: Challenging the state* (Routledge 2009) 64.



The Red Fort at Jahra

> (T)he history of the *biduns* is closely intertwined with that of the nascent state...[926]
>
> An aim, if never explicitly stated, of all Gulf governments in the years following independence has been to forge a national identity and shared history.[927]

The proceeding section outlined the exclusion of certain Bedouin tribes from Kuwaiti nationality following the termination of the protectorate agreement, focusing on an analysis of the law and its application to the Bedouin. But the above section did not explore the root causes of this exclusion. While it touched upon some of the factors that preoccupied the Kuwaiti government during this time, legal analysis of Kuwait's laws and an overview of its nationality policies cannot explain the discrimination that drove much of this exclusion. This section will explore political, sociological and economic forces that drove the implementation of Kuwait's nationality laws. This section relies on both academic sources and some non-academic sources, which are used to illuminate public debate and government positions.

Forging a unified national identity was an urgent goal for the Al-Sabah family in light of Kuwait's precarious security situation. The divide between Kuwaiti nationals and non-nationals has become a driving force in Kuwaiti politics.[928] At the end of the protectorate

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[926] Beaugrand, Transnationalism, 2010, 4.

[927] C. Zeineddin, 'State-Relgion-Minorities Tensions in the Arab Gulf' in M. Al-Zoby and B. Baskan (eds.) *State-Society Relations in the Arab Gulf States* (Gerlach Press 2014) 147.

[928] Longva, Autocracy, 117. See also Longva, Citizenship, 183.

agreement, security from external invasion would become one of the most important issues for the Kuwaiti government. The issue of borders would plague Kuwait throughout the 20th century and complicate the question of Kuwaiti belonging. The legitimacy of the Al-Sabah family as the rulers of Kuwait would be frequently called into question now that they could no longer rely on overt British support.

Part 2 highlighted the importance of the military abilities of the Bedouin in late 19th and early 20th century Gulf politics. In particular, it looked at the role of the Bedouin in supporting inland rulers like Ibn Saud.[929] The question of Bedouin loyalty would continue to plague Gulf state rulers, even as the Emir of Kuwait continued to rely on Bedouin troops to serve in Kuwait's army. During this period, the perceived ties of many Bedouin to what were now the governments of neighbouring states continued to call their loyalty into question. It should be noted that the integration of the Bedouin into the current system of territorial states in the Gulf has been a problem for governments across the region. Speaking of the Bedouin in the region today more generally, Chatty explains that,

> (i)n spite of a lingering sentimentality toward the Bedouin that has deep historic roots, the popular consensus over the past few decades has been that these tribes are a major obstacle to social and economic development.[930]

Influencing the issue of Bedouin inclusion was the issue of Kuwait's recently created borders and its territorial expansion beyond Kuwait Town to include areas of desert dominated by the Bedouin.[931] Ibn Saud in Saudi Arabia had begun aggressively courting the disaffected Bedouin populations, arguably in an attempt to concentrate Bedouin tribes, and Bedouin power, in Saudi Arabia.[932] The existence of Kuwait seemed to be under threat. With Kuwait's borders little more than lines drawn on maps by the British, the nationality of the Bedouin was deeply implicated in Kuwait's security situation.[933] The supposed militarism of the Bedouin, however, was also linked to perceived cultural differences been Bedouin society and that of urban areas.

The idea of Kuwait had long meant Kuwait Town and its urban, merchant population. Lund-Johansen calls this the "urban-centred" conception of nationality.[934] Post-independence, this conception of Kuwait, the conception of a city-state, would have to change. "Until independence in 1961, the term *Kuwaitis* was used to refer exclusively to the

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[929] Beaugrand, Stateless, 2018, 63.

[930] Chatty, Pastoralists, 15.

[931] Beaugrand calls Kuwaiti nationality law and national identity "hyper-territorialized." Beaugrand, Transnationalism, 2010, 121. K. E. O. Eldin, 'Kuwait Primary (Tribal) Elections 1975-2008: An Evaluative Study' 38 *British J. of Middle Eastern Studies* 141 (2011).

[932] Beaugrand, Stateless, 2018, 65.

[933] Beaugrand, Transnationalism, 2010, 121.

[934] Lund-Johansen, 21.

inhabitants of the town of Kuwait."[935] Now, Kuwaiti identity as a territorial state encompassing both desert and town needed to be created at decolonization, constructed around an "imagined community located within a specific territory and with a specific common history."[936]

Kuwaiti identity would come to be deeply influenced by a division in Kuwaiti society between people of urban, settled descent, the Hathar, and people of Bedouin descent, the Bedu. This section will explore how Kuwaiti nationality law and policy both grew out of the Bedu/Hathar divide, but also reinforced it. As Part 2 showed, ideas about the supposed tribal nature of nomadic societies permeate the distinction between Bedu and Hathar. Wilkinson cites to Ibn Khaldun, a noted 18th century historian of the region:

> Hadar is the organization of a central government system...(while) badw is not Bedouin (nomads) but tribally organized society whose elite operates from oasis settlement...[937]

In general, the term Bedu is now used across the Gulf region to refer to people who are from the desert, whether or not they are settled (or are technically descended from nomadic Bedouin tribes), versus the urban-dwelling Hathar.[938] Today, the term Bedu has become a cultural identifier, rather than a reference to nomadism, but the association with the nomadic Bedouin tribes of history remains strong.[939] As a result, the fact that all Bedouin in Kuwait are now settled has not affected their identity as Bedu.

> The term badu designates a socio-cultural category that refers less to an economic, nomadic or sedentarised dimension than social values and behaviors: badu share a set of images of themselves with regard to their active or real common lineage, values and attributes, including commonality of interests, the reciprocity of obligations, common residence that continues once settled and the importance placed on marriages and alliances.[940]

"Bedu...conveys a sense of otherness..."[941] It distils certain common assumptions that tribal societies, like nomadic societies, are naturally stateless, a view widely shared by European

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[935] Longva, Citizenship, 186.

[936] Longva, Citizenship, 180.

[937] Wilkinson, 301, 313.

[938] Chatty, Negotiating, 131. See also Chatty Persistence 2014 (discussing identity and the Bedouin in the Arabian context.) "The opposition of *bedu* (desert dweller) to *hadar* (urban dweller) is specifically an Arab cultural tradition." Chatty, Persistence, 18.

[939] Chatty, Persistence, 2014, 17.

[940] Beaugrand, Transnationalism, 2010, 70.

[941] Fletcher, 52.

colonizers, as Part 2 discussed. Speaking of the Middle East, anthropologist Dawn Chatty puts it thus:

> Central governments, particularly in the Middle East, generally regard non-sedentary populations as tribes, forming states within a state, and constituting a national problem.[942]

The association between Bedu and so-called tribalism has arguably influenced the perception of the Bedu as somehow unsuited for nationality and the responsibilities of voting. The Bedu vote has become increasingly associated with opposition to the government and social and cultural backwardness.[943] The Hathar have opposed any discussion of further naturalization.[944] The voting choices of the naturalized Bedu population came under increased criticism and the idea of including more Bedu was now an anathema to many Kuwaiti nationals.[945] Though being *bidoon* entitled the individual to many of the same rights as naturalized Kuwaitis in the 1960s, this would change over the decades as the entitlements of the *bidoon* were gradually reduced.[946] The tension between the Bedu and Hathar elements of Kuwaiti society is now a prominent part of Kuwaiti life and arguably impacts the views of the *bidoon* held by many Kuwaiti nationals.

Meanwhile, Bedouin history has long been romantically celebrated in many Gulf states, even as the descendants of the Bedouin have been excluded from nationality in places like Kuwait. Ibn Khaldun himself advocated for the superiority of the Bedouin lifestyle over that of town dwelling.[947] A certain nostalgia therefore permeates Kuwaiti views of the Bedouin today, even as the Bedu are looked upon as a social and political problem. The administrative implementation of nationality in Kuwait therefore perpetuated and reinforced a divide between Bedu and Hathar, a division implicit in Kuwait's nationality law, as discussed above, and a divide which continued long after the settlement of the Bedouin and their assimilation into urban life.[948]

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[942] Chatty, Truck, 80.

[943] Chatty, Negotiating, 131. A. Jordan, *The Making of a Modern Kingdom: Globalization and Change in Saudi Arabia* (Waveland Press 2011) 69. See also Chatty Pastoralists 5. Chatty points out that there has long been tension between Bedu peoples and settled agriculturalists on the Arabian Peninsula. See also Janzen, 165; D. Chatty, *Adapting to Multinational Oil Exploration: The Mobile Pastoralists of Oman* (University of Halle-Wittenberg 2002) 1–19 (Describing the forced settlement and marginalization of nomadic peoples in Oman and French colonialism).

[944] Partrick, 48. See also Longva, Citizenship, 186.

[945] Longva, Citizenship, 186.

[946] Lund-Johansen, 26.

[947] M. Pribadi, 'Ibn Khaldun's Social Thought on Bedouin and Hadar' 52 *Al-Jami'ah: Journal of Islamic Studies* 417 (2014) 424-431, citing the writings of Ibn Khaldun.

[948] Partrick, 51.

In an attempt to create a founding myth around which Kuwaiti identity could coalesce, the Kuwaiti government embraced the Battle of Jahra as the founding myth of Kuwaiti identity. According to al-Nakib, the Battle of Jahra has been broadly recast in modern Kuwait as the Hathar defending Kuwait Town against invading Bedouin, though not all Bedouin are viewed by the government as playing the same role in this event.[949] Some tribes helped to defend the town. It became crucial to Kuwaiti politics to provide these Bedouin with some sort of official status.

> Today, however, this interdependence between Kuwait's pre-oil sedentary and nomadic worlds has been replaced with a popular rhetoric that identifies the badu as antagonistic outsiders. The building of a fortified town wall (sur) in 1920 has become emblematic of this supposed conflict between town and desert.[950]

The first body of Kuwaiti nationals were therefore defined by their settlement in Kuwait Town and other coastal, urban areas before the Battle of Jahra, thereby granting full membership only those families who had taken part in this foundation event, a group that would come to be known as the Hathar population.[951] The Hathar now saw themselves as "the people from within the wall," while the Bedouin were from "beyond the wall."[952] Kuwait's nationality law both reflected the identity of Kuwait as a Hathar nation, while also reinforcing that identity. But the increasingly educated and political Hathar population would come to pose a threat to the Kuwaiti monarchy and drive the push to naturalize some Bedouin.

In 1938, the Al-Sabah family created a parliament to represent the other powerful merchant families that made up Kuwait's Hathar elite.[953] While political parties in Kuwait were banned, Parliament had some authority, particularly a say over legislation and the appointment of ministers, and would play some role in the drafting and enacting of laws in Kuwait.[954] Keeping a favourable balance of factions in Parliament would come to dominate the Al-Sabah family's policies for the coming decades. The ruling Al-Sabah family would struggle to balance the influence of various populations within Kuwait, including internal divisions between various religious and economic factions, between the Bedu and Hathar population, and between nationals and immigrants. This balancing act would drive Kuwaiti nationality policy. In the 1960s, the merchant elite in Kuwait City became increasingly

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[949] Al-Nakib, 9, 11.

[950] Al-Nakib, 5, 8.

[951] Partrick, 57.

[952] Longva, Citizenship, 187.

[953] Ismael, 73. For more information on the parliament, see generally National Assembly, 'The Progress of Democracy in the State of Kuwait' (October 2011).

[954] N. Brown, 'Pushing Towards Party Politics? Kuwait's Islamic Constitutional Movement' (Carnegie Endowment 2007).

liberal and westernized, attending universities abroad and agitating for a more democratic government with a stronger parliament.

Nevertheless, the Al-Sabahs looked to their desert Bedouin allies with their so-called traditional values to balance the educated, urban Hathar. An immediate goal of the Al-Sabah family was therefore to select a group of Bedouin, headed by sheikhs chosen for their loyalty to the Emir, who would be assimilated into Kuwait to help balance the Hathar population and serve in Kuwait's military as naturalized Kuwaitis.[955] The Al-Sabah family decided to naturalize one hundred thousand Kuwaiti Bedouin in exchange for their political support.[956] These Bedouin were granted a second-tier status of naturalized Kuwaitis.[957] Naturalization would allow the Bedouin to vote and the Al-Sabah family assumed that the Bedouin, who were politically conservative, would view their allegiance as being to the person of the Emir and not to the Parliament.[958] They were not, however, recognized as original Kuwaitis under the law, but were instead naturalized, as described above.

Naturalization favoured those Bedouin who had settled and joined the army and those with established ties to the Al-Sabah family.[959] Naturalization would provide only limited rights and access to services for these Bedouin without placing them on the same footing as original Kuwaitis.[960] During the 1960s and 1970s, Bedouin in the military who were not naturalized often qualified for many state benefits, meaning that their lack of naturalization was not an issue beyond their lack of enfranchisement.[961] This lessened the value of nationality to many Bedouin in the post-colonial period as social benefits were available them. As the above section described, the process of naturalization was discriminatory, extra-legal and arguably done in contravention of Kuwait's nationality law. Meanwhile, though often employed in low level jobs, many other Bedouin ended up without a nationality status at all, excluded from Kuwait's national identity even as they lived and worked in Kuwait. This population, though similar to the naturalized Bedu in many respects, became the *bidoon.*

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[955] Longva, Citizenship, 187. See also Parolin 116; S. Yanai, *The Political Transformation of Gulf Tribal States: Elitism and the Social Contract in Kuwait, Bahrain and Dubai: 1918-1970s* (Sussex 2014) 223-225, 234.

[956] G. Power, 'The Difficult Development of Parliamentary Politics in the Gulf,' in D. Held and K. Ulrichsen, *The Transformation of the Gulf: Politics, Economics and the Global Order* (Routledge 2012) 33. See also Ismael, 125.

[957] Salih, 144.

[958] Longva, Citizenship, 180. See also Power, 33; H. al-Mughni and M. A. Tetreault, 'Political Actors without the Franchise,' in P. Dresch and J. Piscatori (eds.) *Monarchies and Nations: Globalisation and Identity in the Arab States of the Gulf* (Tauris 2005) 218; Al-Nakib 7; Beaugrand, Transnationalism, 2010, 137; Neighboring countries Saudia Arabia and Iraq also attempted to settle and assimilate their Bedouin populations around this time. See Chatty, Pastoralists, 19-20.

[959] Al-Nakib, 12.

[960] Longva, Citizenship, 188.

[961] Longva, Citizenship, 188. See also Al-Nakib, 12-13.

To many Hathar, the Bedouin were incapable of understanding modern nationality and civic participation. The Bedu were "something less than Kuwaiti" and not deserving of full membership in the state.[962] Naturalization appeared to be a government handout and political ploy, rather than the resolution of the status of a large section of Kuwait's population.[963] Many Hathar saw the newly naturalized Bedouin as having pledged allegiance to the Al-Sabah family in exchange for handouts from the state, rather than as loyal nationals.[964] Many members of the military, however, remained *bidoon,* a fact which has caused what Longva called a "constant headache" for the government.[965] Yet, at the same time, naturalization became increasingly untenable politically. As a result, Kuwait ended up with a large number of *bidoon* serving in the military, but naturalizing too many Bedouin was not politically possible and became less so over time.[966]

Attractive pay generated by the oil industry meant that some Bedouin living in Saudi Arabia also went to work in Kuwait in the post-independence period.[967] These Bedouin often had family connections to the recently settled Bedouin of Kuwait and were in some cases invited to Kuwait by the government. As a result, the *bidoon* population became a mixture of Bedouin who had settled near urban areas in Kuwait at different periods. During this time, many of the social services available to *bidoon* began to be removed and the *bidoon* were excluded from all but the lowest level jobs, often working in the informal sector, and had limited access to education and welfare.[968] Because the *bidoon* were not nationals, they could not own businesses, so jobs in the military became the main employment option for the Bedouin, particularly those who were not naturalized.[969]

Meanwhile, Bedouin settling in urban areas to work in the military or oil fields were soon joined by large numbers of immigrants. In the decades following the end of the protectorate agreement with Britain, oil wealth began to bring a huge influx of foreigners to Kuwait, both from within and without the region. This immigration happened throughout all occupations, from educated professionals to domestic workers.[970] By 1965, Kuwaiti

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[962] See generally Brown.

[963] Al-Mughni and Tetreault, 218. See also Longva, Citizenship, 188.

[964] Longva, Citizenship, 187.

[965] Longva, Citizenship, 188.

[966] Ismael, 121. See also Lund-Johansen, 27; Beaugrand, Transnationalism, 2010, 133-134.

[967] Yizraeli, 177.

[968] Partrick, 57.

[969] Crystal, 171, 176. Country Information and Guidance: Kuwaiti Bidoon, Home Office, UK, 3 Feb 2014.

[970] Carmichael, 122.

nationals were a minority in their own country.[971] Migrant workers came first from Palestine and, later, from Southeast Asia.

The immigrant label was also extended to Bedouin tribes who had not been naturalized, even though they originated within the region.[972] At this point, Kuwait began to turn away from pan-Arab nationalism that sought to unify all tribes in favour of a policy including some tribes while labelling others as foreign.[973] Nomadism was now conflated with immigration.[974] They Hathar increasingly viewed the *bidoon* as "trespassers" and "foreigners."[975] Beaugrand refers to those Bedouin families who would one day make the *bidoon* population "near foreigners,"[976] capturing their fuzzy status as somehow both closely connected to Kuwait yet the residents of elsewhere. Today, in popular Kuwaiti discourse, the term *bidoon* means simply foreigner, even when applied to *bidoon* of Bedouin descent.[977] This has been aided by the fact that the category *bidoon* also includes a small population of the children of foreign fathers and Kuwaiti mothers, as Kuwaiti women cannot pass their nationality to their children. This latter category, however, is probably less than 5% of the total *bidoon* population.[978] Nevertheless, it adds to the perception that *bidoon* equals "foreign."

In this way, the Bedouin would come to occupy a space somewhere between Kuwaiti and foreigner, a vagueness in status that the Kuwaiti government would never resolve. The question of the exclusive allegiance of the Bedouin to the Kuwaiti government would remain the subject of debate in Kuwait to the present day. Bedouin belonging is now predicated almost entirely on the perceived loyalty to the Al-Sabah family of one's tribe.

> (I)t is only through the aid of tribalism that people can earn their 'citizenship', residency, and jobs. Currently a sizable number of Bedouins have been denied the right to citizenship. Without citizenship, they do not have free access to such basic services as education, medical care and housing. It is only through the mediation of tribal sheiks that citizenship can be earned.[979]

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[971] Ismael 117. Between 1965 and 1970, the Kuwaiti population increased by 62,000 and between 1970 and 1975 it increased by 38,000.

[972] Longva, Citizenship, 183.

[973] Ismael, 121-124. See also Longva, Citizenship, 183.

[974] Longva, Citizenship, 182.

[975] Longva, Citizenship, 187.

[976] Beaugrand, Stateless, 2018 4.

[977] Longva, Citizenship, 188. See also Lund-Johansen 1. I am indebted to Professor Alwuhaib for his insights on this point.

[978] Beaugrand, Transnationalism, 2010, 140; Conversations with *bidoon* activists. Lund-Johansen, 1-2.

[979] Salih, 143.

Bedouin were chosen for naturalization based on a combination of factors including perceived tribal loyalty to the Al-Sabah family and the time and manner in which they settled in the territory that is now Kuwait.[980] Yet it is important to note that many Bedouin who would later come to serve in the military were not naturalized. Many Bedouin who joined the military in later decades would remain *bidoon,* despite their service.[981] Rather, historical ties to the Al-Sabah family, past military service at key moments in Kuwait's history, and ties to Kuwait's territory were the most important factors driving naturalization:

> There are eight major tribal groups in Kuwait: al-'Awazim (al-Awazems), al-Mutayri (al-Mutair), al-'Ajman, al-Rashayda (al-Rashaida), al-'Utaybi, al-'Inzi, al-Zufayri, and al-Shammari. Al-'Awazim is one of the oldest tribal groups that settled in Kuwait. Its members live mostly along the coastal strip which extends to Saudi Arabia, from where its parliamentary representatives come...Like al-'Ajman, al-Rashayda is also a famous tribal group in the Arabian Peninsula, due to the fierce battles it fought with the Ottomans at the end of the nineteenth century. As a result, many members of this tribe migrated to Egypt and Sudan...Al 'Utaybi tribe has played a dominant role in the Wahabi movement and in the conflicts which erupted in the Peninsula during the formation of the third Saudi state...Al-Zufayri is one of the most influential tribes in the north western part of Kuwait, and, in particular, they are located on the border areas between Iraq, Kuwait and Saudi Arabia (Hofrat al-Batin). *Unlike other tribes, the settlement of al-Zufayri in Kuwait's urbanised areas came late and that is why many members of the tribe do not have Kuwaiti citizenship...Al-Shammari was forced to migrate to Kuwait following political conflicts in the Najd area...*[982]

Certain tribes who are claimed to have played a role in defending Kuwait Town from Iraqi and Saudi invaders are now prominent in Kuwaiti politics, including the al-Awazems, the al-Mutair, the al-Ajman and the al-Rashaida.[983] By contrast, according to Human Rights Watch, many stateless Bedouin who now hold the status of *bidoon,* or being without a status in Kuwait, come from the al-Shammari and Aneza tribes.[984] Beaugrand claims that the majority of the *bidoon* populations comes from what are sometimes referred to as the

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[980] I am indebted to Professor Al-Wuhaib for his comments on this point. Longva, Citizenship, 187.

[981] Beaugrand, Stateless, 2018, 108.

[982] Salih, 144 (My italics). For more on this subject, see Beaugrand, Stateless, 2018, 62-68.

[983] Middle East Online, 'Kuwait splits between conflicts of sheikhs, and sheikhs of conflicts' (June 7, 2011). Note the spelling is different in different sources. This dissertation has preserved the spelling as written in each source.

[984] Human Rights Watch, 'The Bedoons of Kuwait: Citizens without Citizenship' (1995).

"northern Arabian tribes," specifically the "Shammar, Dhatir and Anaza."[985] As Beaugrand puts it;

> Biduns claim their entitlement to first degree Kuwaiti nationality on the basis of a pre-state understanding of sovereignty and territoriality, when political power was associated with the control of inland tribes, together with the trade routes they commanded and far-flung military resources they could mobilize so that their immemorial roaming patterns and seasonal *musabila* (Bedouin's seasonal visits to the town markets for the sale and purchase of goods) is as good a proof of their presence in the North Arabian region.[986]

Therefore, in addition to past service in the protection of Kuwait's towns, the time at which various tribes settled near urban areas and took up wage employment was also a key factor in the extent to which they received a nationality. Over time, the identity of individual Bedouin tribes settled in Kuwait but without nationality became subsumed into that of the *bidoon,* a population of poor people living on the margins of Kuwaiti society. By the 1990s, naturalized Bedouin made up 60% of Kuwaiti nationals.[987]

It should be noted that much of what is cited above continues to be contested history. The intent of this section is not to plunge into the debate of where various Bedouin tribes come from, or to provide a definitive history of Kuwait's Bedouin tribes, but rather to explain how the issue of Bedouin allegiance and origins came to be the deciding factor for their nationality status. There appears to be some general agreement among sources that the al-Shammari, who are a powerful tribe in Iraq, the Al-Aneza, a powerful Syrian tribe with connections to Iraq, and the Al-Zufayri tribe from northern Kuwait most frequently found themselves without Kuwaiti nationality, though the government of Kuwait also claims that many of the *bidoon* are actually faking their tribal origins, a fact which complicates efforts to summarize Bedouin history.[988]

Some sources point to the fact that some *bidoon* have family origins in Syria and came to Kuwait more recently, though it is not the purpose of this dissertation to take a view on the extent to which individual *bidoon* families had ties to Kuwait Town before decolonization or migrated to Kuwait in the post-independence period.[989] Beaugrand argues that many

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[985] C. Beaugrand, 'Framing Nationality in the Migratory Context: The Elusive Category of Biduns in Kuwait' (Author's Manuscript) 6 *Middle East Law and Governance* 1 (2014) 8. See also Beaugrand, Stateless, 2018, 4.

[986] Beaugrand, Transnationalism, 2010, 29. Statelessness and lesser forms of nationality that don't include full citizenship rights plague Bedouin populations across Arabia. See for example the Bedouin tribes in Lebanon, where Chatty notes that today as many as two thirds of Bedouin in Lebanon may be without a nationality. Chatty, Persistance, 11, 24.

[987] Longva, Citizenship, 187.

[988] Beaugrand, Transnationalism, 2010, 10.

[989] Beaugrand cites to a *bidoon* family who came from Syria to Kuwait in the 1970s. Beaugrand, Stateless, 2018, 191.

Bedouin who later came to settle in what is now Kuwait had what she calls "transnational" ties to the region[990] including ties to Saudi Arabia,[991] but it is not clear what this means in light of the recent nature of Kuwait's colonial borders in the desert. Citing Rania Maktabi, Beaugrand notes that some naturalized Bedouin were "Saudi and Iraqi."[992] More independent research would need to be done to establish the historical claims of individual Bedouin families to Kuwaiti nationality under the laws at the time. Crucial would be an interpretation of the term "settlement" under Kuwaiti law.

In the 1980s, the Kuwaiti government became increasingly concerned that the *bidoon* population was being infiltrated by what they called outside agitators, particularly agents from Iraq.[993] This view was accompanied by new documentation requirements for the *bidoon,* now for security reasons, and was accompanied by the termination of the naturalization program, as discussed above.[994] The war in Iraq would be devastating for the status of the *bidoon,* cementing the association between them and Iraq and elevating them as a security risk to the state. Because many settled Bedu lived to the north of Kuwaiti City near Al-Jahra, they were the first to flee during the invasion, further adding to the perception that they were disloyal to Kuwait.[995] During the Iraqi occupation, the Provisional Government contained many *bidoon* and the Iraqi authorities forced all *bidoon* to register for the army or face execution. Many Bedu families who lived on the outskirts of towns fled to Saudi Arabia where they had relatives. These facts combined to paint a devastating picture of *bidoon* "loyalty."[996] The invasion was the last straw for many Hathar Kuwaitis, who now equated the *bidoon* with Iraqi supporters and other dangerous foreigners.[997] After the restoration of the Al-Sabah family and the Kuwaiti government, those *bidoon* who had fled abroad were prohibited from returning,[998] and many others were fired from their jobs or required to inform on their neighbours. This occurred despite

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[990] Beaugrand, Stateless, 2018, 62.

[991] Beaugrand, Stateless, 2018, 193-194.

[992] Beaugrand, Stateless, 2018, 86, citing R. Maktabi, 'The Gulf Crisis (1990-91) and the Kuwaiti regime – Legitimacy and Stability in a Rentier state' (Master's thesis, U. Oslo 1992).

[993] Longva, Citizenship, 188.

[994] Beaugrand, Transnationalism, 2010, 150.

[995] Longva, Citizenship, 188-191. Longva argues that this debate represents a continuation of the different views of nationality by the Bedu and Hathar, where the Bedu see nationality as based on allegiance to the Al-Sabah family, while the Hathar see it as allegiance to the nation and territory of Kuwait. Longva, 192-193.

[996] Longva, Citizenship, 189.

[997] Longva, Citizenship, 188. See also Lund-Johansen 33.

[998] Beaugrand, Stateless, 2018, 17.

a court ruling in 1998 that *bidoon* were stateless people and not aliens.[999] Being *bidoon* had for many become synonymous with being Iraqi.[1000] These events would produce a toxic situation for the *bidoon,* who were now issued papers claiming their origin as Iraqi.[1001]

The problem of the *bidoon,* whose statelessness was wholly created by the Kuwaiti government, would be recast as an issue of national security. [1002] The so-called solution, however, did not involve naturalization but rather involved increasingly extreme schemes to deport the *bidoon.* While Beaugrand points out that in actual fact, neither Iraq nor Saudi Arabia have made direct claims of nationality on Kuwaiti *bidoon,* it was undeniable that during the Iraq wars, the question of the status of Kuwaiti *bidoon* became a highly politicized pressure point on Kuwait.[1003] During the war, some Iraqis may have entered the *bidoon* population, possibility doubling it in size and further linking the concept of *bidoon* to being from Iraq.[1004]

With time, many naturalized Bedouin have achieved a lifestyle and standard of living similar to the Hathar.[1005] For the *bidoon*, however, life had only gotten more difficult.[1006] As time went on, assistance programs for the *bidoon* began to be seen as expensive and fell out of favour.[1007] As well, the Bedu stopped being such dependable allies for the Al-Sabah family and now often vote with the opposition.[1008] At the same time, the government increasingly equated the *bidoon* with migrants from other parts of Arabia, blurring the distinction between nomads and economic migrants. Recasting the *bidoon* as immigrants helped to legitimize their continued statelessness while political, economic and social factors lessened the appeal of the resolution of their status.[1009] Recently, the government has used denationalization as a way to punish naturalized former Bedouin (Bedu) accused

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[999] Crystal 176-178. See also Country Information and Guidance: Kuwaiti Bidoon, Home Office, UK, 3 Feb 2014. Refugees International, 'Without Citizenship, Statelessness, Discrimination and Repression in Kuwait' (2012); Lund-Johansen 34.

[1000] Beaugrand, Transnationalism, 2010, 152.

[1001] Beaugrand, Stateless, 2018, 33.

[1002] Beaugrand, Stateless, 2018, 168-169.

[1003] Beaugrand, Transnationalism, 2010, 31.

[1004] Beaugrand, Stateless, 2018, 114-115.

[1005] Longva, Citizenship, 187.

[1006] Al-Nakib calls the naturalization and settlement of the Bedouin by the government "incoherent" and "untenable in the long term." Al-Nakib 7.

[1007] Ismael, 125-126.

[1008] K. Diwan, 'Kuwait: Too much politics, or not enough?' Foreign Policy (10 Jan 2011).

[1009] Beaugrand, Transnationalism, 2010, 227.

of forgery during naturalization.[1010] Beaugrand hypothesizes that such acts are linked to the modern tendency of what is often called tribal political groups to vote in opposition to the government.[1011]

For the purposes of the argument over the registration of the *bidoon* as without a status, the existence of Kuwait's borders is treated as an unchanging fact rather than something that developed over time, during a period of external influence, and overlaid an earlier system of belonging and membership that was not exclusively territorial in nature. The complexities and fluid nature of the relationship between town and desert described in Part 2 were reduced to a dichotomy of territorial insiders and outsiders that has now ossified. Ironically, in adopting and defending the territorial concept of the state, the so-called foreign status of the *bidoon* is now used as a moral justification for itself, part of what defines Kuwaiti nationality.[1012]

As the next section will discuss, below, while the question of national unity and the inclusion of minority groups, including the Bedouin, was a major factor driving Kuwait's nationality policy, other important factors were at work that are crucial to understanding Bedouin exclusion. The statelessness of the *bidoon* was taking place against the backdrop of a dramatic regional struggle for oil that would dramatically raise the importance of the question of the loyalty and belonging of the so-called Bedu population and control over what had been Bedouin lands. First, the next section will turn back to the Mali example to explore how nationality identity and the push for national unity influenced Malian nationality law and the status of the Tuareg.

[1010] Beaugrand, Stateless, 2018, 30-31.

[1011] Beaugrand, Stateless, 2018, 31.

[1012] Beaugrand, Stateless, 2018, 69.

National Identity in Mali

Mali's original flag with the Kanaga figure of the Dogon people, associated with the Négritude movement.

> Exclusion can be a way of affirming the boundaries of the nation when loyalty or unity is most needed by political elites.[1013]

As the above section showed, Mali's nationality law contained considerable protections against inter-generational statelessness, including the use of double-birth. Yet, many Malian Tuareg today lack documents to prove their nationality. This section will look at the civil war in northern Mali to help explain why Mali's nationality law has not prevented Tuareg statelessness. This section will look at how the Malian government pursued the goal of national unity in northern Mali in order to fend of what it perceived as a serious threat of Tuareg separatism. The sources for this section are primarily academic, but U.N. and World Bank reports are used where needed to provide current information. In person interviews were also conducted with experts to provide information that is otherwise lacking.

For the Malian government, national unity would come to be one of the major goals of the post-independence period.[1014] As in many Sahel countries, the fight to prevent Tuareg succession would have an impact on how Mali's nationality law was applied to the Tuareg.

> (In Africa, p)olitical elites have battled over nationality as a specific tool to restrict the scope of contestation and render powerful opponents illegitimate by virtue of non-national status.[1015]

Like Kuwait, Mali was a diverse region without a common religion, culture or history, a creation of colonial borders. Like with the Bedouin, concerns over territorial sovereignty

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[1013] Gibney, 2014, 55.

[1014] L. Smith, *Making Citizens in Africa: Ethnicity, Gender and National Identity in Ethiopia (*Cambridge UP 2013) 23 (hereinafter L. Smith).

[1015] L. Smith, 4.

would fuel Tuareg exclusion.[1016] As this section will show, the inclusion of the Tuareg into the Malian state would present the biggest challenge to Mali's post-colonial integrity. The experience of the Tuareg in Mali is an example of how statelessness can be both the cause, and the result, of conflicts over colonial-era borders.[1017] In particular, this section will focus on how forced settlement and assimilation of the Tuareg minority fuelled separatism and a debate over Tuareg nationality. Ryser calls decolonization a "failure" in Africa because it created conflict between indigenous groups and their states over land and resources.[1018]

Since independence from France, there have been four major Tuareg uprisings resulting in the mass expulsion and repression of the Tuareg: the first in the early 1960s, the second in the early 1990s, the third in 2006 and most recently in 2012, which has led to the current vacuum of Malian state authority in northern Mali. The conflicts have involved the three northern provinces of Gao, Kidal and Timbuktu, close to 500,000 km squared.[1019]

As the above section explained, as in Kuwait, the colonial powers had elevated settled, urban rulers over nomadic leaders in Mali. At independence, the new government, located in Bamako far to the south, had to find solutions for the "problem" of their nomadic, Sahel populations.[1020] The Malian government in many ways inherited the struggles of the French administration to bring nomadism in line with the needs of the territorial state. The need to integrate northern Mali would dominate Malian politics to the present day.

Like Kuwait, the belonging of the Tuareg would come to be reframed as an issue not of nationality and belonging, but of national security, with devastating consequences.

> (T)he practice of African pastoralism...has always transcended State borders but must now take into account of constraints linked to migrations, terrorism, organized crime, insecurity...[1021]

In Kuwait, the "problem" of nomadic populations was solved through the nationality law, by creating a series of tiers of belonging and a special class of stateless persons. As this section will show, the Tuareg qualified for nationality under Malian law, either automatically at independence, or subsequently through double birth, yet persecution has

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[1016] Lecocq, Desert, 2002, 69-70.

[1017] African Commission, para 24.

[1018] R. Ryser, *Indigenous Nations and Modern States; The Political Emergence of Nations Challenging State Power* (Routledge 2012) 157, 199.

[1019] Diarrah, 85-86.

[1020] The Malian government is not alone in Africa in regarding nomads as a threat to their statehood. "Mutual distrust" characterizes the relationship between many nomads and governments. J. Ginat and A. Khazanov, *Changing Nomads in a Changing World* (Sussex 1998) 1-2 (hereinafter Ginat and Khazanov).

[1021] African Commission, para 30. See also S. Straus, 'Mali and Its Sahelian Neighbors' (World Development Report, World Bank 2011).

led to their statelessness.[1022] Instead of being registered as nationals, the Tuareg were subjected almost immediately following colonial independence with a period of violent repression and, in the case of the northern Kidal region, military rule. As Lecocq puts it, the outcome of independence:

> ...was not a Malian state, but a state harbouring at least two nascent national ideas, if not more: the Malian nation and the Tamasheq nation.[1023]

Unlike the *bidoon*, who hold an official, government-issued status of "no status," most Tuareg qualified under Mali's nationality law but remained unregistered.[1024] But unlike many other rural people in Mali who may lack documents but whose belonging as part of Mali is unquestioned, many Tuareg were not simply unregistered due to weak state structures, instead, their nationality became the subject of a bitter debate over the sovereignty of northern Mali and the place of the Tuareg in Malian society.

> Mali, like many young states in Africa, has a weak sense of national unity and national identity. Geography ...undermines (its) national unity...(p)olitical and economic power is strongly centered on the urban elites in (the) south of the country.[1025]

The fact that many Tuareg are unregistered does not, on its own, mean that the Tuareg are stateless. As Mark Manly points out, "lack of birth registration is not sufficient to render a person stateless."[1026] Nor does economic and political marginalization,[1027] nor minority status, on their own, necessarily produce statelessness. As this section will show, however, the violence directed against Tuareg communities by the Malian government, coupled with government rhetoric of Tuareg being foreigners, means that most Tuareg have lived in what is essentially a military sub-state in northern Mali, treated as alien occupiers and subversives. Tuareg exclusion therefore extends far beyond the lack of documents experienced by many rural Africans.

[1022] Based on expert interviews, September 2018 M. Bado of CERAP (available on request), it is likely that many Tuareg families have never been registered as nationals of Mali.

[1023] Lecocq, Desert, 2002, 29.

[1024] According to an interview with noted Mali specialist Arsène Brice Bado of the Centre de Recherche et d'Action pour la Paix (CERAP) in Abidjan, Cote d'Ivoire, the majority of Tuareg today are not registered as Malian nationals and it is likely many families have never been registered since decolonization, though statistics are not available. Interview COI September 2018 (available on request).

[1025] Stewart, 23, 25-26.

[1026] Manly, 2014, 107.

[1027] Keenan, Lesser Gods, 10.

The quest for Malian unity began even before the French left. Leopold Sédar Senghor had worried that what he called the myth of nationalism was being transmitted to Africa.[1028]

> Until relatively late in the colonial game, the proposition that there was a Nigerian, Algerian or Congolese 'nation' would have been treated as utterly ludicrous.[1029]

Needing to unify disparate and diverse regions, African leaders in the 1960s were incentivized to formulate a cohesive national identity, a process that often led to the exclusion of minority groups. But Senghor saw a single national identity as at odds with the African sense of a local *patrie* and the diversity that marked many post-colonial African states.[1030] As noted in Part 2, the French had done nothing to construct a sense of national identity in French Soudan, opting instead to create further divisions by administrating separately the nomadic and settled portions of Sahel society. National identity therefore had to be constructed at independence by the Mali government, which favoured a southern, black African identity, often expressed through the writings of the *Négritude* movement.[1031]

Already, as Part 2 discussed, the policies of the French had heavily favoured the settled population.[1032] The Malian state inherited the colonial structures of the French, including the centralized, urban-based administrative divisions of territory and French policies on schooling, voting, registration and other aspects of civic life, policies that, as Part 2 showed, favoured the sedentary population.[1033] As Part 2 showed, the French had also reoriented economic and political power in the region towards the south of the country and away from the Sahara caravan trade.

Mali also faced several new problems with which the French had been wholly unconcerned, including the need to shore up its new borders and to develop national unity and a unified national identity, as well as an independent economy.[1034] As Part 2 showed, none of these issues were of importance to the French, but they would assume primary importance in Mali. Race and culture would play a large part in the construction of this unified Malian identity. Branding minorities as foreign colonizers would become a way to exclude so-called problematic individuals or groups, including the Tuareg. The Malian government has

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[1028] Cooper, 330, 350 footnote 61, quoting Senghor; Congrès constitutif du parti de la fédération africaine 'Proceedings' Afrique Nouvelle (3 July 1959).

[1029] Young, 6, 18.

[1030] Cooper, 349, quoting Senghor.

[1031] Cooper, 166. See also Stewart, 9; Manby, Citizenship, 2018, 4.

[1032] Diarrah, 86.

[1033] Boilley, Les Touaregs, 1999, 271.

[1034] Mali inherited a weak economy from the French, who had done little to build infrastructure outside of urban centers. Lecocq, Desert, 2002, 74.

often presented the Tuareg as being too closely connected to the French government, as being white and as being foreign.[1035]

The process of registration of the Tuareg first began as the AOF was being dissolved into individual states, with borders being drawn through the heart of the Tuareg region. The failure of the *Sahara français* and the OCRS struck a blow against a separate, or quasi-independent Tuareg state. The fact that the Tuareg were split across multiple states meant that they would now be a tiny minority not only in Mali as a whole, but also in northern Mali. Less than 5 percent of the total Malian population today is of Tuareg descent.[1036] As a result, government policies on the Tuareg would now be decided by non-Tuareg.

Malian politics after independence can be divided into two very distinct periods: the socialist policies of Modibo Keïta from 1960-1968 and the dictatorship of General Moussa Traore from 1968-1991.[1037] The early stages of creating the Malian state took place from 1958 to 1960.[1038] 1958 saw the proclamation of the Soudanese republic, which was to become Mali. The rapidity of events took many Tuareg by surprise. Instead of a separate, Tuareg state, all of northern Mali now became part of the VIth administrative region of Mali, which encompassed the Sahara, Sahel and all points north, with the capital at Gao. By 1959, all of the French administrators had been replaced by Malians.

At the start, it seemed as if northern Mali was to take part in its own governance. The first civil servants appointed were familiar with the north.[1039] In 1960, the first Malian military units posted in the north were made up of a mixture of men from the south and the north.[1040] It seemed as though the Malian state were making an effort to incorporate the Tuareg into Mali, in spite of their resistance to Keïta's one party state.[1041]

Yet these moves papered over the deep divisions between the government and the Tuareg. As Hama Ag Sid Ahmed, representative to Europe of the *Mouvement Populaire de l'Azawad*, put it,

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[1035] Panter-Brick, 73.

[1036] Keenan, a noted anthropologist working for decades with the Tuareg, estimates the number of Tuareg in Mali today at 675,000 people. Keenan Lesser Gods 1-2. Northern Mali is sparsely populated, and ninety percent of the population of Mali live in the south. Stewart 16. See also Chipman 28; Gaudio, 1988, 149; Minority Rights Group International, 'World Directory of Minorities and Indigenous Peoples - Mali: Overview' (May 2013).

[1037] Diarrah, 25.

[1038] Boilley, Les Touaregs, 1999, 285.

[1039] Boilley, Les Touaregs, 1999, 301.

[1040] Boilley, Les Touaregs, 1999, 302.

[1041] Bourgeot, Résistances, 268 (Discussing the problems facing the administration of the Tuareg within one party states.)

> the ex-French Sudan became independent under the name of Republic of Mali. Its borders were drawn since the beginning of colonization as we know, the new Malian state extended her sovereignty into our territory by the simple logic of the colonial system.[1042]

The Tuareg region was now divided between five separate sovereign states, each demanding exclusive loyalty to a distant power centre controlled by others. The centre of power for the Tuareg was now located not in Timbuktu or Agadez, but far to the south in Bamako.[1043] The separated sovereign states would come to have increasingly difficult relationships to one another and their borders would become potential sources of conflict. The need to control territory defines many African conflicts between minority groups and the state.[1044]

> (T)he geography and politics of the greater colonial project led to states that have persistent border disputes with neighbors...and human refugee and migration flows.[1045]

The "nationalist leadership" of the new states sought legitimacy and security; strengthening their borders was a priority.[1046] Neighbouring Algeria was also employing forced settlement of the Tuareg as a means to control their disputed southern border, further cutting Malian Tuareg off from their extended families.[1047] In Mali, according to the African Commission;

> the principle of the sanctity of borders is used by all the nation states to deny the nomads the right to associate with their kin who find themselves in different nation states. One example is that of people who live in Kidal in Mali, which is 1,500 kilometers from the capital city of Bamako. The nearest city for the residents of Kidal is the town of Tinzawaren in Algeria. But because of the sanctity of borders, nomads who have no identity cards or travel documents suffer harassment when they cross borders to acquire the basic necessities. They are often searched, beaten, imprisoned and bribes are often solicited from them, and failure to pay leads to the loss of resources purchased.[1048]

[1042] Quoted in Gaudio, 1988, 187.

[1043] Claudot-Hawad, 655. See also Manby, Struggles, 3.

[1044] D. Rothchild and V. Olorunsola, 'Managing Competing State and Ethnic Claims' in D. Rothchild and V. Olorunsola (eds.), *State Versus Ethnic Claims: African Policy Dilemmas* (Westview P. 1983) 11.

[1045] L. Smith, 21.

[1046] Young, 5. In this, Mali is similar to other west African nations. Rothchild and Olorunsola, 1.

[1047] Azarya, 261. Algeria forcibly settled most of the Tuareg following independence, also developing the tourist infrastructure of southern Algeria, creating jobs. The Tuareg resisted these efforts.

[1048] Report of the ACHPR Working Group of Experts on Indigenous Populations/Communities, 39.

Armed conflict, however, was not the first reaction of the Malian government to the Tuareg. Like the French before them, the Keïta government put in place policies of assimilation to settle the Tuareg, which it saw as key to economic development, stability and the conversion of the Tuareg from a problem to productive members of the Malian state. Keïta's government wanted to solidify Mali's borders by limiting cross border grazing, emancipating the Tuareg slave classes, giving land to the sedentary population, and developing agriculture in the region.[1049] In short, they wished to finish the project begun by the French.

In the north, the Keïta regime was "convinced" that agriculture was possible in the Sahel, but that the Tuareg were too "lazy" and the French too apathetic to make it work.[1050] The Malian government officially adopted a policy of assimilation towards the Tuareg. Diby Sillas Diarra, Mali's administrator in the north, is quoted by Boilley as saying, "sedentarisation of the nomad is our objective (in the north)."[1051]

Settlement of the Tuareg was explicitly encouraged by the Malian government, but it was also a side effect of its broader economic programs. Borders split grazing areas and restricted seasonal migration, encouraging settlement, and Mali's agricultural development schemes led to overgrazing, contributing to drought and making pastoralism more difficult.[1052] Like the French before them, the Malian government also used schooling and access to services as tools of assimilation. Education under the Keïta regime became an obligation for all Tuareg children, following the French system already so unpopular with the Tuareg, and was used as a way to promote socialist ideas.[1053]

The *Tamasheq* language was banned and children were taught songs and stories that focused exclusively on southern Malian culture.[1054] Tuareg culture was presented as backward and children were encouraged to reject nomadism. Many children were completely cut off from their parents, unable to return home even during vacation because of the distances involved. Tuareg children who had been traumatized by the events of the rebellion would not forget these early experiences with the Malian state.[1055] Throughout

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[1049] Hall, 319. The Tuareg were not the only pastoral nomads to suffer under these policies; in southern Mali, nomadic Fulbe peoples were prohibited from crossing the border with Cote d'Ivoire to sell their cattle in the lucrative Ivorian cattle market and had their cattle confiscated by the Keïta government, causing the mass relocation of Fulbe to northern Cote d'Ivoire. Diallo, 37.

[1050] Lecocq, Desert, 2002, 153-154.

[1051] Boilley, Les Touaregs, 1999, 360.

[1052] A. Khazanov, 'Pastoralists in the Contemporary World: The Problem of Survival' in J. Ginat and A. Khazanov (eds.), *Changing Nomads in a Changing World* (Sussex 1998) 9-12 (hereinafter Khazanov, Pastoralists).

[1053] Boilley, Les Touaregs, 1999, 351.

[1054] Lecocq, Desert, 2002, 157-158.

[1055] Boilley, Les Touaregs, 1999, 357-360.

the 1960s, the Tuareg would resist government schooling.[1056] In 1967, for example, three Tuareg chiefs were executed in Kidal for failing to bring the children of their clans to school.

In this way, the conversion of the local economy to agriculture may be seen less as an attempt to transform the economy to something more "productive," but rather an attempt to assimilate the Tuareg into the majority lifestyle of the region, which was settled, subsistence agriculture employing a traditional system of land tenure. While Diarra made some progress in promoting agriculture, however, ultimately, he would be frustrated in his efforts by the economic realities of the Sahel environment, as the French had been before him.[1057] The drive to assimilate the Tuareg, however, would continue long after Diarra's departure.

Another way the Keïta government encouraged assimilation was by breaking the authority of the Tuareg nomadic noble class, as the French had tried to do before them. As discussed above in Part 2, Tuareg society was based around a class system that allowed the noble class to focus on nomadism and military protection. Camels had been used by the Tuareg nobility to fight Malian troops and conduct the caravan trade, activities that the government wished to discourage.[1058] The Tuareg nobility were associated in the minds of many Malians with slavery and devastating raids on crops and villages.

The socialist government rejected the traditional hierarchy of the Tuareg chiefs and sought to abolish the Tuareg class structure, employing much more aggressive policies than the relatively hands-off approached developed by the French.[1059] Settlement became more and more necessary to the noble class, as those noble families who settled in towns had greater access to political power and became more wealthy, while those pursing pastoralism became more and more impoverished and cut off from any say in their affairs.[1060] Administrators were appointed without consulting the local population and were chosen almost exclusively from among the southern population.[1061]

Freeing the slaves was also a major priority for the Keïta regime, one that would greatly increase the size and, therefore, political power of the sedentary population. Both Malian political parties vigorously sought the support of the Tuareg slave population following independence.[1062] Former slaves were granted land and cattle from their former masters'

[1056] Azarya, 260.

[1057] Lecocq, Desert, 2002, 156.

[1058] Bourgeot, Résistances, 226-231.

[1059] Boilley, Les Touaregs, 1999, 310-317, 355.

[1060] Bernus, 169.

[1061] Diarrah, 86-87. See also Boilley, Les Touaregs, 1999, 349.

[1062] Lecocq, Desert, 2002, 110.

herds. In the first elections following independence, the newly liberated population enthusiastically embraced voting.[1063] Like the French before them, the Malian government saw freeing the slaves both as a humanitarian project of liberation and as part of an effort to transform Tuareg society and weaken the power of the nomadic nobility, further accelerating the assimilation of the Tuareg.

This program of assimilation was met with stiff resistance by the Tuareg, as had previous programs by the French. But the Keïta regime was far more focused on incorporating and assimilating its northern territories into the Malian state than the French had been. As Lecocq points out, speaking of Tuareg treatment by the Malian government:

> (A) lack of understanding of nomad social and political organization from the side of sedentary peoples leads to the belief that nomads are by definition unruly anarchists averse to organization and control.[1064]

The first post-independence elections were scheduled for 1964, but the project of assimilating the Tuareg into the Malian state would not last that long.[1065]

Even as it was attempting to assimilate the Tuareg, the new Malian state saw sedition everywhere in the north. Persons suspected of sedition could be placed in prison without trial for acts against the public order.[1066] The *Milice populaire* and *Brigades de vigilance*, volunteer cadres mainly of Songhai people, were used to uncover supposed Tuareg sedition and subversive activities. Arab and Tuareg groups came under state surveillance.

Influential Tuaregs who had supported independence of the northern regions came under government suspicion, such as Mohammed Makhmoud ould Cheikh, M. Wafy, the founder of the Arab-Berber association, and the chief of the Kel Antsar, Mohammed Ali ag Attaher, who fled to Morocco.[1067] Keïta justified these laws by saying that the Malian state was young and diverse, and "the idea of the State is not yet formed."[1068] Nation building, economic development and humanitarian concerns therefore justified the use of draconian measures against the Tuareg.

The Tuareg developed a "profound resentment" towards southern leaders.[1069] Malian nationalism and anti-colonialism were seen by the Tuareg as southern chauvinism. For the

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[1063] Lecocq, Desert, 2002, 110.

[1064] Lecocq, Desert, 2002, 90.

[1065] Hall, 275.

[1066] The government passed Ordonnance 32 of 28 March 1959, criminalizing acts of discrimination of a racial, "regionalist" or religious nature with punishments of 5-10 years in prison.

[1067] Boilley, Les Touaregs, 1999, 304. See also Lecocq, Desert, 2002, 191.

[1068] Boilley, Les Touaregs, 1999, 303.

[1069] Diarrah, 86.

Malian government, the Tuareg were seen as "troublemakers," distinct from the national identity of Mali, which was black African and engaged in slavery and pseudo-colonialism.[1070] In Mali and Niger, the Tuareg were increasingly treated as outsiders in their own country due to the growing perception, often promoted by Tuareg leaders themselves, of a sharp cultural and racial divide between "white, northern" nomads and "black, southern" agriculturalists.[1071] As anthropologist Baz Lecocq put it,

> The Tuareg were thought of (by the government) as white, feudal, racist, pro-slavery, bellicose and lazy savage nomads, who were used as the vanguard of French neo-colonialist and neo-imperialist projects in the mineral-rich Sahara.[1072]

As a result, there developed a racial and ethnic nature to the Malian conflict, as well as discrimination against the Tuareg's mobile way of life. Today, the government continues to classify people from northern Mali according to lifestyle first, (nomadic or sedentary) and ethnicity or religion second.[1073]

At first, the Tuareg tried to work within the Malian state. Some Tuareg leaders joined the Malian government.[1074] They argued for greater representation of Tuareg at both the regional and national level. But Tuareg were largely overlooked for posts in the government, despite the existence of an educated elite with a long history of governing alongside the French.[1075] Malian officials evidenced a long-running antipathy to nomads in general and the Tuareg in particular.[1076] Lecocq describes the Malian government's attitude towards the Tuareg during this period as "paranoid" over separatism and revolt.[1077]

Like the French before them, the Malian government got involved in the appointment of the new Amanokal of the Kel Adagh Tuareg, appointing a member of the ruling family who promised to be pro-Mali, echoing French meddling in the Tuareg leadership.[1078] Quickly, the relationship between prominent Tuareg and the Malian government deteriorated. Those Tuareg arguing for autonomy or independence, such as Muhammad 'Ali and Ould al-

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[1070] Pezard and Shurkin, 9. See also Lecocq, Desert, 2002, 89.

[1071] Bourgeot, Résistances, 406. See also Lecocq, Desert, 2002 89.

[1072] Lecocq, Desert, 89.

[1073] M. Tiessa-Farma Maiga, *Le Mali : de la sècheresse a la rébellion nomade : Chronique et analyse d'un double phénomène du contre-développement en Afrique sahélienne* (L'Harmattan 1997) 98-108.

[1074] Hall, 311-313.

[1075] Lecocq, Desert, 2002, 138-139.

[1076] Hall, 318.

[1077] Lecocq, Desert, 2002, 173-174.

[1078] Lecocq, Desert, 2002, 146-149.

Shaykh, were imprisoned.[1079] The "problem of the north" was presented as a security issue, rather than an issue of state legitimacy, minority rights or civic participation.[1080]

> In the first years of independence, during the socialist regime, sedentarization policies were part of the nation building process through which all Malian 'citizens' had to be assimilated...[1081]

In 1962, an incident between a Tuareg noble and two Malian soldiers in the Kidal region would become the catalyst for a local uprising.[1082] The brutal government response would engulf the entire Kidal province in violence, which the Tuareg called the *Alfellaga*, causing an exodus of thousands of Tuareg and the end to any real cooperation between nomadic Tuareg and the Malian state during the Keïta regime.[1083] As many as 5,000 Tuareg from Kidal left for Algeria to escape this scorched earth campaign.[1084] Tuareg rebels were put to death and the civilian population was treated with cruelty.[1085]

Eventually, the government replaced the Arab, Songhai and Tuareg troops in Kidal with soldiers from the south who had no ties to the region, mostly Bambara who had never been north before. These forces were under the control of captains who had fought throughout the French Empire, equipped with modern weapons and used to dealing with much more serious uprisings.[1086] During the conflict, the government declared the border with Algeria to be a "no-go" zone, and every person found there was automatically considered to be a rebel.[1087] To starve out the Tuareg fighters, wells were poisoned, herds killed and Tuareg civilians killed or forcibly removed from the area.[1088] Tuareg notables and leaders were

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[1079] Hall, 314.

[1080] Stewart, 25.

[1081] Randall and Giuffrida, 436.

[1082] Diarrah 86. See also Stewart 32; Bourgeot, Résistances, 233. Two Malian soldiers (a Songhai and a Tuareg) attempted to arrest one of the sons of Alla, a famous Tuareg noble who had fought the French. The Tuareg youth escaped. The police reacted strongly to this incident, canvassing the area to arrest Alla's son and his friends, targeting the civilian population. In response to this, a small, fractured band of rebels formed, mostly Arabs, but with some Tuareg. Boilley, Les Touaregs, 1999, 318-334.

[1083] Lecocq, Desert, 2002, 1. Lecocq notes the use of "(m)igration as a passive form of resistance" to describe Tuareg departures both before the during the Alfellaga. Lecocq, Desert, 2002, 82.

[1084] Lecocq, Desert, 2002, 210.

[1085] Boilley, Les Touaregs, 1999, 340.

[1086] Boilley, Les Touaregs, 1999, 329.

[1087] Lecocq, Desert, 2002, 209-211.

[1088] Boilley, Les Touaregs, 1999, 330. See also Lecocq, Desert, 2002, 217.

executed.[1089] Tuareg rebels were tortured and publicly humiliated, led through the streets as captives with their veils removed.[1090]

While effective in smothering the rebellion, these tactics alienated the nomadic population and caused a great deal of civilian suffering.[1091] The conflict also ended what little cooperation there had been between the Tuareg and the Malian government. Both sides now saw the other as an enemy.[1092]

The government declared the conflict over in 1964 as Tuareg resistance collapsed.[1093] But for the northern population of Tuareg in Kel Adagh in particular, the consequences of the rebellion were severe and long lasting. The brutal government response caused the exodus of thousands of Malian Tuareg to neighbouring Algeria and Libya, where many had relatives.[1094] The social structure of Tuareg life in Kidal had been destroyed and almost a thousand people had been killed, as well as a million pastoral animals.[1095] The Kidal region was proclaimed a "military zone" under military rule and banned to outsiders until the end of the 1980s.[1096]

The experience of being refugees abroad permanently changed the Tuareg, particularly those who would be born abroad with no Malian identity documents or ties to the Malian state.[1097] Young men moved to larger towns in Algeria, or even travelled further afield looking for paid work, abandoning pastoralism. Other Tuareg were confined to refugee camps, ending their seasonal migration.[1098] Captain Diby Sillas Diarra was appointed as the

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[1089] Stewart, 33.

[1090] Lecocq, Desert, 2002, 214-215.

[1091] Boilley, Les Touaregs, 1999, 331.

[1092] The impact of drought and environmental degradation on conflict in Mali cannot be ignored, though the relative importance of these factors towards fueling the 1962 conflict are beyond the scope of this paper. Here, it is simply argued that concerns over Tuareg separatism and Tuareg rejection of assimilation and forced settlement played a large role in fueling the conflict. Ginat and Khazanov, 4. See also Tiessa-Farma Maiga, 190-193.

[1093] Hall, 320.

[1094] Diarrah, 86. See also Gaudio, 1988, 188; Pezard and Shurkin, 8; Hall, 320; Bourgeot, Sahara, 233.

[1095] Boilley, Les Touaregs, 1999, 344.

[1096] Boilley, Les Touaregs, 1999, 307, 345, 352-355.

[1097] Information on documentation for Tuareg refugees from this period is difficult to find. More field research on this point is needed. For an overview of how displacement can lead to statelessness, see generally M. Bermudez, 'Accessing documents, preventing statelessness' in Institute on Statelessness and Inclusion, *The Worlds' Stateless Children* 226. See also G. Gyulai, 'The long-overlooked mystery of refugee children's nationality' in Institute on Statelessness and Inclusion, *The Worlds' Stateless Children* 242, for a discussion of statelessness among refugee children.

[1098] Bourgeot, Résistances, 267.

head of the military, administration, and political party Union Soudanaise-RDA in Kidal. The government closed the borders to seasonal migration further limited Tuareg mobility, particularly long-distance mobility.[1099]

Since 1964, successive Malian governments have consistently portrayed the northern conflict as one over national unity and territorial sovereignty, rather than of discrimination. The Malian government has consistently held the view that Tuareg succession is a threat to the Malian state such that it justifies the treatment of the Tuareg as a security risk, rather than as nationals of Mali with rights. As the government put it,

> This problem (the conflict between the government and the Tuareg) is extremely complex and touches the very essence of national unity and territorial integrity, but it is poorly understood abroad, where it is misinterpreted as a war between Whites and Blacks, between Muslims and non-Muslims, or between sedentary and nomadic populations. Needless to say, this is an oversimplified view, which betrays great ignorance of Mali's situation, with some critics going so far as to talk of attempted genocide of one community by the other.[1100]

In 1968, the Keïta government was overthrown in a coup, replaced by the military dictatorship of Moussa Traoré.[1101] The coup was "enthusiastically" celebrated by many Tuareg.[1102] Initially, relations between the Tuareg and the Malian state improved, as Traoré proclaimed a time of "national reconciliation" and promised to improve relations. The socialist program was abandoned, including forced settlement and the government's program to abolish the Tuareg class system.[1103] The *Amanokals* were restored to power and influence within the local government. Some Tuaregs again took part in the political life of the country, claiming posts in the National Assembly.[1104]

But while the repression of the north relaxed, true reform did not occur. The region of Kidal remained under military rule, outsiders were banned, and the majority of administrative posts continued to be occupied by southerners. The surveillance of nomads continued and no Tuaregs were appointed to the military. Over time, the regime of Traoré became increasingly dictatorial throughout Mali, bringing an end to political participation across

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[1099] Azarya, 260. The Algerian government also closed its borders.

[1100] Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Fourteenth periodic reports of States parties due in 2001, Addendum MALI* (CERD/C/407/Add.2) page 11.

[1101] Diarrah, 62-64; 68-69. See also Gaudio, 1988, 110; Stewart, 23.

[1102] Lecocq, Desert, 2002, 86.

[1103] Lecocq, Desert, 2002, 164.

[1104] Boilley, Les Touaregs, 1999, 364-367.

the country. In 1974, the new Malian Constitution retained one party rule in Mali under the *Union démocratique du peuple malien (UDPM)*.[1105]

But most importantly for the Tuareg, the dictatorship of Traoré coincided with one of the worst droughts to hit the Sahel in modern times. Drought would drive many Tuareg to relocate to areas that were now in other countries, greatly increasing the risk of statelessness even for those families who were registered with the state. While cyclical drought was a part of life in the Sahel, and the 1910-1915 drought had been arguably worse than that of the early 1970s, never had the Tuareg been so ill prepared. Years of harmful government policies, poor land management and overgrazing combined with natural fluctuations in rainfall to decimate the region, killing thousands of Tuareg and driving thousands more abroad. International assistance for the drought mostly ended up diverted into the pockets of politicians.[1106]

The government saw pastoralism as to blame for the drought and introduced measures to further restrict nomadism, including limiting nomad access to water and parcelling land for agriculture.[1107] Many nomads responded to the drought by settling in camps, where they were provided with assistance but unable to practice nomadism. Once again, international organizations encouraged settlement and agriculture, believing that pastoralism was unsustainable.[1108]

The above history of the post-colonial period demonstrates that while most Tuareg likely qualified for Malian nationality, widespread discrimination and persecution, coupled with mass displacement, made civil registration all but impossible for many Tuareg families. Many others may have seen registering as Malian nationals in a negative light. It may be tempting to see the lack of registration among the Tuareg in Mali as simply a symptom of weak state structures and lack of registration, but as the above sequence of events demonstrates, the exclusion of the Tuareg extends far beyond mere lack of registration. While many rural Africans may lack documentation, they are often presumed to be nationals by their governments. In the case of the Tuareg, they were treated not as nationals, but as a security threat, almost from the moment of independence. Today, Tuareg who lack documents and were displaced to camps have no way to prove their origins in Mali.

The experience of living settled in refugee and displaced persons camps also forever changed Tuareg society in very consequential ways. First, it meant a generation of Tuareg

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[1105] Boilley, Les Touaregs, 1999, 367.

[1106] Bernus, 172. See also Diarrah, 86-87; Gaudio, 1988, 188; Boilley, Les Touaregs, 1999, 368, 376, 379.

[1107] Stewart, 33. See also Gaudio, 1988, 111, 250-255; Khazanov, Pastoralists, 15-16; Bourgeot, Résistances, 215; Gremont, 138.

[1108] Khazanov, Pastoralists, 7, 13. See also Bemus 174-175; Azarya, 262. Boilley argues this was misguided, as pastoralism is ideally suited to land management in arid climates, allowing flexibility and migration during a drought. Boilley, Les Touaregs, 1999, 27, 377. It is beyond the scope of this dissertation to debate whether or not pastoralism causes drought, but it should be noted that many experts now agree it does not.

were growing up abroad without exposure to nomadism. Second, the exodus of Tuareg abroad from both conflict and drought created a diaspora of Tuareg in other countries. Many were likely without Malian identity documents.[1109] Tuareg children born Algerian camps were not only unable to register as Malian nationals, but learned other languages and become adapted to sedentary ways. This and other diasporas in Libya and beyond would become the root of the modern Tuareg independence movement, linking Tuareg separatism in the mind of successive Malian governments with Mali's neighbours to the north.[1110]

Beginning in the 1980s and continuing through the 1990s, many Tuareg sought to return to northern Mali in the hopes of a fresh start.[1111] The issue of return for Malian and Nigerien Tuareg became more and more important during the 1980s, as Tuareg in camps in Libya and Algeria agitated to return. But the framing of the time the Tuareg had spent in areas that were now other countries only fuelled the view that they were not Malian. As the cycle of drought continued to drive the Tuareg to spend periods of time abroad, the Malian government continued to treat them as foreigners. A less serious drought occurred from 1984-1986, and again thousands of Tuareg left northern Mali for camps and cities in Algeria. Over this period, continued contact between Malian Tuareg and the Algerian and Libyan governments fuelled security concerns in Bamako. The cross-border movements and increasing militarization of the Tuareg seemed to justify Bamako's concerns of separatism.

Yet the Malian Tuareg were not universally welcomed in Algeria. In 1986, the Algerian government, fed up with the constant stream of Malian Tuaregs into Algeria, expelled thousands of Tuareg back to Mali.[1112] Forced into trucks and driven to the border by the Algerian government, the Tuareg were stopped by the Malian authorities who refused to let any Tuareg enter Mali who could not prove his or her Malian nationality. Without papers to prove their Malian nationality, the forcibly returned Tuareg settled in towns at the border or in the "no man's land" between the two countries.[1113] In 1987, the new president of Niger offered an "amnesty" and allowed some Tuareg with ties to what had become northern Niger to return from Libya and Algeria, but there was no similar offer from Traoré in Mali.[1114] This is one example of the effect that a chronic lack of registration was having

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[1109] Boilley, Les Touaregs, 1999, 386-390.

[1110] Boilley, Les Touaregs, 1999, 395. Bourgeot 267-268, 359 (Discussing the formation of a Tuareg diaspora in Algeria and Libya).

[1111] Diarrah, 87.

[1112] Boilley, Les Touaregs, 1999, 382, 392.

[1113] Boilley, Les Touaregs, 1999, 392-394.

[1114] Boilley, Les Touaregs, 1999, 442. The goodwill between the Nigerien Tuareg and the Tuareg would later be shattered by the affair of Tchin Tabaraden, where the Nigerien government attacked Tuareg civilians following a security incident at a prison, causing mass displacement of Nigerien Tuareg back to Libya and

on the Tuareg, who were increasingly being treated as a stateless population by both governments.

In 1990, 300 Tuareg families were repatriated to Mali from Algeria, fed by promises of reintegration. Instead, they were placed in squalid camps controlled by the army with no possibility of leaving or moving around the countryside. Men and boys from the camps were regularly arrested and tortured by the Malian security forces, mistrusted because of their time in Algeria and Libya, where some Tuareg fighters had been granted Libyan nationality.[1115] The military rounded up Tuareg men and boys in villages and beat them in public.[1116] Caravans of Tuaregs returning from Niger were turned back or attacked. The returning Tuareg also faced a dismal economic climate, as the returning Tuareg had no access to land for agriculture and few other job prospects in northern Mali.

The decimation of the pastoral lifestyle had also decimated the Tuareg economy. During this time, a new challenge appeared for the Malian government: the drug trade. The Tuareg, who continued to trade across what was now the Algerian border, trade that was now illegal, increasingly became seen as the cause of drug trafficking.[1117] By the early 1990s, many Tuareg in Mali remained in camps, cut off from their traditional migrations and prohibited from legally crossing into Algeria, targeted by the police and facing few viable job prospects. The situation that the Tuareg found themselves in at the beginning of the 1990s was one of exclusion, expulsion, disenfranchisement, forced settlement and poverty.

Once again, Tuareg grievances would erupt into violence against the Malian government, but this time, the rebellion would be much better organized and armed. In 1991, Traoré was overthrown after demonstrations and political unrest, replaced first by a transitional government headed by Amadou Toumani Touré, then by an elected, civilian government in 1992.[1118] For the first time since 1967, it seemed like meaningful change for Mali's Tuareg was possible. When change did not occur, the Tuareg once again took up arms, led by a younger generation who had been trained by the Algerian and Libyan military. In 1991, the *Front de Liberation de l'Azaouad (FLA)* was formed by unhappy Tuareg, many of whom had fought for Gaddafi against Chad and had military training, and some of whom had Libyan nationality.[1119] This generation of Tuareg had grown up with the stories of the 1962-1963

Algeria. This incident was watched with concern by Malian Tuareg and continues to be an important incident for the Malian Tuareg independence movement. Boilley, Les Touaregs, 1999, 451.

[1115] Azarya, 261.

[1116] In one incident, the military executed ten light skinned men and women in Gao. Azarya, 261.

[1117] Pezard and Shurkin, 2-5. The extent to which the Tuareg are to blame for drug trafficking is contested. The point of this section is to show how the Tuareg are perceived as a security threat and cause of the drug trade by the Malian authorities.

[1118] Stewart, 24.

[1119] Stewart, 34. See also Hall, 320. The Tuareg independence movement has a wing in Niger as well. Bourgeot, Résistances, 362-363.

rebellion and aftermath. Once again, the rebellion began in Kidal, the province most subjected to government repression and closest to the Tuareg refugee camps in Algeria, Niger and Libya. The Tuareg diaspora, unable to gain any acceptance in Mali or even the promise of return, now dreamed of a national, independent homeland, to be called the *Azawad*.[1120]

This war was far better organized and armed than the 1962 conflict.[1121] The goal was an independent state that would encompass the entire Tuareg region. "By the 1990s, the Tuareg image of their state had gone from one based on blood ties to one based on bounded territory. The Tuareg have adopted the western conception of the nation state."[1122] At the root of the independence movement was the feeling among many Tuareg that the Malian government had been treating them not only as foreigners but as enemies for decades, that incorporation within Mali had failed, and that independence was the only way to gain their rights.[1123] As Hama Ag Sid Ahmed, representative to Europe of the *Mouvement Populaire de l'Azawad*, put it, "the ex-French Sudan became independent under the name of Republic of Mali. Its borders were drawn since the beginning of colonization as we know, the new Malian state extended her sovereignty into our territory by the simple logic of the colonial system."[1124]

Once again, the government response was swift and indiscriminate, attacking civilians and rebels alike.[1125] Ironically, due to an entire generation of Tuareg growing up in camps and cities abroad, many Tuareg fighters now had real, tangible ties to Algeria and Libya, fueling Malian government concerns over an invasion from the north. The chronic lack of documentation among the Tuareg was now weaponized against them. The Malian government arrested Tuareg civilians for lacking identity cards, which was used as proof of their foreign status.[1126]

In Bamako, the government employed familiar rhetoric to label the Tuareg, rebels and civilians alike, as outsiders and un-Malian and characterized the war as one between white slavers and black former slaves in rhetoric designed to incite hatred against the Tuareg and Arabs.[1127] The Songhai civilian population once again formed civilian militias, such as the *Ganda Koy* movement, to protect their villages from Tuareg rebels. Increasingly, the conflict

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[1120] Stewart, 31-32.

[1121] Boilley, Les Touaregs, 1999, 396.

[1122] Lecocq, Desert, 2002, 228.

[1123] Gaudio, 1988, 189.

[1124] Quoted in Gremont ,141.

[1125] Gaudio, 1988, 183, 186. See also Boilley, Les Touaregs, 1999, 457.

[1126] Gaudio, 1988, 183. Once again, more information is needed on the state of documentation among the Tuareg today.

[1127] Stewart, 34.

became a local civil war between agriculturalists and former and existing nomadic Tuareg, many of whom had returned from abroad.[1128] The Malian government capitalized on the rhetoric of foreign, "white," nomadic invaders attacking villages.

Once again, the conflict led to widespread displacement. During the 1990s, more than 20,000 refugees, both nomadic and sedentary, fled northern Mali.[1129] By the end of the conflict, there were more than 60,000 refugees in Algeria, Burkina Faso, Cote d'Ivoire and Niger.[1130] By the mid-1990s, parts of the Niger Bend in the Sahel had been entirely cleared of Tuareg.[1131]

This time, the war got global media attention and pressure was put on all sides to negotiate. The war ended with the Tamanrasset Accords in January 1991, where the government promised greater autonomy and better development projects for the north. The Accords stipulated the immediate cessation of hostilities, the demilitarization of the regions of Gao, Kidal and Timbuktu, semi-independence with increased autonomy in the administration, economy and culture with elections at the *Préfet, Sous-préfet* and *Maire* levels, and greater government investment in northern Mali.[1132]

But the Accords did not address the underlying problems that led to the conflict, such as lack of genuine development in the region, particularly development that could accommodate pastoralism, discrimination against the Tuareg, particularly those returned from abroad, anti-pastoralist programs and environmental degradation.[1133] Perhaps most importantly, the Accords also did not address the problem of the border and the question of Tuareg sovereignty and land ownership, though it did provide for more regional cooperation and for greater political and social contact across the Sahara.[1134]

The agreement that followed the Accords, the National Pact of 1992, provided a roadmap to incorporation of the Tuareg within Mali, but did not address the underlying problem of the division of the Tuareg between countries and their historical claims to their lands. Efforts were made towards semi-independence for the north, however. Most importantly, the Pact made "internal security," meaning the police, the responsibility of the regional, instead of national, administration. Of vital importance, the northern regions could also enact their

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[1128] Hall, 320. See also J. McDougall, 'Frontiers, Borderlands, and Saharan/World History' in J. McDougall and J. Scheele (eds.), *Saharan Frontiers: Space and Mobility in Northwest Africa* (Indiana UP 2012) 141 (hereinafter McDougall); Gremont, 141; Diarra,h 87.

[1129] A. Giuffrida, 'Tuareg Networks: An Integrated Approach to Mobility and Stasis' in Ines Kohl and Anja Fischer, (eds.) *Tuareg Society within a Globalized World : Saharan Life in Transition* (Tauris 2010) 25.

[1130] Gaudio, 1988, 194.

[1131] Hall, 320.

[1132] Diarrah, 87. See also Gaudio, 1988, 115-117, 190-191.

[1133] Diarra,h 120, 131.

[1134] Diarrah, 99-104. See also Gaudio, 1988, 121; Stewart, 35.

own bilateral agreements with neighbouring states to facilitate cross border movement and more interaction with Tuareg in Niger and Algeria. The newly created assemblies would be "democratically elected" and represent the commune, the arrondissement, the *cercle* and the region, as well as an assembly for the three northern regions together, reflecting their commonalities.[1135]

To outside observers like the African Commission on Human and Peoples' Rights, the National Pact to implement the peace accords was a positive development: "(s)een in the light of the previous massive suppression of the human rights of the Tuareg, the National Pact is a positive development that gives the Tuareg areas decentralized powers and allows for Tuareg participation and representation."[1136] It ultimately failed, however, in part because it was not fully implemented,[1137] but also because it refused to grapple with the deep problems of Tuareg belonging and the history of forced settlement and political and cultural fragmentation that had left deep scars on northern communities. The Pact took few steps cultural unification of the Tuareg across borders. Possible solutions that would weaken the primacy of nation-state integrity, such as through specially created, semi-autonomous zone, were ignored.

Today, the Tuareg have not received an official designation of being without Malian nationality, as the *bidoon* in Kuwait have, but many Tuareg are treated as an undocumented population that poses a security risk to Mali, despite their extensive history in northern Mali that was documented in Part 2. A lack of registration and decades of living in refugee camps have left many Tuareg stateless or at risk. Behind the hostility between the Tuareg and the Malian government lies the simmering and unresolved issue of Tuareg self-determination, the history of colonial borders and contested territory and the potential devolution of some sovereignty to a semi-independent state. The question of ownership of the Sahara, which had been of only strategic importance to the French, has become an issue of control of potentially valuable mineral and oil resources. The possibility of succession has led successive Malian governments to regard the Tuareg as a security threat and a

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[1135] Décret No 92-121/p-CTSP2, Pacte National, Comité de Transition pour le Salut du Peuple et les Mouvements et Fronts unifies de l'Azawad (11 Avril 1992). See also Boilley Les Touaregs 1999 528-529. Very importantly for Tuareg inclusion, the Pact reserved four seats for representatives of the north in the Malian National Assembly, and two seats for Malians abroad. Boilley notes that this would be an important step for the northern who in the past, "had little participated in legislative elections." Boilley, Les Touaregs, 1999, 528-529.

The new Constitution drafted as part of the peace agreement reaffirmed universal suffrage for all nationals in keeping with the principles of the Universal Declaration of Human Rights and the African Charter of Human and Peoples' Rights. Art. 70 left the matter of nationality to laws passed by the National Assembly. La Constitution de la République du Mali du 25/02/1992 Mali : Code des personnes et de la famille, Loi No. 11-080/AN-RM, 2 December 2011.

[1136] African Commission on Human and Peoples' Rights at its 28th ordinary session, 'Report of the ACHPR Working Group of Experts on Indigenous Populations/ Communities' (2005) 47.

[1137] Gaudio, 1988, 192-193.

threat to Mali's territorial sovereignty and the issue of separatism has only grown more contentious with the passage of time.

As the next sections will show, the debate over Tuareg inclusion would be impacted by the potential for mineral wealth in northern Mali and, in particular, the discovery of oil and uranium in neighbouring countries. These discoveries would transform the Sahara and Sahel from areas useful to the French colonialists mainly for strategic reasons to valuable regions in their own right, elevating the importance of Tuareg claims to their lands. The next section will examine these factors in more detail and how they affect Tuareg nationality and registration, but first, the next section will look at national unity in Malaysia and how it affected Sama Dilaut inclusion and registration during decolonization.

National Identity in Sabah, Malaysia

The Sultan of Sulu, with representative of the BNBC, 1899

> (I)n Malaysia, statelessness as an issue is always embroiled in wider moral and political arguments...in many contexts, statelessness is not just an issue of legal identification but is embroiled in contentious politics of national and regional belonging.[1138]

This section will look at how the push for nationality unity in Malaysia affected the implementation of Malaysian nationality law. Forging a single, national identity in Malaysia has not been helped by its diverse geography, where different groups live long distances from one another in a federation spanning territorial non-contiguous states[1139] with very different histories[1140] that were united mostly by their trade ties and intermittent and uneven domination by Britain.[1141] Several former colonies, like Hong Kong, Singapore and Brunei, are not included in Malaysia.[1142]

Like the Tuareg, the Sama Dilaut found themselves divided by an international border in a contested border zone, where their mobility appears to tie them to the Philippines. Unlike in Kuwait and Mali, the Sama Dilaut are a small part of a larger debate over ethnicity and nationality in Sabah. Like in Kuwait and Mali, however, concerns over nationality unity and ethnic balance would greatly influence how the Sama Dilaut are perceived. This section

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[1138] C. Allerton, 'Contested Statelessness in Sabah, Malaysia: Irregularity and the Politics of Recognition' 15 *J. of Imm. and Ref. Studies* 250 (2017).

[1139] Clark and Pietsch, 160.

[1140] Sinnadurai, 309-310. See also South Asia Defence And Strategic Year Book, Colonel Harjeet Singh 219.

[1141] K. Young, W. Bussink, P. Hasan 11.

[1142] Singapore was originally included in the Federation, but left in 1956.

uses primarily academic sources, but non-profit reports and news articles are occasionally used to provide more information or to highlight public debate.

In the decades following Malaysian federation, as the Sama Dilaut found themselves unregistered and subjected to exclusionary government policies, including deportation, the border between the Philippines and Sabah remained a sensitive point of contention between the two states. The linked issues of nationality and borders has only gained in prominence in Southeast Asia over the decades, as evidenced by what Alice Nah calls,

> ...the remarkable steadfastness of ASEAN states in holding onto a Westphalian notion of state sovereignty, in particular, when constructing immigration control regimes.[1143]

In order to understand how the Sama Dilaut fit into the larger political and social debate over nationality in Sabah, it is important to understand how national identity and nationality in Malaysia are entwined. It is also important to show how these preoccupations are linked to the issue of territorial sovereignty and borders. Malaysia today is usually described as being made up of three ethnic groups: Malays and other "indigenous" peoples, and two "immigrant" populations: Chinese and Indians.[1144] Yet, as this section will show, this division does not reflect the complexity of identity in Sabah, where non-Malay groups worry about Malay dominance in politics and cultural life.[1145] The categorization of the Malaysian population as being made up of Malays, other indigenous groups and so-called immigrant populations is something of an oversimplification and obscures the very real differences between the Borneo states and Peninsular Malaysia.[1146]

The question of Malaysian national identity would come to be of the first importance for successive Malaysian governments, a key part of holding the federation together. In this way, Malaysia closely resembles Mali, where colonial borders have bound vastly different cultures together, while separating groups with historical affinity, making the forging of a unified national identity a big challenge for the government. As in Mali, the spectre of the

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[1143] A. Nah, 'Globalisation, Sovereignty and Immigration Control: The Hierarchy of Rights for Migrant Workers in Malaysia' 40 *Asian J. of Social Science* 486 (2012) 487 (hereinafter Nah). See also J. Clifton, G. Acciaioli, H. Brunt, W. Dressler, M. Fabinyi, and S. Singh, 'Statelessness and Conservation: Exploring the Implications of an International Governance Agenda' 19 Tilburg L.R. 81 (2014) 85 (hereinafter Clifton, Acciaioli, Brunt, Dressler, Fabinyi and Singh).

[1144] Lim Hong Hai, 102.

[1145] Saleeby, 158. See also Sinnadurai, 312; see generally Cheah Boon Kheng.

[1146] Malay as an ethnic group is defined by law. "'Malay' is defined by law as a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and; (a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or; (b) is the issue of such a person..." Constitution of Malaysia art. 160(2). See also W. Guinee, 'Race, Ethnicity, and Ethnic Relations: A Malaysian Case Study: A Curriculum Project for the Fulbright-Hays Seminar Abroad: Malaysia and Singapore' Westminster College (2005).

breakup of the Federation hangs over the question of nationality. As Young, Bussink and Hasan put it, "(t)he common status of the myriad peoples of the country is Malaysian citizenship, but it takes more than this shared status to transcend the separate identities of diverse cultures."[1147] Immigration, Islamification and relations with neighbouring states, particularly the Philippines, would therefore become intertwined preoccupations for both the governments of Sabah and Malaysia.[1148]

As this section will show, the statelessness of the Sama Dilaut must be seen in part through the lens of the wider context of the struggle to forge a unified, Malaysian identity. Unlike the Tuareg, the contested nationality of the Sama Dilaut is not by itself a major political issue in Sabah, but is rather part of a larger debate over national integration and the relationship between Malaysia and the Philippines. This section explores how Malaysia, and Sabah within Malaysia, sought to forge a unified national identity, and how this goal influenced nationality law and policy, to explain why a country with protections against statelessness written into its Constitution could contain such a large population of stateless people.[1149]

It should be noted that unlike in Kuwait, the statelessness of the Sama Dilaut is part of a much larger problem of statelessness in Malaysia. UNHCR estimates that there may be as many as 40,000 stateless people in Malaysia.[1150] Much of the debate over national unity in Malaysia has centred on Peninsular Malaysia and the incorporation of the ethnic-Chinese population. But while this debate may seem remote from the Sama Dilaut, it has indirectly influenced nationality policy in Sabah and, as this section will show, the inclusion and exclusion of the Sama Dilaut. Most importantly, the struggle to end statelessness in Malaysia is closely tied to the issue of Malay ethnic dominance and the identity of Malaysia as an ethnic nation. Today, the main debate over national identity in Sabah revolves around the problem of immigration from the Philippines and the dominance of Malays in politics. The issues of national unity and territorial unity would become entwined, with serious implications for the Sama Dilaut.

[1147] Young, Bussink and Hasan, 11.

[1148] Donner, 32-33. See also Verzijl, 23; Brownlie, Principles, 388-394; Van Waas, Nationality, 2008, 33, 50; I. Kerno, 'Nationality, including Statelessness: Analysis of Changes in Nationality Legislation of States since 1930' International Law Commission, A/CN.4/67 (1953); Handbook 2014 11. For a discussion of the intersection between immigration and statelessness in Malaysia, see R. Razali, R. Nordin and T. Duraisingam 'Migration and Statelessness: Turning the Spotlight on Malaysia' 23 *Pertanika J. Soc. Sci. and Hum.* 19 (2015). See also Maury, 51.

[1149] UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Malaysia' 3rd cycle (July 2018) 2.

[1150] UNHCR, 'Global Appeal 2014-2015: Malaysia' (2013). See also the Institute on Statelessness and Inclusion, 'The World's Stateless' (December 2014). It should be noted that this number includes only Malaysians of Indian descent and does not count many other populations, including the Sama Dilaut. The actual number is probably therefore higher.

Like in many post-colonial states, including Kuwait and Mali, issues of sovereignty and national identity would come to be linked together in the eyes of many Malaysian politicians and government agencies.[1151] These concerns would influence how Malaysia's nationality laws were drafted, but also how they were applied. As described above in Part 2, Malaysia went through a series of federal groupings, entering into its present form in 1965 with the addition of the Borneo States of Sabah and Sarawak to the peninsular states, and subtracting Singapore.[1152] Brunei has remained independent.

The departure of the British Empire as a unifying force brought to the forefront the sensitive and related issues of Malaysian nationality and the inclusion of the Borneo territories. Their inclusion in Malaysia in 1963 was the result of political negotiations very much tied to Malay concerns over nationality and ethnic balance.[1153] Worsening fears of the breakup of the Federation, both Indonesia and the Philippines claim the former British North Borneo (Sabah) based on claims of sovereignty described in Part 2, above, and based on the region's history, including the zone of influence of the Sultanate of Sulu.

Islamification, the dominance of Malay, and border security in a way which would greatly influence the belonging and perceived legitimacy of the Sama Dilaut. The current complexities of ethnicity in Malaysia, including in Sabah, can be seen in the ongoing struggles over the census, introduced by the British in 1871 in what was then known as the "Straits Settlements" of Peninsular Malaysia and subsequently used across Peninsular Malaysia and the Borneo territories.[1154] The concept of classification by race in the sense of physical characteristics or ethnic groupings was arguably brought to Malaysia by the British and did not fit the societal and cultural divisions in Malaysia, complicating later government efforts to define the concept of "Malay" and that of other indigenous groups.[1155] Originally, the census classified peoples by nationality, but later the British started employing the term "race" in line with their own thinking about the classification of peoples.[1156] Early censuses included the indigenous peoples of Borneo in the category of "Malay".[1157] These categories, however, did not reflect the enormous diversity of the pre-

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[1151] See generally Lim Hong Hai.

[1152] Sinnadurai, 309-310.

[1153] Hirschman, 559. See also Sinnadurai, 311.

[1154] Over the course of the late 19th century and early 20th century, the British expanded census taking to include all the territories in Peninsular Malaysia. By the 1930s, the census had expanded to include the Borneo territories. Hirschman, 559.

[1155] Chea Boon Kheng, 'Malaysia: The Making of a Nation' (Institute of Southeast Asian Studies 2002). The issue of race and ethnicity is extremely sensitive and contested in Malaysia. This section simply attempts to summarize the views held on the subject by experts.

[1156] Hirschman, 566-568.

[1157] Hirschman, 563. See also Y. Maunati, 'Networking the Pan-Dayak' in W. Mee and J. Mee *Questioning Modernity in Indonesia and Malaysia* (Nus Press 2012) 97, discussing the use of the term Dayak to apply to Borneo's "non-Malay natives."

colonial population, which had already incorporated various peoples from all over the region, including previous immigrants from China and Arabia. Classifications of people by race ignored the fact that Malaysians themselves thought more in terms of religious affiliation.[1158]

Like in many British colonies, the census created ethnic classifications in Malaysia, introducing ethnicity as a vital feature of politics. While nationality remained undefined during the colonial period in North Borneo, the census provides important information on the number of people under British jurisdiction at that time and their supposed ethnicities. Since the 1891 census, the term Bajau had been applied by the British to the inhabitants occupying the coastal areas of North Borneo and Sarawak, though details on the breakdown of the population are not available.[1159] Malaysian identity became based on the creation of a majority-Malay nation, or *bangsa,* yet defining the concept of being Malay would prove contentious.[1160] As with northern Mali, the inclusion of Sabah in the Malaysian Federation raised issues of ethnic minority status for Sabah's religions and ethnicities.

The inclusion of the Borneo states in Malaysia was done, in part, to balance the ethnic makeup of the country. To balance the majority Chinese population of Singapore, which was originally to be included in Malaysia, the resulting Federation of Malaysia incorporated the Borneo territories in 1963.[1161] The addition of Sabah and Sarawak was therefore always couched in terms of increasing the so-called "non-immigrant" population of Malaysia. This political compromise glossed over the very real ethnic, historical and cultural difference between the Peninsula and northern Borneo. While most Malays are Muslim, non-Malay groups in Sabah and Sarawak are frequently Christian or animist.

Before the establishment of the Sultanate of Brunei and the spread of Islam, the peoples living in Borneo did not appear to classify themselves along anything that could be described as ethnic lines, nor did all indigenous peoples in Borneo adopt Islam.[1162] During the late colonial period, Kadazan, Dusun and Murut nationalism in Borneo emerged and the Borneo states have periodically pushed for more independence from Kuala Lumpur, citing how their histories and cultures are very different from that of Peninsular Malaysia.[1163] As Part 2 showed, many of the peoples of coastal Sabah share a common history, way of life and ethnicity with those of the southern Philippines, part of the ancient Sultanate of Sulu. In this way, the border region in the Sulu Sea resembles post-colonial border regions in

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[1158] Hooker, 21. See also Hirschman, 565.

[1159] Nagatsu and Kazufumi, *Pirates, Sea Nomads or Protectors of Islam? A Note on 'Bajau' Identifications in the Malaysian Context* (Kyoto University 2001) 216.

[1160] Nagatsu and Kazufumi, 218-219.

[1161] Singapore would depart the Federation in 1965.

[1162] Barlocco, 35. It should be noted that the origins of the concept of race in Malaysia are contested.

[1163] Barlocco, 43.

places like Kuwait and northern Mali in that it has been very difficult to draw a hard, firm line between overlapping, diverse and mobile communities.

Tunku Abdul Rahman, Malaysia's first Prime Minister, saw western-style nationality laws as the key to forging a common national identity in a country where 50 percent of the population was non-Malay. Yet he simultaneously sought to preserve Malay identity as the core of Malaysian identity.[1164] In 1969, Malaysia began a policy of granting special privileges to a class of nationals called the *bumiputra*, or "sons of the soil."[1165] These special provisions, enacted under the New Economic Policy of Prime Minister Mahathir, included favourable educational and trade quotas, areas of reserved land, and special licenses, all designed to raise the standard of living of Malays and other so-called indigenous groups. The creation of the *bumiputera* category was specifically designed to bond Malays with the so-called "native" populations of the Borneo territories.[1166] Many Sabahans have come to associate closely with Malays and often still consider themselves to be *bumiputra.*

But the grouping of some groups living in the Borneo states with Malays has been contentious. This is in part due to the history of ethnicity in the region, which was complicated by multiple cycles of immigration and emigration in an area dominated by the long-distance, seafaring trade by Arab, European and Chinese traders, as described in Part 2.[1167] Despite the border, there remains a great deal of continuity between the peoples of what are now Sabah, Sarawak, Kalimantan and the southern Philippines.[1168] Immigrants to Sabah and Sarawak from the Philippines in particular are often ethnically similar to Malaysia's Malay population.[1169] As a result, any increase in the Bajau/Sama population is perceived as increasing the Muslim population of Sabah.

As Young puts it,

[1164] See generally Cheah Boon Kheng.

[1165] A History of Malaysia 341. See also Clark and Pietsch 162. Programs included quotas, promotion of Malay language education and a special bank for bumiputera, as well as land reform. See Goh Beng Lan, 'Dilemma of Progressive Politics in Malaysia: Islamic Orthodoxy versus Human Rights' in W. Mee and J. Kahn, *Questioning Modernity in Indonesia and Malaysia* (Nus Press 2012) 302-306, 342.

[1166] Hooker, 227.

[1167] Sinnadurai, 311. See also T. Harrisson, 'The Prehistory of Borneo' 13 Asian Perspectives 17 (1970) 38. Indonesia also contains a large Malay population. J. Kahn, 'Islam and Capitalism in the Frontiers and Borderlands' in W. Mee and J. Kahn, *Questioning Modernity in Indonesia and Malaysia* (Nus Press 2012) 49. See also K. Young, 'Malay Social Imaginaries: Nationalist and Other Collective Identities in Indonesia' in W. Mee and J. Kahn, *Questioning Modernity in Indonesia and Malaysia* (Nus Press 2012) 61.

[1168] Sather, Adaptation, 1997, 21-23.

[1169] Barlocco, 50.

> the Malay nationalist project came to rely on the idea of the Malay bangsa, or 'race-nation', as a foundation of its political and territorial claims.[1170]

The effects of Malaysia's attempts to build a legal system on the concept of an ethno-state created considerable tensions throughout the country. In 1969, riots broke out in Peninsular Malaysia over special privileges given to holders of the *bumiputra* category.[1171] Elections in Sabah were postponed due to the violence on the Peninsula.[1172] As a result of the contradictions of the *bumiputra* category and the difficulties in creating a Malaysian ethno-state, modern Malaysian governments have attempted to recreate Malaysian nationality as based on nationalism and a common experience with British laws and system of government.

The application of the term *bumiputra* to various groups in Malaysia would never really be resolved. For example, aboriginal, non-Malay peoples of Peninsular Malaysia were not included in the *bumiputra* category.[1173] Meanwhile, non-Malays in the Borneo states, such as the Bajau/Sama, Kadazan and Dusun groups, were included in the *bumiputra* category.[1174] As a result, the "aboriginal" peoples of peninsular Malaysia are treated under a different set of laws from the "indigenous" peoples of Borneo. This came to have real implications under Malaysia's laws.

For example, *bumiputra* and aboriginal peoples, defined under the law, were counted separately in the census.[1175] Aboriginal groups, as distinct from the rights of *bumiputra*, are protected by the Aboriginal Peoples' Act of 1954.[1176] The Act provides for the recognition of aboriginal sovereignty over land and for compensation for any takings by the government. It also ensures the right of aboriginal children to an education. This Act and various judicial decisions have helped to protect the rights of aboriginal peoples in Peninsular Malaysia, particularly their land rights.[1177]

[1170] Young, 61.

[1171] Cheah Boon Kheng, 102. See also Holst, 45.

[1172] Goh Beng Lan, 298.

[1173] Hirschman, 563. See also Hooker, 23. Aboriginal peoples in Malaysia and are .5% of the population.

[1174] Barlocco, 34. See also Holst, 33; Lim Hong Hai, 102. In Sabah and Sarawak, non-Malay ethnicities, such as the Kadazan/Dusan and Iban peoples, make up about 30% of the population. R. Bulan, 'Native Title in Malaysia: A "Complementary" Sui Generis Proprietary Right under the Federal Constitution' 11 Australian Indigenous L. R. 54 (2007) 55.

[1175] Young, Bussin and Hasan, 17. See also Clark and Pietsch, 162; Hirschman, 562-564.

[1176] Malaysia Aboriginal Peoples Act (1954) (revised 1974), Malaysia Act, 134. Aboriginal is defined in Malaysia's Constitution as limited to Aboriginal peoples of the Malay Peninsula. Constitution of Malaysia (1957) art. 160(2).

[1177] For a general overview, see generally Minority Rights Group International, World Directory of Minorities and Indigenous Peoples at http://minorityrights.org/minorities/orang-asli/ (accessed July 2020).

In Sabah and Sarawak, by contrast, the rights of indigenous minorities were instead protected in theory by their inclusion in the *bumiputra* category during the period it was in effect, but these protections are often not actualized for non-Malay minorities like the Sama Dilaut.

> In Sabah, there is no enumeration of the native groups in the Constitution, although there are at least 38 known groups...A native community is defined as any group or body of persons the majority of who are natives, and who live under the jurisdiction of the local authority or under the jurisdiction of a native chief or headman.[1178]

"Native" rights in Malaysia are also protected under the common law and the state laws of Sabah and Sarawak. Courts in Malaysia have cited indigenous rights cases in Australia, Canada and the United States when upholding the land rights of the Iban, for example, as a "native" group.[1179] A recognition of native title has given certain indigenous groups in the Borneo territories the ability to claim ownership of their lands in the courts. Establishing itself as a native group of Borneo under the law, therefore, arguably brings certain rights, including the right to claim native title to land. The process of qualifying as a "native" group, however, is unclear and has never, as far as this dissertation could ascertain, been applied to the Sama Dilaut, though more research is needed.

The government banned discussion of ethnic classifications in Malaysia following violent riots in the 1960s, but the sensitivity over the subject continues.[1180] In 2000, the census listed over 65 percent of the population as *bumiputera*, whereas the rest fell into immigrant categories, raising the question of whether Malaysia would become a majority-immigrant country, a concern that is not dissimilar from those described in the Kuwait example, above.[1181] According to the Malaysian government, in 2010, the Malay population was a little over 50% of Malaysia's total population, while non-Malay *bumiputra* made up an additional 11%.[1182]

The above history of ethnicity in Malaysia is an important factor in Malaysia's immigration policies and the current debate over immigration to Sabah. The issue of immigration is critical for the Sama Dilaut, as they have come to be classed as an immigrant group, due to their association with the border and the Philippines. Until the 1930s, immigration to

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[1178] Bulan, 55. See also Interpretation (Definition of Native) Ordinance (1958).

[1179] For example, in Nyawai v Borneo Pulp Plantation Sdn Bhd, the Sarawak government recognized native land rights against the rights of logging companies in Sarawak. See generally D. Sanders, 'Indigenous Land Rights in Malaysia: Nor Nyawai & 3 Ors v Borneo Pulp Plantation Sdn Bhd & 2 Ors' 5(14) Indigenous Law Bulletin 21 (2002).

[1180] Hooker, 234.

[1181] Daniel Goh, Matilda Gabrielpillai, Philip Holden, Gaik Cheng Khoo, *Race and Multiculturalism in Malaysia and Singapore* (Routledge 2009) 10. See generally Cheah Boon Kheng. See also Clark and Pietsch, 162 .

[1182] The aboriginal population totals less than one percent of the population.

Malaysia was unrestricted by law. The British encouraged it to provide labour for the timber industry.[1183] Seasonal migration and trade were transformed into immigration by the enforcement of borders, with immigrants now relocating to Sabah for wage employment, rather than taking part in a fluid trade economy.

As in Kuwait and Mali, cross-border mobility began to be regarded not as an economic good, but as a threat. The discovery of oil off the coast of Sabah also transformed the nature of the economy away from one based on trade into one based on a fixed resource. Economic migration would continue through the 20th century, as Malaysia, and particularly Sabah, remained stable and relatively prosperous whilst the Philippines and Indonesia went through several periods of civil unrest. But migration now took the form of migrant workers who came to fill lower level jobs in the economy. While ethnically similar to people living in coastal Sabah, both migrants and boat nomads like the Sama Dilaut were now reclassified as immigrants.

Most irregular migrants come to Sabah by boat, traversing clandestinely the maritime border between Sabah and the Philippines, which is made up of numerous small and difficult to police islands.[1184] As a result, migration is now linked to clandestine border crossings and boat migration, which are also associated with the Sama Dilaut. Irregular migration to Sabah from the Philippines therefore exacerbates the climate of tension between Malaysia and the Philippines,[1185] and makes the resolution of the status of stateless persons in Sabah more difficult.

In the middle of the twentieth century, immigration to Sabah also increased following the armed insurrection of Moro rebels in what was now the southern Philippines.[1186] During the Philippine civil war, "large numbers" of Bajau, Sama, Tausug and Suluk refugees, including sea nomads, fled to Sabah.[1187] These groups had always been accustomed to relocating in times of strife, but now this relocation occurred across and international border, rather than within the loose, diffuse zone controlled by the Sulu Sultanate.[1188]

In general, Filipino immigrant and refugee families in Sabah lack documents and are locked out of Malaysian nationality by *jus sanguinis*, making their status in Sabah similar to that of

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[1183] Clark and Pietsch, 168.

[1184] A. Kassim and R. Haji Mat Zin, 'Policy on Irregular Migrants in Malaysia: An Analysis of its Implementation and Effectiveness' (Philippine Institute for Development Studies 2011) 53 (hereinafter Kassim and Zin).

[1185] Razali, Nordin and Duraisingam, 27.

[1186] Fernandez, 54. See also Razali, Nordin and Duraisingam, 24.

[1187] Sather, Commodity, 2002, 38. Malaysia is not a party to the 1951 Refugee Convention or Protocol.

[1188] Sather, Adaptation, 1997, 54. See also J. Warren, Chartered, 1971, 67, 83, 87.

the Sama Dilaut.[1189] Filipino immigrants to Sabah are now often spoken of in the same terms as the stateless members of the ethnic Indian population and stateless sea nomads. All three are categorized as part of the problem of so-called "stateless immigrants" in Malaysia.[1190]

The refugees were accepted into Malaysia under a negotiated agreement whereby they were not formally recognized or granted permanent asylum,[1191] but instead granted a special pass by UNHCR and a temporary work visa, with the understanding that they would later return to the Philippines.[1192] Instead, this population would remain in Malaysia long term, creating tension between the two countries and increasing in the Sama-Bajau population in Sabah. Despite recent economic troubles, Malaysia remains a destination country for migrant workers, fuelled by the gap in wealth and political stability between Malaysia and its less developed neighbours.[1193] These workers were not driving a lucrative trade economy, as the migrants of the Sulu Sultanate had been, but were instead filling low-level jobs, often in the informal economy.[1194]

In the mid-1980s, there were as many as 500,000 immigrants in Sabah performing a range of wage-earning jobs across the economy.[1195] Armed conflict and poverty in neighbouring states would also fuel immigration to Sabah, increasing the perception of immigration as a burden. The public perception in Sabah is that certain coastal towns are "overwhelmingly" made up of irregular immigrants from the Philippines and Indonesia of similar ethnicity as Peninsular Malays, increasing the Malay and Muslim population of Sabah.[1196] In 1991, the

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[1189] UNHCR 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Malaysia' (March 2009) 7-8.

[1190] Sadiq, 106.

[1191] The children of many refugees from the Philippines are stateless in Malaysia today as their parents had only a temporary refugee card, many of which were not eligible for renewal as of 1986. Brunt Vulnerability 28, footnote 35. Refugee status for people from the Philippines was revoked in 2001.

[1192] See also H. Brunt 'Stateless Stakeholders, Seen but not heard? The Case of the Sama Dilaut in Sabah, Malaysia' (MA Dissertation: University of Sussex 2013) 23 (hereinafter Brunt Stakeholders). Kaur 82-83. See also the UN High Commissioner for Refugees (UNHCR), 'Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report: Universal Periodic Review: Malaysia,' (March 2013) Malaysia is now home to as many as 80,000 Filipino refugees from the war in the 1970s, most of whom only received temporary documents in place of asylum under the 1951 Convention.

[1193] Clark and Pietsch, 158. See also J. Kahn, 'Islam and Capitalism in the Frontiers and Borderlands' in W. Mee and J. Kahn (eds.) *Questioning Modernity in Indonesia and Malaysia* (Nus Press 2012) 28.

[1194] See for example M. Filmore, 'Living Stateless (Di Ambang)' Youtube (6 September 2016) (accessed July 2020).

[1195] Nah, 490-491.

[1196] Sadiq, 106. These concerns are also present in Sarawak. Barlocco 52; Nagatsu and Kazufumi, 220.

government introduced the Comprehensive Policy on the Recruitment of Foreign Workers to regulate immigration.[1197]

In the 1980s, the government also sought to change the ethnic classifications in the Borneo States. It began to employ the term *pribumi* in the census for all indigenous groups in Sabah and Sarawak, a term also used in Indonesia. This prompted a backlash in Sabah, as it appeared to include Indonesian and Filipino immigrants.[1198] In 1991, the government introduced the Comprehensive Policy on the Recruitment of Foreign Workers to regulate immigration.[1199]

Meanwhile, as Nagatsu notes in a review of Malaysian textbooks in the 1980s and 1990s, Sama/Bajau peoples began to be presented by politicians as an immigrant group from Johor, though they were still included as *bumiputra* under the law. This appears to have left the Sama Dilaut in a grey zone of identity, sometimes classed as foreigners and sometimes as indigenous peoples. Today, Malaysia, and Sabah in particular, have tight immigration regimes and the concept of "infiltration" by foreigners is a cornerstone of media reports.[1200]

In the 1990s, the Malaysia government attempted to do away with racial classifications and instead introduced the national identity of "Bangsa Malaysia"[1201] and in 2010, "1Malaysia," asking Malaysian nationals to see themselves first as Malaysian nationals and only secondly as members of a racial, ethnic or religious group.[1202] Malaysia also adopted "Vision 2020" in 1991, with nine national challenges for transforming Malaysia into a "self-sufficient" economy; challenge number one was to establish a unified Malaysian national identity.[1203] This program, however, has not been popular with Malays, who fear a decline of Malay culture.[1204]

As in Mali, some of the security functions of the state have been deputized to civil groups. In an echo of the Ganda Koy movement in Mali, in 1972, the Malaysian government authorized a paramilitary force, the Malaysian Volunteer Corps (RELA), to crackdown on

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[1197] Nah, 491.

[1198] Barlocco, 56-57.

[1199] Nah, 491.

[1200] Clark and Pietsch, 170.

[1201] Hirschman, 566. See also Hooker, 233.

[1202] Barlocco, 53, 79.

[1203] Hooker, 260.

[1204] Cheah Boon Kheng, 240. See also Goh Gabrielpillai Holden, Gaik Cheng Khoo 10. See also Hwok-Aun Le, 'Affirmative Action in Malaysia and South Africa: Contrasting Structures, Continuing Pursuits' 50 *Journal of Asian and African Studies* 615, 616 (2015) for a discussion of the current state of Malay and *bumiputra* affirmative action policy.

undocumented persons and introduced corporal punishment for unauthorized entry into Malaysia.[1205] These measures have not decreased the number of migrants to Malaysia, but have made life extremely difficult for irregular migrants, asylum-seekers, undocumented persons and those who overstay their visas.

Yet, like Kuwait, Malaysia still requires a certain amount of managed immigration for its growing economy. Malaysia today has the highest dependency on foreign labour in the region, an issue which on its own has increasingly come to be seen as a security threat by the government, as it has been in Kuwait. In this way, Malaysia resembles Kuwait, where an influx of low wage workers has changed mobility from a social good to an unfortunate and mistrusted necessity. Malaysia is therefore caught between the "competing policy objectives" of controlling their borders, fostering economic growth, and managing demographic change.[1206] As a result, "(n)arratives of Malaysia being infiltrated by aliens, or uninvited guests, within the territorial borders of the sovereign states are common in Malaysia's government-controlled media..."[1207]

The competing interests of cheap labour and national security have led the government in Sabah to alternately fast-track temporary work visas, while at the same time conducting mass deportations, leading to a complex and contradictory immigration policy.[1208] On the one hand, the government conducted several exercises to regularize immigrants, beginning in 1985 and conducted every few years.[1209] These have been followed by crackdowns and deportations. The goal of this policy appears to be maintaining a cheap labour force of the right size without permanently affecting Sabah's demographics. Foreign workers are now routinely deported during economic downturns, such as in 1997 and 2009, or in response to security incidents.[1210] With time, these exercises have become increasingly linked to maritime security and border control. In 1992, the government of Malaysia instituted an operation, *Ops Nyah 2*, or "Op. Get Rid 2", to track down and deport irregular migrants.[1211] This program was conducted in conjunction with increased border monitoring as part of *Ops Nyah 1*. Irregular migrants caught under the program were sent to immigration detention, where men were sometimes punished by, for example, caning, in preparation for

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[1205] Nah, 499-500.

[1206] A. Frank, 'Negotiation Borders: Everyday Corruption and Immigration Policing in Malaysia' (International Students Association Working Paper 2014) 2.

[1207] Clark and Pietsch, 170.

[1208] Holst, 133.

[1209] Kassim and Zin, 21.

[1210] Nah, 491-492, 498-499. See also Kassim and Zin, 16. Recently, the crackdowns have taken place as part of Esscom operations, discussed below. See for example, Borneo Post, 'Esscom ops against illegal immigrants in Kudat' (15 May 2015) (accessed July 2020).

[1211] Kassim and Zin, 21.

being deported.[1212] The militarization of the maritime border in Sabah is similar in many ways to that of the Kidal province in northern Mali.

Concerns over national identity, immigration and voting is also related to religion. Immigration from the Philippines and Indonesia is often viewed by non-Malays in Sabah as increasing the Muslim population at their expense, particularly immigration of Muslim Moro peoples.[1213] As well, despite immigration controls, Sabah receives internal migration from the Peninsula, leading to concerns over a perceived "Malay-ification" or "Islam-ification" of Sabah.[1214] Immigration from the Philippines includes a large number of Sama/Bajau and Suluk peoples, groups who also live in coastal Sabah. This mirrors the migration that has been occurring in the region for hundreds of years, as described in Part 2, but in modern Sabah, such migration has been re-categorized as dangerous immigration.

As in Mali and Kuwait, the issue of voting and the issue of national identity are intimately entwined. The issue of "phantom voters" and persons improperly removed from the rolls became a periodic political issue in Malaysia.[1215] In Sabah, the problem of irregular migration is blamed for demographic change and "rigged" voting due to the issuance of fake and fraudulent documents to immigrants. So contentious has the situation become that the Malaysian Royal Commission of Inquiry tasked with looking into the question of fraudulent documents issued to irregular migrants called it "an all-consuming nightmare."[1216] As a result, the issuance of ID documents in Sabah is extremely political, complicating attempts to resolve statelessness, including among the Sama Dilaut, who are viewed as an immigrant community.

In this way, the conflation with nomadism and immigration resembles the rhetoric in Kuwait against the *bidoon,* where previously nomadic populations are unable to prove their indigenous status because of more recent immigration and a lack of documents with which to establish their claims. In Sabah, statelessness itself has therefore become a reinforcing cycle, both fuelling and resulting from the conflation of immigration, nomadism and regional, historical migration.

Like in Kuwait and Mali, the government has also pushed assimilation of the Sama Dilaut. Since independence, many Sama Dilaut have settled as part of coercive settlement programs, which include linking government services and access, including the right to a nationality, to settlement. For example, when Sama Dilaut began settling near Semporna

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[1212] Kassim and Zin, 22. See also K. Navallo, Filipino Migrants in Sabah: Marginalized Citizens in the Midst of Interstate Disputes (Kyoto U. Masters Thesis 2013) 10 (hereinafter Navallo).

[1213] Hooker, 23.

[1214] Barlocco, 52.

[1215] For example, as many as 300,000 non-Malays may have been removed from the electoral rolls during the 1974 and 1990 elections. See also Lim Hong Hai, 115-116.

[1216] Tan Sri Datuk Amar Steve Shim Lip Kiong (Chairman) and Commissioners, 'Report of the Commission of Enquiry on Immigrants in Sabah,' Royal Commission of Enquiry (2012) 3.

Town around independence, the “water village" was connected to the mainland by a government-built bridge, encouraging further settlement. By 1969 the sedentary population of this settlement had doubled.[1217]

The Sabah government also pursued deliberate settlement programs, for example, relocating Bajau families from outer islands to the mainland and concentrating them in towns.[1218] Settlement since independence, therefore, has simply been a continuation of colonial policy regarding sea nomads, with settlement and economic development seen as dependent upon one another. Development schemes have been instrumental in moving the Sama Dilaut into a more settled way of life, assimilating them into the larger population of settled Bajau peoples.

Conversion to Islam has been a part of assimilation as well.[1219] For example, settled Sama Dilaut communities sometimes construct village prayer houses, visual markers of their conversion.[1220] As in Mali, settlement has helped many Sama Dilaut establish a fixed residence, which was vital in the decade following independence to gaining a nationality. Because of the law’s reliance on *jus sanguinis* and the need to produce one’s parents’ identity documents, however, settlement is no longer the path to a nationality that it once was.

This section has outlined some of the ways in which the quest to forge a unified national identity has driven nomad statelessness, even in places where nomads should qualify for a nationality under the law. The next section will discuss another factor driving the failure of Kuwait, Mali and Malaysia to resolve nomad statelessness: the discovery of natural resources on nomad lands and the development of nomad lands for tourism. The next section will explore how the concept of *terra nullius* has been re-purposed for modern use, by linking the perceived natural statelessness of nomads to their inability to claim land, leaving their lands open to seizure by the government. The extreme wealth now located under many nomad territories means that granting a nationality to nomads risks empowering them to claim their lands away from the government.

[1217] C. Warren, Consciousness, 1980, 228.

[1218] Sather, Adaptation, 1997, 27.

[1219] Sather, Commodity, 2002, 40.

[1220] Sather, Commodity, 2002, 40. Sama Dilaut were banned from Islam until independence. See also Sather, Adaptation, 1997, 76.

Natural Resources as a Driver of Nomad Exclusion

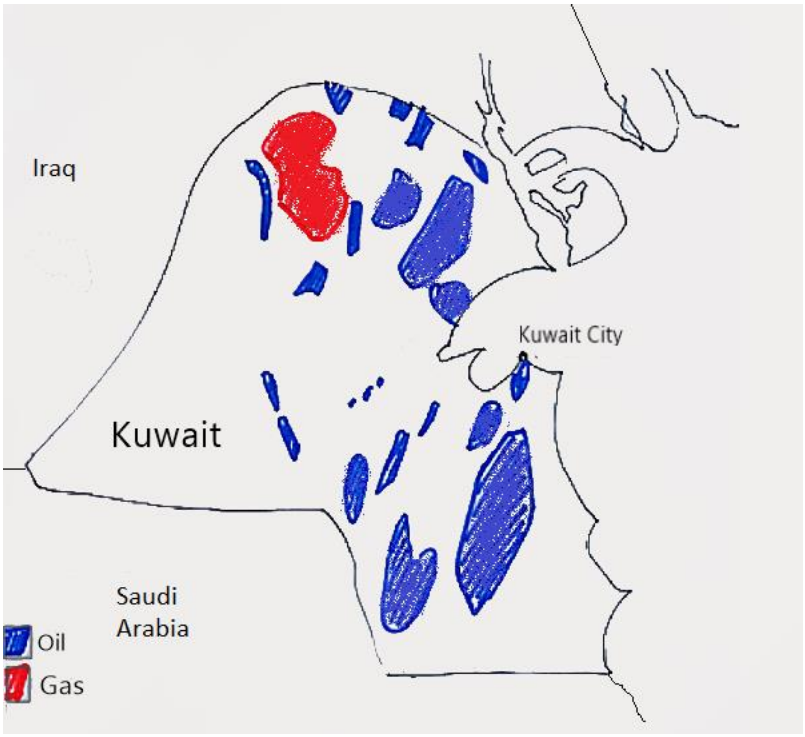
> Indigenous communities have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and to large scale development initiatives that tend to destroy their lives and cultures rather than improve their situation.[1221]

This section will explore how the discovery of oil, natural gas, minerals and other natural resources has fuelled the unwillingness of states to resolve nomad statelessness in Kuwait, Mali and Malaysia. While not originally a topic of concern for this dissertation, a strong correlation was noted during the research phase of this project between nomad statelessness, the seizure of nomad lands by the state and natural resource extraction in all three examples. Experts on nomads have also noted that natural resource extraction and the creation of national parks requires exclusive control of land that is incompatible with potential ownership claims by nomads and former nomads, leading to the clearing of nomads from their lands.[1222] This section will rely on a mixture of academic sources alongside non-academic sources that provide factual information on natural resource extraction, or that illuminate the opinions of government, media and other key actors.

[1221] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, para. 247, quoting Report of the African Commission's Working Group on Indigenous Populations/Committees (2005) 20 (hereinafter Endorois).

[1222] See generally Gilbert and Begbie-Clench, 2018, 3, discussing the problems nomads often face in proving exclusive occupation of land.

Kuwait, Oil and Bedouin Land Rights



Approximate location of Kuwait oil fields in relation to its borders (author's map)

> The sovereign state is now busy projecting its power to its outermost territorial borders and mopping up zones of weak or no sovereignty. The need for the natural resources of the 'tribal zone' and the desire to ensure the security and the productivity of the periphery has led, everywhere, to strategies of 'engulfment'...[1223]

This section will look at the ways in which oil extraction fuelled Bedouin statelessness in Kuwait. As this section will explore, Kuwait's nationality laws were enacted and enforced in an age of massive oil development in the desert. In particular, this section will describe how the Kuwait government came to claim the desert for its exclusive use. It will also examine how oil transformed the regional economy from one based on trade and, in part, on nomadism to one based on oil extraction by the central government, located in Kuwait City, in areas that were once the domain of Bedouin tribes. This shift, it is argued, encouraged the settlement of the Bedouin in urban areas and turned mobility from an asset into a "problem" for the Kuwaiti government. As Toth puts it;

[1223] Scott, 2009, xxi, 6. Scott discusses the threat posed by nomads in the "periphery" to the settled, centralized governments in Asia and Europe since their founding days, noting that nomads and other peoples in the periphery often opted out of state control and, with it, taxation and forced labor. Scott, 2009, 5-6.

> Bedouin have had to deal with droughts and economic fluctuations for centuries. However, the rise of states in the region, with their need to regularize such things as borders, laws, the monopoly on power, economic control and the allegiance of its citizens, brought new challenges to nomadic populations.[1224]

When oil was first discovered in Kuwait, it was treated as the exclusive domain of the Kuwaiti government. Even though the desert was most closely associated with Bedouin groups during the colonial period when oil was discovered, the centralization of power in the hands of the Al-Sabah family meant that under the logic of territorial sovereignty, the oil now belonged to the Kuwaiti government. The shift to an oil economy also drove the decline of pastoralism as a key part of the economy, as well as the decline in long-distance trade, while exploding the wealth of Kuwait City to unimaginable heights.[1225] Maintaining the integrity of the border and eliminating competing claims to the deserts around Kuwait City was therefore a key goal of the Kuwaiti government. The drive to exclusively control oil production was a major factor behind the Kuwait government's push to relocate the Bedouin off their lands and settle them in urban areas, as described above.

Once oil was discovered, the wealth of the Arabian Peninsula went from being based on a movable resource, camels, to a fixed resource, oil. This increased the need for hard borders and decreased the usefulness of nomadism to the governments of both Kuwait and Iraq.[1226] The goal of setting hard borders to establish exclusive and total control over Kuwait's oil reserves would also push government settlement policies to end nomadism and remove nomads from their lands.[1227] It would encourage the government to move former nomads away from the desert and into urban areas, often employing them as guards for oil wells. These policies would convert the Bedouin population to shanty dwellers on the margins of urban society.[1228] At the same time, Kuwait became rentier state, where financial support from the proceeds of the oil was limited to nationals. This drove a conversation over who deserved Kuwait's oil wealth.

The historic relationship of the *bidoon* to land is highly contested. Unbiased information is difficult to obtain. The point of this section is not to make absolute statements about any historical claims to territory descendants of the Bedouin in Kuwait may have,[1229] but rather to explore the ways in which control of oil, like national unity, is a motivation behind Kuwait's nationality policy. Instead of entering into a debate on disputed history as to who owns Kuwait's deserts, this section will instead explore how the politicization of the origins

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[1224] Toth, Tribes, 166.

[1225] Beaugrand, Stateless, 2018, 70.

[1226] Commins, 160.

[1227] Crystal, 175.

[1228] Beaugrand, Stateless, 2018, 91-93.

[1229] Maps drawn by European explorers show tribal areas, but as these cannot be evaluated for their accuracy, they are included in the Annex simply as approximations of where various tribes were located.

of the *bidoon* relates to the control of the source of the wealth that fuels the welfare state: the oil fields.

As the above sections of this dissertation showed, solving the status of the *bidoon* in Kuwait is a matter of government will. Yet, there is very real resistance to expanding the Kuwaiti welfare state to include the *bidoon,* particularly in an age of declining oil revenues.[1230] Beaugrand estimates that the "cost" of naturalizing the *bidoon* population may be as high as 600 million KD.[1231] Underlying this debate is the assumption that former Bedouin who are now *bidoon* have no legitimate claims to Kuwait's oil wealth. Their statelessness is therefore an important part of their perceived illegitimacy, despite the fact that Kuwait's oil, unlike its pearls, originates not in Kuwait harbour, but in the desert.

Oil was discovered in Kuwait during the colonial period, but would not become the linchpin of Kuwaiti politics until after WWII. In 1909, the Emir signed an exclusive agreement with Britain for oil exploration.[1232] There appears to have been no Bedouin input or consultation with regards to this agreement.[1233] Lands that the Bedouin had used for centuries were now being given to the British for oil exploration by the Emir of Kuwait City, thanks to his territorial sovereignty over the desert. The Bedouin were looked at not through the lens of their possible rights, but rather through the lens of their usefulness, or hindrance, in achieving the goal of centralized oil exploration.

The claims of the Emir to the desert were helped by European theories on nomads, described above, whereby nomad lands were empty desert; *terra nullius.* The Kuwaiti government was not alone in this approach in the region, with Gulf governments adopting the logic of the territorial, centralized state to lay claim to vast oil fields under the desert. For example, Dawn Chatty discusses the concept of oil fields as *terra nullius* and how this affected the Bedouin in Oman.[1234] In Kuwait, instead of being part of the oil exploration arrangements with the British, loyal Bedouin were settled in government housing in urban areas and employed by the state as Kuwaiti soldiers and as workers in the oil fields.[1235] It was as low-level employees of the petro-state, not owners, that the former Bedouin would make themselves most useful to the state.

[1230] "The state provides such hefty welfare benefits to citizens that politicians have told me that giving citizenship rights to even a small proportion of the Bidun, in a country with around 1.2 million citizens, could bankrupt the government." B. Wille, 'Kuwait's Plan to Pawn Off its "Stateless"' Al Nahar/Human Rights Watch (March 26, 2015) (accessed July 2020). See also Beaugrand, Stateless, 2018, 160-166.

[1231] Beaugrand, Stateless, 2018, 165.

[1232] Casey, 21.

[1233] Information on Bedouin participation in this decision, if any, would be an important subject of future research.

[1234] Chatty, Negotiating, 138-141. See also Gilbert, Nomadic, 2014, 195. Gilbert notes that the development of oil often causes competition between nomads and governments.

[1235] Kasaba, 5-6. See also Carmichael, 122.

Beginning in the 1940s, and accelerating in the 1960s, Bedouin from the desert began to settle in shanty towns around Kuwait's growing urban areas in order to access jobs in the military and police, often the only jobs available to them now that long distance trade was curtailed.[1236] At first, this settlement was informal and ad hoc, a response, in part, to the limits on nomadism created by the new borders, as well as to rapid modernization created by the discovery of oil. The government, however, also promoted the informal settlement of the Bedouin as a way to fill needed low level jobs in the police and military. Urban Hathar Kuwaitis were given posts in the new government in exchange for their loyalty to the ruling Al-Sabah family,[1237] but wealthy and middle-class Kuwaitis did not want low level jobs in the military or as border guards in remote areas, so these jobs were filled with Bedouin.[1238]

Many *bidoon* were relegated to temporary shanty towns on the outskirts of urban areas while naturalized Kuwaitis were settled in special neighbourhoods constructed by the government and continued to be given social benefits.[1239] When the Kuwaiti government decided to naturalize a portion of the Bedouin population, it began a massive housing construction program, in place from the mid-1960s to 1980, razing informal shanty towns and semi-nomadic settlements and replacing them with western-style housing projects.[1240] These state-built housing projects came to resemble ghettos.[1241] Today, many naturalized Bedu are associated with shanty towns and government housing.[1242] Both the shanty-towns and housing projects were located far from the wealthy inner cities where the Hathar lived. The government justified the segregation of the Bedouin population by claiming that the desert peoples needed to remain close to the desert.[1243] A result of these housing projects and movement restrictions on the Bedouin has been the mass settlement of former Bedouin and, by consequence, their removal from their lands.

Control of oil was also a major driver of the Iraq invasion of Kuwait, highlighting for the entire world the sensitive nature of Kuwait's desert border. Kuwait also faces an ongoing border dispute with Saudi Arabia.[1244] Oil production and transportation required exclusive

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[1236] For an overview of what some have alluded was an influx of Bedouin during the 1950s and 1960s see Beaugrand, Stateless, 2018, 90-91. See also Al-Nakib, 16-17. Al-Dekhayel, 144. See also Beaugrand, Transnationalism, 2010, 23.

[1237] By the 1970s, over 70% of the urban Kuwaiti population was employed by the government. Ismael, 121.

[1238] Longva, Citizenship, 184.

[1239] Yanai, 234. Longva, Citizenship, 184.

[1240] Al-Dekhayel, 145. See also Beaugrand, Transnationalism, 162; Al-Nakib, 1.

[1241] Beaugrand, Transnationalism, 2010, 164-165.

[1242] Beaugrand, Stateless, 2018, 99-100.

[1243] Al-Nakib, 19.

[1244] U.S. Energy Information Administration, 'Kuwait' (July 8, 2013).

government control over large wells in the desert, as well as infrastructure to transport and ship the oil from the coast. At the end of the British period, Iraq ended up with limited access to the coast. This would become a constant source of strain between the two countries, as coastal access was now vital for oil export.[1245] Kuwait would need to maintain both these things in order to continue to control its oil profits.

As the above sections discussed, the migrations of the Bedouin and the resulting lack of clarity around the arbitrary border between the three countries became a source of anxiety for the Kuwaiti government. Bedouin loyalty and ongoing migrations were increasingly presented as a security issue.[1246] In the 1960s, Kuwait's borders were still somewhat fluid, border posts few and far between, and Bedouin could continue their traditional way of life, albeit with increasing difficulty.[1247] Shoring up the borders against Saudi and Iraqi expansionism became a major issue for the Kuwaiti government and settlement of the Bedouin, while claiming Bedouin lands, became a key facet of that effort.[1248] As Toth puts it, writing of the region more generally, "areas where ownership of the land or sovereignty was in question became hotly contested."[1249] Solving the so-called problem of the Bedouin became seen as key to maintaining Kuwaiti control over its oil fields. Settlement for employment in the army and oil industry was arguably seen as an ideal solution, both to fill those jobs, but also to decrease border crossings and marginalize the camel trade. This settlement and employment also took place during a period of drought, when pastoralism was particularly difficult. Beaugrand argues, however, that many Bedouin viewed these jobs as temporary and not indicative of a permanent abandonment of nomadism.[1250]

Aggressive oil extraction in Kuwait coincided with the increasingly negative view of nomadism throughout the region as bad for the desert environment.[1251] With Kuwait and

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[1245] Carmichael 129.

[1246] Longva, Citizenship, 51.

[1247] Longva, Citizenship, 188. See also Fletcher, 59.

[1248] Casey, 21. G Power, 'The Difficult Development of Parliamentary Politics in the Gulf,' in D. Held and K. Ulrichsen, *The Transformation of the Gulf: Politics, Economics and the Global Order* (Routledge 2012) 32-33. Beaugrand Transnationalism 2010 110-111 (noting the influence of drought and modernization on settlement, while arguing that settlement was also a priority of the Kuwaiti government).

[1249] Toth, Control, 60.

[1250] Beaugrand, Stateless, 2018, 70-71.

[1251] Chatty, Pastoralists, 16, 228-240 (where she highlights the example of wild animal reintroduction programs in Oman and Syria). Chatty notes the link between policies applied in the Gulf region and those applied to African pastoralists, discussed below in the Tuareg case study. Chatty and Colchester also place the settlement of nomads as part of conservation in the wider context of the displacement of indigenous peoples for conservation. D. Chatty and M. Colchester, 'Introduction' in D. Chatty and M. Colchester (eds.) *Conservation and Mobile Indigenous Peoples: Displacement, Forced Settlement and Sustainable Development* (Berghan Books 2002) 1-15.

other Arabian states now pumping millions of barrels of oil and building large infrastructure projects, including pipelines,[1252] the international community and Gulf State governments focus on environmentalism must be questioned. But the views of outside experts about environmental harm provided another rationale to Gulf State governments to settle nomads.[1253] While the extent to which Kuwaiti settlement policies were influenced by international anti-pastoralism policies is unknown, it was frequently evoked in other Gulf states.[1254] More research on the role of anti-pastoral policies in Kuwait is needed.

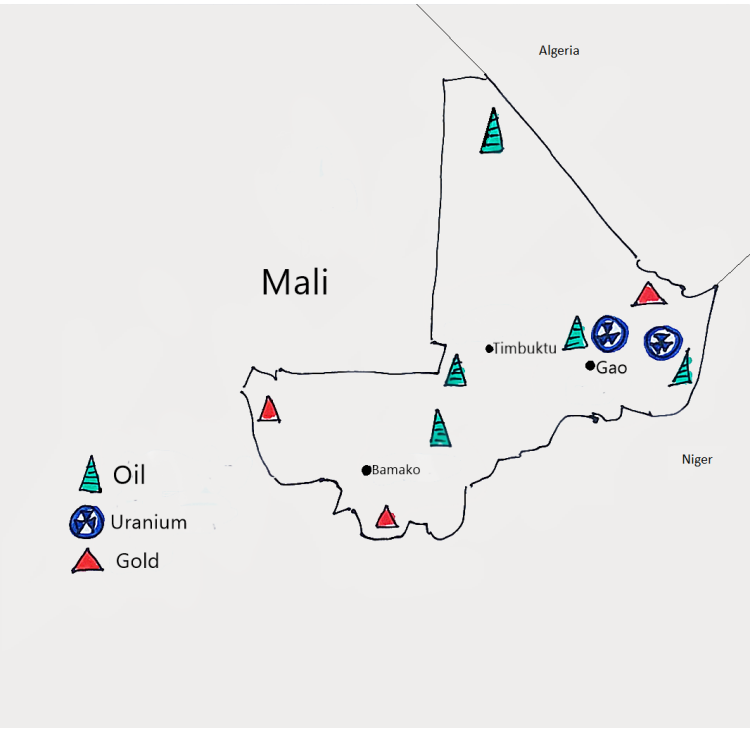
The contested history of the *bidoon* makes it difficult to trace the history of seizure of Bedouin lands by the Kuwaiti government. As are result, much more research is needed into this issue. Yet, as this section has shown in general terms, the enormous importance of oil has led the Kuwaiti government to take aggressive measures to protect its borders and exclusively control its oil wells, centralizing control in the hands of the government. Adopting the principle of absolute territorial sovereignty and *terra nullius* in the desert has allowed the government to centralize control of both oil production and transportation. Once the domain of Bedouin tribes, oil producing regions around Kuwait City and Jahra are now under exclusive government control. Meanwhile, the wealth from oil extraction has made nomadism superfluous to Kuwait's economy. Today, the former Bedouin population in Kuwait are regarded as a security threat and a potential burden to the state. Their ongoing statelessness, therefore, appears to serve important Kuwaiti government interests, though more research is needed.

While agriculture was not a priority of the Gulf States for economic reasons, Dawn Chatty notes that in other Gulf states, forced settlement of Bedouin tribes was encouraged after independence in order to promote agriculture, despite the dubious environmental effects. Chatty, Persistance, 23.

[1252] Information on Kuwait's oil infrastructure can be found at www.kpc.com.kw, the website of the Kuwaiti Petroleum Corporation.

[1253] Bocco, 302. Riccardo Bocco notes that the "Arab intelligentsia," members of urban elites, who also pushed for settlement of the Bedouin were often as foreign to nomadism as western scholars and viewed it as backward. Bocco, 302-303. Government policy encouraging Bedouin settlement was therefore aligned with international development policy.

[1254] More research is needed on this issue.



Possible locations of minerals in Mali in relation to its borders, author's map

> It may well turn out that Europe's most enduring legacy to Africa is the state.[1255]

While the mineral wealth in Tuareg areas cannot be fully established due to the ongoing conflict, like in Kuwait, possible mineral wealth in the Sahara has long fuelled the Malian government's intention to retain control over these areas. While not as much of a driving force in Malian politics as in Kuwaiti politics, natural resource extraction, particularly mining leases, play an important role in the Malian government's drive to retain control over its Sahel territory.

Malian land use policy in the north began as a continuation of colonial policy, with the promotion of agriculture the central focus. French attempts to retain some control of the region, particularly to establish mineral exploration rights, however, remained a consideration for the Malian government. As the above sections showed, following independence, Keïta's government moved swiftly to consolidate territory and jump-start

[1255] A. Mazrui, 'Francophone Nations and English-Speaking States: Imperial Ethnicity and African Political Formations' in D. Rothchild and V. Olorunsola (eds.), *State Versus Ethnic Claims: African Policy Dilemmas* (Westview P. 1983) 25.

the economy according to socialist models. Unlike in Kuwait, the original focus of Malian government was on developing land in the fertile Niger Bend region for agriculture.

The Sahara regions, however, had already been identified by the French as having potential mineral wealth that would attract the attention of future governments. At first, Keïta's socialist agriculture programs targeted nomadism as a barrier to agriculture, expanding similar French efforts.[1256]

> The modernisation of the economy could only be successful if the mentality of the rural population could be transformed from a backward traditional outlook on production and society to a modern rational one. If this process was successful economic production would rise automatically, or so the regime thought.[1257]

As the decades went by, however, lucrative mining contracts in neighbouring Niger and Algeria raised the stakes for ownership of the desert. As time passed, uranium mining and oil exploration in neighbouring countries renewed fears that potential Sahara wealth was at stake if Tuareg succession was successful.

Land use policies in northern Mali adopted the principle that the nomadic Tuareg did not own their lands. The socialist Keïta government saw the Sahel territories as belonging collectively to the state with the Tuareg granted the right to use, not own, the land. Meanwhile, agricultural peoples were seen as the proper and natural owners of land and the holders of private, individual title.[1258] As the above section discussed, Keïta put into place an ambitious program of modernization specifically favouring agriculture.[1259] The Malian government declared much non-agricultural land, which included pastoral land, to be of communal use. The administration set up agricultural collectives and "agricultural brigades."[1260] In an instant, the Tuareg were told they had no right to lands they had occupied for generations.

As the northern Kidal province remained under military rule due to the 1962 conflict, the region to the south near the Niger river, where the Tuareg were heavily mixed with settled Songhai and other groups, saw the aggressive introduction of programs to promote

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[1256] For example, the regime reintroduced travel permits that had been used by the French to restrict migration. Lecocq, Desert, 2002, 81.

[1257] Lecocq, Desert, 2002, 78.

[1258] Gremont, 137.

[1259] C. Coquery-Vidrovitch, 'The Transfer of Economic Power in French-Speaking West Africa' in P. Gifford and W. Louis, *Decolonization and African Independence: The Transfers of Power, 1960-1980* (Yale UP 1988) 105.

[1260] Lecocq, Desert, 2002, 160-162. "The successive obstacles brought about the formation of a 'nomad commons' that paradoxically evolved into a 'nomad's land' without either nomads or land." Bourgeot, Résistances, 407.

agriculture at the expense of pastoralism.[1261] The state organized rural cooperatives.[1262] Government offices were created to supply rural farmers with credit and equipment. As in Kuwait, the Malian government, encouraged by international agencies, also sought to enforce several environmental preservation schemes that linked pastoralism to environmental decay.

One of the ways in which the Keïta regime supported agriculture in the Niger Bend was by digging more wells. Between 1961 and 1969, sixteen new wells and pumping stations were established, mostly without input from the Tuareg as to their location or management. These wells were open to both the Tuareg and sedentary population, despite being located on the same sites as traditional water sources used by the Tuareg. New wells encouraged the spread of agriculture northward. In 1960, a law had been passed to limit agriculture from encroaching on Tuareg grazing in an attempt to preserve pastoral rights, but this law was not enforced and more and more land came under production during the Keïta period.[1263] The failure of the Malian government to support pastoralism would become one of the continuing flash-points in tensions between the Tuareg and the government.

The Malian state also took an active role to encourage agriculture amongst the Tuareg. Toward the end of the Keïta regime, the government organized agricultural fairs for the Tuareg, though this project found success only amongst a small population of ex-slaves already accustomed to agriculture. The transport of cattle to Algeria and Niger for sale was banned if it did not take place as part of state sponsored programs.[1264] The Tuareg did not understand the purpose of these controls and refused to cooperate. The main outcome of the Malian government's attempts to "modernize" the economy of the north was to make seasonal migration and trade more difficult and clandestine. Such meddling by the state in their affairs further alienated the Tuareg, but the state did not give the Tuareg and outlet to air their complaints or participate in the process of setting policy or making decisions over resources and programs, seeing every attempt by the Tuareg to air their grievances as a sign of sedition.[1265]

All of these policies had disastrous effects on the Tuareg's ability to pursue pastoralism just at the time when the introduction of the Malian Franc led to an economic crisis throughout the country.[1266] Such policies brought suffering throughout Mali, but particularly to the pastoralists who were without government subsidies like other sectors. As a result of these

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[1261] Boilley, Les Touaregs, 1999, 350.

[1262] Diarrah, 39-42. « La priorité était accordée à l'agriculture qui devait être le pilier de développement économique du Mali. » Diarrah, 42.

[1263] Bernus, 166-167.

[1264] Organizations like SOMIEX (the Malian society for imports and exports. Boilley, Les Touaregs, 1999, 361. The banning of the caravans also took place on the Algerian side of the border. Keenan, Resisting, 93.

[1265] Boilley, Les Touaregs, 1999, 310.

[1266] Diarrah, 39-42, 47-48. See also Gauido, 245-248; Boilley, Les Touaregs, 1999, 316.

policies, throughout the period following independence, settlement of the Tuareg accelerated.[1267]

Despite government support for agriculture across Mali, output remained frustratingly low, and eventually surpassed by mineral exploitation and manufacturing.[1268] As agricultural output in the Niger Bend fell behind expectations, increasingly the Sahara revealed itself to contain a wealth of mineral riches.[1269] Throughout the post-independence period, the Malian government would fight to retain control of the potentially lucrative Sahara, viewing Tuareg agitation for rights as dangerous separatism, French imperialism or collusion with Algeria and Libya. This cycle of mistrust continues to dominate Tuareg-Mali relations to this day and is arguably the biggest barrier to Tuareg inclusion within the Malian state.

During the French period, however, there were already signs that the real wealth of the Sahel lay not in agriculture but in mining. Mining for salt and gold, as Part 2 showed, was always a major occupation of the Sahel and Sahara. As discussed above, civil war broke out in northern Mali in 1962, putting an end to many of the government's programs in that region. The armed conflict and continued insecurity also inhibited the same sort of mineral exploration that was taking place in the Sahara in neighbouring countries like Niger. But if the vast resources discovered in neighbouring Algeria and Niger were any hint of what may be contained beneath the Malian Sahara, it is likely that Tuareg lands in northern Mali may turn out to be very valuable.

> (O)il was struck in Algeria, near the Libyan border, in the northernmost part of the Tamasheq world. Five months later, the largest oil well in Algeria until present started spouting its riches at Hassi Messaoud...Various metals and other minerals were discovered in the Hoggar Mountains of Southern Algeria, and phosphor and iron ore were located in Mauritania.[1270]

Mineral riches like uranium[1271] in Niger would soon be added to the Sahel's output.

While gold, cotton and livestock are currently Mali's biggest exports, unproven oil and other mineral deposits in the north are increasingly attracting attention.[1272] In 1987, the

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[1267] Azarya, 260. See also Bernus, 168. Similar anti-nomad policies were put into place in southern Algeria. Keenan, Lesser Gods, 923. See also Bourgeot, Résistances, 166-168, 179-180 (discussing the effect of development projects on the Tuareg.)

[1268] Coquery-Vidrovitch, 111-112.

[1269] Claudot-Hawad, 673.

[1270] Lecocq, Desert, 2002, 49.

[1271] In Niger, uranium mining, and the government's desire to maintain control over the mines, dominated the relationship between the Tuareg and government beginning in 1975. Claudot-Hawad, 665.

[1272] See for example USA International Business Publications 'Mali Mineral & Mining Sector Investment and Business Guide' (2007) 44 and J. Whaley, 'Mali: A Country on the Cusp?' 5 GeoExpro, 4 (2008).

UN and the Malian government did a study of minerals in the northern Sahel region. This report was not made public until 1991. According to the report, northern Mali contains large deposits of gold, iron, magnesium, copper, zinc, uranium, phosphates, salt, gypsum and oil and tar sands,[1273] including the potentially lucrative Taoudeni Oil and Gas Basin in the far north of the country.[1274] In next door Niger, near Agadez, the former location of the Ayar Sultanate discussed in Part 2, uranium mining has become a major source of wealth for the Nigerien government.[1275]

Any potential mineral or oil wealth in northern Mali is speculative and it is not the purpose of this dissertation to make claims on whether or not there is mineral or oil wealth there, but only to point out that there is speculation in the natural resources industry about northern Mali's potential, speculation that arguably fuels tensions over the sovereignty of northern Mali.[1276] The possibility of vast wealth in the Malian Sahel and Sahara has greatly raised the stakes for the Malian government to win the civil war against Tuareg separatists and retain control of the region.

Meanwhile, land use in the Sahel has only become more contentious in the 1980s and 1990s. The process of sedentarisation of the Tuareg has continued.[1277] The return of the Tuareg to Mali since the 1990s has led to increased pressure on available land. The repatriation of refugees was used to promote Tuareg settlement, but it exacerbated questions of land ownership for returned Tuareg.[1278] The international community has also played a part in the settlement of these returnees, adding to the pressures on available land.[1279]

The exact number of refugee returns to Mali is unknown, but UNHCR estimated that between 1995 and 1996, between 50,000 and 80,000 refugees returned to Mali, increasing

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[1273] Diarrah, 264.

[1274] OECD Sahel and West Africa Club, 'Vulnerabilities and factors of insecurity in the Sahel' (August 2010) 4.

[1275] See the World Nuclear Association, Uranium in Niger at http://www.world-nuclear.org/information-library/country-profiles/countries-g-n/niger.aspx (accessed July 2020).

[1276] Kennan discusses the relationship between oil and uranium exploration, the Tuareg, and the government of Niger in Keenan, Resisting, 214-217.

[1277] "Increasingly forced to switch from nomadic to urban lifestyles over the last few decades, lots of Tuareg in the Sahara and Sahel are being squeezed into sedentarization." Kohl and Fischer 'Tuareg Moving Global: An Introduction' in Kohl and Fischer (eds.) *Tuareg Society within a Globalized World: Saharan Life in Transition* (Tauris 2010).

[1278] Randall and Guiffrida, 438-439, 454. Whether this settlement would have occurred without displacement is unclear.

[1279] For example, UNHCR and the German Technical Cooperation Agency (GTZ) created 638 returnee settlements centered around wells and boreholes in northern Mali in the late 1990s. Randall and Guiffrida, 439. In neighboring Niger, nomads were encouraged to settle in order to claim land. C. Oxby, 'Will the 2010 'Code Pastoral' Help Herders in Central Niger? Land Rights and Land Use Strategies in the Grasslands of Abalak and Dakoro Departments' 15 *Nomadic Peoples* 53 (2011) 53.

the urban population and placing stress on land availability and employment prospects.[1280] Refugee returns brought out differences between the returned Tuareg, accustomed to living in camps and towns, and those who had remained in northern Mali in very difficult circumstances, continuing to practice seasonal migration when possible.[1281] Younger Tuareg often found themselves caught between the ideals of pastoral life and the allures of a more settled existence like that experienced abroad. The 1990s saw the effects of decades of Tuareg settlement, a change in lifestyle that would have wide-ranging environment, social and political affects. In particular, it continued to raise the stakes for land ownership in northern Mali.

In the 1990s, settlement and land ownership would also be linked to registration and voting, meaning that returned and settled Tuareg, if registered, could influence Malian elections. Art 8 of the new Constitution, passed as part of the peace agreement, required that all voters have been resident in their *arrondissement* or commune for six months in order to vote.[1282] Land ownership was linked to residence and, therefore, to voter registration. A 1998 land apportionment exercise by the government heavily favoured settled communities, who could prove long standing tenure to the land, which in turn increased the electoral representation of the settled population.[1283] Settlement became increasingly the best way to claim territory in northern Mali and establish residence in order to register to vote.

This created a strong link between settlement, land ownership and voting that would fuel Malian politics in the north until the present day. The linkage of residence to voting rights fuelled another wave of settlement amongst the nomads as they attempted to establish their right to Malian identity cards and land deeds.[1284] The land registration program brought them into further conflict with the Songhai population, who had long-standing claims to much of the land in the Niger Bend. The cycle of voting based on registration, which was in turn based on land ownership or occupation, led to strain on the already poor relationship between the recently settled Tuareg and longer-settled communities.

Meanwhile, the government's policy of treating Tuareg lands as communal lands owned by the state continued throughout the 1980s, 1990s and 2000s. This idea, that Tuareg lands

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[1280] United States Committee for Refugees and Immigrants, 'U.S. Committee for Refugees World Refugee Survey 1997 - Mali,' (1 January 1997). About 30,000 received assistance from UNHCR; the rest repatriated spontaneously.

[1281] Giuffrida, 32.

[1282] Diarrah, 159.

[1283] The rush to register land ownership in Mali was not confined to the north. The 1990s and 2000s saw a rapid increase in the number of land title documents filed with the government across Mali as people in rural areas scrambled to claim land. M. Djire, 'Land Registration in Mali; No Land Ownership for Farmers?' (144 I.I.E.D. 2007). (Though this study focuses on land ownership near Bamako, the increase in ownership can be seen throughout Mali.

[1284] Gremont, 143.

were commons, or *terra nullius,* had a long history that could be traced to colonial scholarship, as was discussed in the above section on nationality law during colonization.. In addition to early policies claiming Tuareg lands as commons, the armed conflict caused Tuareg lands to revert to the state, meaning that pastoralism was now to be done on state owned or communal land over which the Tuareg would have little control.[1285] This interpretation of Tuareg land use as being not one of ownership but of communal use on land owned by others was rooted in the philosophy of land use and statehood described above.

> In addition, even those land tenure systems recognizing pastoralists' rights to natural resources (in Mali and the Niger), differently value agricultural and pastoralist land use. Accordingly, pastoralists only enjoy usufruct rights of pastoral resources under the condition that they respect private (agricultural) land. Pastoralists' access to natural resources thus remains tenuous and subject to agricultural requirements. In several coastal States, in addition, ideas of indigeneity (*autochtonie*) have become virulent, posing indigenous against settlers or autochtones against *allogènes*. The indigenous are generally the local farming communities, while migrant farmers and all herders are considered as settlers or strangers. It has become a widespread practice to negate strangers any secure access to natural resources such as land, and in some cases even to jobs, education and infrastructure. These beliefs exacerbate the social and economic marginalization of pastoralists, and further restrict their access to resources.[1286]

In 2001, the Malian government, like many others in the region, belatedly acknowledged the importance of pastoralism in Mali. The government enacted the Pastoral Charter to establish important rights of pastoral people to land, paving the way for a more nomadic-friendly land policy in the north. But like many such Charters across the region, the policies would not lead to meaningful change in how land was owned and allotted in the Sahel.[1287]

As in the Gulf region, the international community and development agencies played a role in the decline of pastoralism and the loss of Tuareg land rights. Settlement continued to be promoted by international and regional organizations, despite some initiatives to protect pastoralism, such as the ECOWAS Protocol on Transhumance (1998) and supporting Regulation (2003).[1288] Support would include the creation of pastoral development programs and the inclusion of herders in regional and national policy making and conflict

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[1285] Badi, 85.

[1286] Leonhardt, 8.

[1287] Boureima, 115-116. In 2003, various pastoral associations and NGOs in West Africa, including in Mali the Association des Organisations Professionnelles Paysannes, the Fédération des Éleveurs pour le Bétail et la Viande au Mali (also known as the Fédération Nationale Groupement Interprofessionnel de la Filière Bétail Viande au Mali), as well as the Federation Amadane and the peacebuilding organization Tassaght, and the regional organization Réseau Billital Maroobé, sought to improve conditions for pastoral nomads in West Africa.

[1288] ECOWAS Protocol on Transhumance (1998) and supporting Regulation (2003).

resolution mechanisms. The ECOWAS Protocol also provides some support to "facilitate" cross-border transhumance.[1289] The ECOWAS Protocol also finds additional support from the N'Djamena Declaration on the contribution of pastoral livestock herding to the security and development of the Sahara-Sahelian areas and the African Union Commission, Department of Rural Economy and Agriculture, Policy Framework for Pastoralism in Africa.[1290] Mali and Niger also passed a protocol to regulate cross-border pastoralism.[1291] Such regional attempts to improve nomad rights, however, fall short of fully protecting their property rights.

There has also been limited international attention on the link between pastoral land rights, civil registration and nationality. Importantly, the 1998 Protocol mandates that pastoralists have identity documents, but it does not provide a mechanism by which herders can prove their eligibility.[1292] The enactment of these declarations and protocols, however, continues to treat pastoralists as wards of the state, rather than as nationals with rights. They have not led to changes in the behaviours of states like Mali towards their pastoral populations. Full political equality would remain elusive for the Tuareg during this time. The unresolved status of the Tuareg in Mali fuelled a new round of minor conflict in the 2000s, but increasingly, this violence was between local communities of herders and farmers.[1293] The war between the Malian government and the Tuareg was quickly turning into a war over land ownership.

As in Kuwait, concerns over the environmental impact of pastoralism injected a new element of negativity into nomad-state relations. Throughout this period, the Malian government, international actors and the local, settled community continued to blame environmental degradation on pastoralism. The government's support for agriculture and land ownership based on productive use of the land are in line with former French policy and with government policies concerning nomadic pastoralists all over the world.[1294] In 1987, a UN report stated that nomads should be forced to give up their traditional lifestyle and encouraged to pursue agriculture when pastoralism becomes a threat to the

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[1289] ECOWAS Protocol on Transhumance (1998) and supporting Regulation (2003), Article 2.

[1290] S. Beyene, 'Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities' (Fort Hare U. October 2010).

[1291] Protocole d'accord en matière de transit du bétail entre la République du Niger et la République du Mali (Bamako 1988).

[1292] Twenty-first conference of heads of states, Decision A/DEC.5/10/98 Relating to the regulations on Transhumance between ECOWAS Member States, Abuja, (31st October 1998), Article 12. "Herdsmen must be in possession of identify papers duly issued by the competent authorities in their countries of origin. They must be able upon demand, to show proof of the identity and permanent residence of the owner(s) of the herd..."

[1293] Gremont, 142. United States Department of State, '2010 Country Reports on Human Rights Practices - Mali,' (8 April 2011). See also Stewart, 5.

[1294] Khazanov, Pastoralists, 15. Khazanov lists the forced settlement of nomads in Russia in 1930-1931 and in Iran under the Shah, as well as the forced relocation and settlement of nomads in Somalia in 1974.

environment.[1295] Northern Mali has suffered heavily from climate change, with a 30% decrease in rainfall since 1998.[1296] and the Sahara is expanding south at a rate of 30 miles a year.[1297] Both the Malian government and the international aid community have pushed for the settlement of the Tuareg as a way to prevent desertification.[1298] Even the Pastoral Charter contained language linking pastoralism to environmental degradation.[1299]

It is beyond the scope of this paper as to whether and to what extent pastoralism is bad for the environment or causes desertification in the Sahel. Proponents of pastoralism argue restrictions on mobility have limited the Tuareg's ability to adapt to cyclical drought, intensifying desertification. The hard borders restricting Tuareg movement cannot be adjusted for the expansion of the Sahara. This has taken away the Tuaregs' ability to manage their territories as necessary to minimize drought. Over farming has added to the problem.[1300] As well, Tuareg settlement has created a strain on arable land, bringing the Tuareg into greater conflict with their settled neighbours.

Only recently have opinions about the environmental sustainability of nomadic pastoralism in the Sahel shifted in favour of nomadism. Ironically, the settlement of the Tuareg, so long a goal of both the colonial and the post-colonial government as well as held up as good land stewardship by international NGOs, is now fuelling a conflict over land in an increasingly arid environment. With modern research into the negative effects of intensive agriculture on the Sahel, the government of Mali has recently created some programs to assist the Tuareg, including husbandry cooperatives, fixed prices for the sale of animals, and employment projects for settled, urban Tuareg to adopt wage labour. But all of these programs seek to control pastoralism or provide for a transition to a non-pastoral lifestyle. Recent attempts by the Malian government to reduce Tuareg dependence on foreign aid by the Malian government by encouraging pastoralism have been too little, too late to halt settlement.[1301] As long as pastoralism is seen as backward by both governments and international actors, it will be discouraged by government policy, leading to more settlement.

[1295] United Nations, 'Our Common Future' Sec. 5.2 (1987) paras. 95-96.

[1296] Stewart, 28-29.

[1297] Stewart, 29.

[1298] Khazanov, Pastoralists, 7, 13. Boilley,, Les Touaregs, 1999 315.

[1299] Article 7, while supporting the right of pastoral communities to practice traditional pastoralism, including nomadism within Mali and, where possible by bilateral agreement, between Mali and neighboring countries, clearly states that; "the exercise of pastoral activities is subject to the obligation to preserve the environment." Charte Pastorale du Mali, Loi N. 01-004 of 27 Feb. 2001. Oxby argues that a similar initiative in Niger, the Charte Pastorale, was too late and too ineffective to stop sedentarization. Oxby, 53.

[1300] J. McDougall, 'Frontiers, Borderlands, and Saharan/World History' in J. McDougall and J. Scheele (eds.) *Saharan Frontiers: Space and Mobility in Northwest Africa* (Indiana UP 2012) 84-85.

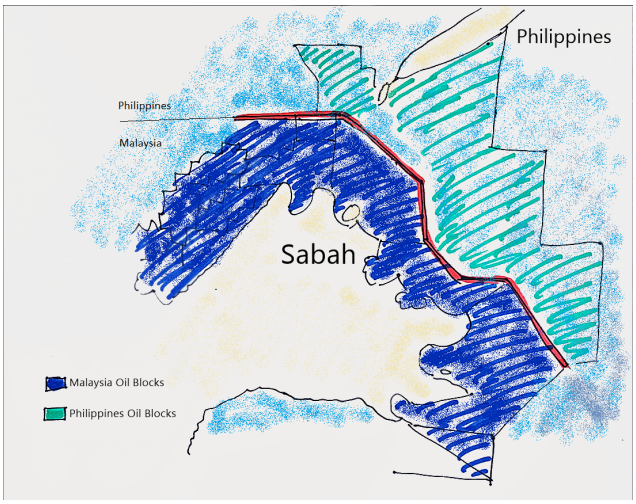
[1301] Diarrah, 275-285.

Meanwhile, the marginalization and exclusion of the Tuareg from both land ownership and political participation has meant that government policy continues to be set by urban Malians and agricultural interests. The continued disenfranchisement and lack of registration and political opportunities of pastoral peoples like the Tuareg makes it difficult for them to be heard by their governments, and even more challenging to create pro-pastoral policies.[1302] This has created a cycle of settlement, land overuse and conflict. The linking of registration, voting and legitimacy to settlement and land ownership has only fuelled further settlement and reduced the voices and political power of pastoral nomads like the Tuareg. The failure of decades of forced and coercive settlement policies will not be easily undone in the Sahel, and the lack of a political solution between the Tuareg and the Malian government only makes the problem worse.

As this section has shown, Malian land use policy is deeply connected to Tuareg nationality, registration and voting. Throughout the 1980s, 1990s and 2000s, Malian land use policy continued to favour settlement, agriculture and the seizure and communal use of Tuareg lands in the Niger Bend region, even as these policies put a strain on the available land for farming. The link between land ownership and voting led some Tuareg to abandon nomadism in an attempt to prove title to their lands. The experience of living as refugees in camps distanced many younger Tuareg from nomadism, while international development programs targeted nomadism as bad for the environment. With little political clout, it was hard for Tuareg communities to challenge these policies. Meanwhile, potential mineral and oil wealth in the Sahara fuelled continued Malian government concerns over separatism in the north of Mali, leading to continued crackdowns on northern Tuareg.

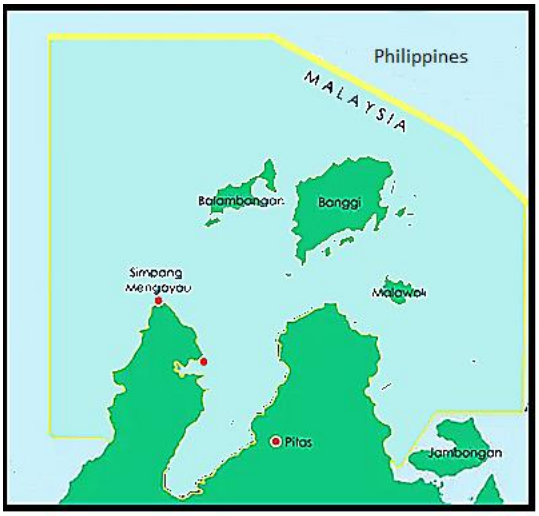
[1302] Diarrah, 285.

Malaysia, Oil, Tourism and Sama Dilaut Ocean Rights



Above: Approximate location of offshore oil blocks in relation to the border, author's map

Below: Tun Mustapha Marine Park



Like in Kuwait and Mali, concerns over the integrity of Sabah's ocean borders would be fuelled by the discovery of massive amounts of natural resources, specifically oil, under the oceans that were once the domain of the Sama Dilaut and other fishing communities. While the status of the Sama Dilaut is a much lower profile issue in Malaysia than that of the *bidoon* in Kuwait or Tuareg in Mali, as this section will show, concerns over sovereignty

and natural resources in Malaysia, including the establishment of tourist parks, had arguably a great deal of indirect influence on the status of the Sama Dilaut.

The settlement of the Sama Dilaut has been continuing since the colonial period. According to Sather, by 1965, the population of nomadic Sama Dilaut had declined to about 660 in the Semporna district.[1303] In 1967, James Warren noted the rapid abandonment of boat nomadism by the Sama Dilaut.[1304] According to Carol Warren, by 1969, the sedentary population of Sama Dilaut at Semporna had doubled, and ten years later, only 25 to 30 boat dwelling families remained.[1305]

Sama Dilaut nationality may appear to be unrelated to bigger questions about the inclusion of Sabah in Malaysia and the ownership of Sabah's vast oil reserves and tourist parks, but in reality, Sama Dilaut nationality and legitimacy are directly impacted by the quest to exclusively control natural resources in Sabah. As the section on nomads before colonization showed, the Sama Dilaut occupy the Sulu Sea, now a sensitive maritime border zone and the location of the majority of Malaysia's oil and some of its most lucrative tourist parks. Ocean areas once occupied by the Sama Dilaut is now some of the most valuable in the world.[1306] Like in Kuwait and Mali, the presence of natural resources has greatly raised the stakes for border security and Malaysia's sovereignty over the oceans around Sabah.[1307] This section will explore how the discovery of oil and the creation of tourist parks in were once Sama Dilaut fishing zones has influenced Sama Dilaut belonging and how questions of sovereignty, borders and ocean rights have helped perpetuate their statelessness.

While during the colonial period described in Part 2 north Borneo was considered to be a remote part of the British Empire, a place where the BNBC struggled to make money, today, Sabah's offshore oil is a key driver of Malaysia's economy. As described above, under a closely related European theory to that of *terra nullius*, the oceans around Sabah are

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[1303] Sather, Adaptation, 1997, 28. The number of nomadic families is difficult to determine, in part because nomadism is difficult to quantify. Sather and Warren are in agreement, however, that boat nomadism greatly declined in the region following independence. I am indebted to Helen Brunt for her comments on this point.

[1304] J. Warren, Chartered, 1971, ix. Though according to some accounts, there may be as many as 5,000-7,000 Sama Dilaut still living a nomadic or semi-nomadic lifestyle in Sabah today. The number of Sama Dilaut who continue to practice some form of boat nomadism, however, is unknown. I am indebted to Helen Brunt for her comments on this issue.

[1305] C. Warren, Consciousness, 1980, 228. See also Sather, Adaptation, 1997, 28. Sather points out that the number of settled Bajau also increased due to the influx of refugees from the Philippines. In Indonesia, many Sama Dilaut families were similarly settled in villages in the 1950s to crack down on piracy, leading to poverty and overfishing. C. Majors and J. Swiecicka, 'Missing the boat?' Inside Indonesia (June 24, 2007). See also L. Lenhart, 'Orang Suku Laut Communities at Risk: Effects of Modernization on the Resource Base, Livelihood and Culture of the 'Sea Tribe People' of the Riau Islands (Indonesia),' 5 *Nomadic Peoples* 67 (2002).

[1306] See generally Wright. See also Fernandez, 55; G. Poling, 'The South China Sea in Focus: Clarifying the Limits of Maritime Dispute' (Center for Strategic and International Studies 2013); Hooker, 221-222.

[1307] Kassim and Zin, 110.

considered to be *mar liberum* and are exclusively under the centralized control of the Malaysian government. The federal government has strengthened its control over the Borneo territories in recent decades by coming to dominate their finances and controlling their oil.[1308]

Currently, the federal government is focusing heavily on exploration in Sabah and Sarawak, with oil fields pushing up against the maritime boundaries with Brunei and the Philippines, who, in turn, have their own off-shore wells.[1309] Important deep-water oil discoveries off the coast of Sabah continue to be made. As well, the region continues to be vital to oil refining and export. 2017 saw the building of an important new refinery.[1310] Western Sabah houses the Sabah Oil and Gas Terminal (SOGT), the Sabah-Sarawak Integrated Oil and Gas Project, and the Sabah-Sarawak Gas Pipeline.[1311] Altogether, Sabah and Sarawak are crucial to Malaysia's economy.

Yet, as Part 2 explored, the inclusion of Sabah and Sarawak in Malaysia was not without controversy, and regionalism remains a strong part of identity in Sabah and Sarawak. Sabah has been the site of several independence movements, including a Communist insurgency in the 1960s, and more recently under Chief Minister Donald Stephens.[1312] Tensions over separatism, however, have never risen to the level of armed conflict as they have in Mali.

Like northern Mali, several attempts have been made over the years to secure some independence for the Borneo states. This autonomy has been considerably weakened as oil has slowly come to dominate Malaysia's economy. Until the discovery of oil, Sabah and Sarawak maintained a degree of financial independence, suffering through the decline of the timber industry in the 1960s and beginning to develop tourism as an alternative.[1313] But as oil production took off, Sabah grew in economic importance to Malaysia. Starting in the 2000s, oil and gas surpassed tin, palm oil, rubber, fishing, and other, more traditional economic drivers in Sabah as the dominant export, becoming a large part of Malaysia's total GDP.[1314]

[1308] Goh Beng Lan, 340.

[1309] See maps, below.

[1310] US Energy Information Administration, 'Malaysia: International Energy Data and Analysis' at http://www.eia.gov/beta/international/analysis.cfm?iso=MYS (July 2020).

[1311] US Energy Information Administration, 'Malaysia: International Energy Data and Analysis' at http://www.eia.gov/beta/international/analysis.cfm?iso=MYS (July 2020).

[1312] Singh, 222. See also Cheah Boon Kheng, 102. It is not the purpose of this dissertation to chronicle the history of separatism in Sabah, but simply to point out that the legitimacy of Sabah's inclusion into Malaysia has frequently been called into question.

[1313] Andaya, 335. See also Sather, Adaptation, 1997, 27.

[1314] Singh, 218.

Thanks to oil and gas from across Malaysia, of which Sabah is crucial both for production and refining,[1315] the Malaysian economy went through a boom, becoming a major world producer of oil and gas and a regional manufacturing and tech hub. But the economic growth has benefited different groups to different extents. Despite being the location of much of Malaysia's oil wealth, the Borneo states have a lower GDP than Peninsular Malaysia.[1316] In particular, minorities like the Sama Dilaut and aboriginal peoples have been the most left out of this economic growth.

As a result of the need to maintain exclusive, federal control of the oil, Sabah and Sarawak's semi-independent status has become more fiction than fact. By law, the federal government of Malaysia is responsible for "health, education, finance, external affairs, internal security and civil and criminal law" and the state governments responsible for land regulation and use, education, civil service. In reality, Sabah has little say when it comes to oil exploration. While Sabah and Sarawak continue to set their own immigration policy, over time, the two states have slowly become more incorporated into the federation economically.[1317] The federal government has in recent decades come to exert more control over Sabah's affairs, particularly on the issues of border control and oil exploration.[1318]

Importantly, though each state has its own constitution, finances are very centralized and oil production and revenue are controlled at the federal level.[1319] The oil and gas revenue is almost wholly controlled by Petronas, Malaysia's national oil company, and the federal government.[1320] Yet, though Sabah produces almost one third of Malaysia's oil and gas, it receives only five percent of royalties.[1321] Out of this, almost no money goes to the Sama Dilaut.

Along with internal tensions, however, Sabah and Sarawak's somewhat arbitrary inclusion within Malaysia have fuelled a series of border and sovereignty disputes with her neighbours. In this way, the situation in Sabah is similar to that of Kuwait, though Sabah has not been subjected to a sustained invasion by a neighbouring state the way Kuwait was

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[1315] US Department of Commerce International Trade Administration, 'Malaysia - Oil and Gas' (June 18, 2017).

[1316] Young, Bussink and Hasan, 3, 283. See also Hooker, 243.

[1317] Young, Bussink and Hasan, 17, 18. The special rights granted to Sabah and Sarawak to restrict immigration from the rest of Malaysia are not without controversy. Malaysia Today, 'The Real Purpose of Sarawak and Sabah's Immigration Controls' (7 April 2014).

[1318] Andaya, 335.

[1319] Malaysia's national oil company, Petronas, controls all of Malaysia's oil and is owned by the federal government. Control of Malaysia's oil and gas industry was transferred from the states to the federal government in 1974. Sabah and Sarawak receive 5% royalty payment. E. Lee, 'Scope for Improvement: Malaysia's Oil and Gas Sector' (Research for Social Advancement 2013) i-ii. See also Lim Hong Hai 101; Astro Awani, 'Najib assures Sabah of more revenue from oil, gas resources" (15 Nov. 2014); Hooker, 226.

[1320] Hooker, 250.

[1321] Hooker, 251.

by Iraq. Nevertheless, tensions over the border and control of oil would come to drive much of the region's politics and, as this section will show, influence how the Malaysian government has approached the subject of nationality for the Sama Dilaut.

As Part 2 explored, the border between Sabah and the Philippines divided the Sultanate of Sulu. Because the original border demarcations were based on a disputed colonial-era treaty, the issue of the border cannot be easily solved as long as the legitimacy of the treaty is called into question. Under the UN Convention on the Law of the Sea, each state has an "exclusive economic zone" 200 nautical miles off its coast, including islands, a critical provision for claiming oil exploration rights.[1322] Yet, if the original treaty is not valid, the placement of the border is called into question, along with these oil rights.

At federation, oil production had not yet assumed its central role in Malaysia's economy. The biggest concern over the sovereignty of Borneo was the threat of communist influence, not the prospect of oil rights. The Philippines and Indonesia strongly objected to the plans for federation. In Indonesia, Sukarno began a somewhat limited military campaign to "crush Malaysia." Meanwhile, the Philippines began a long, diplomatic campaign to regain what it claimed were parts of the historical Sultanate of Sulu.[1323]

This prompted unresolved tensions over the border as the Philippines cut off diplomatic relations with Malaysia, complicating any attempts to resolve the border dispute or questions of nationality. The issue of Sabah's sovereignty has not been helped by the fact that the Malaysian government continues to pay an annual fee to the Sultan of Sulu, based on the original agreement signed with the BNBC.[1324] The dispute with the Philippines over the placement of the border should be viewed not as an isolated issue, but as part of broader anxieties over Malaysia's sovereignty in the region.[1325]

More recently, in 2002, Indonesia took one of its claims to the International Court of Justice. The Philippines tried to do the same, but Malaysia would not cooperate.[1326] Tensions

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[1322] UN Convention Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (1982), with 168 states parties.

[1323] Hooker, 219. See generally Cheah Boon Kheng.

[1324] Once again, the purpose of this section is not to take a side in the border dispute, but rather to point out that the dispute exists, is very important to both sides, and is long-standing.

[1325] Another related conflict that does not directly impact the Sama Dilaut, but adds to the general anxiety over the integrity of Sabah's maritime borders, is the dispute over the Celebes Sea between Malaysia and Indonesia, where the two countries have, for example, granted competing contracts to Shell Oil. This dispute is relevant to the Orang Laut living off the coast of Riau, in a closely related example of disputed borders impacting a nomadic "sea gypsy" community. L. Lenhart, 'Orang Suku Laut Ethnicity and Acculturation' (Bijdragen tot de Taal-, Land- en Volkenkunde Deel 153, 4de Afl. 1997) 577-604, 581. See also US US Energy Information Administration, 'Malaysia' at http://www.eia.gov/beta/international/analysis.cfm?iso=MYS. For a summary of the relevance of oil to the border dispute between Malaysia and Indonesia, see generally International Court of Justice, Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia) (Merits) Judgment of 17 December 2002.

[1326] International Court of Justice, Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipandan (Indonesia v. Malaysia) (Merits) Judgment of 17 December 2002. See also R. Haller-Tros, 'The Territorial

between Malaysia and the Philippines over the maritime border would prove particularly relevant to the status of the Sama Dilaut.

While unlike in Kuwait and Mali, border tensions between Malaysia and the Philippines have not led to war, they have stoked Malaysian fears about the possibility of a military incursion into Sabah by factions from the Philippines. The actual validity of the supposed threat is unclear and beyond the scope of this dissertation, but Malaysia has, at times, accused the Philippines of being behind incursions by armed groups, first in 1968 and again in 2013.[1327]

The extent to which the government of the Philippines is involved in these invasions is a matter of debate, but these incidents have kept the problem of the border an issue of major concern for the Malaysian government. As this section will show, this has led to the securitization of the border region that is similar to that of northern Mali. It has driven the Malaysian government to aggressively police and control its maritime border as a security, rather than a civilian, zone.

One important background issue to the debate over ownership of Sabah's natural resources is the economic imbalance between Malaysia and the Philippines. While Brunei and Malaysia have forged ahead with exploration, the Philippines has been slow to grant oil and gas concessions and remains a net energy importer, though the government is trying to change this.[1328] Like in northern Mali, security issues in the Southern Philippines have created an environment that is unfriendly to oil exploration, making it difficult for oil companies to establish their claims and conduct business.[1329]

As a result of all of the factors discussed in the proceeding paragraphs, there is now a perception in the Malaysian government that the Philippines regards Sabah as part of the Philippines, that conflict with the Philippines would impede oil exploration, and that this threat of conflict, in turn, impedes a bilateral solution between the two countries on issues

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Dispute Between Indonesia and Malaysia Over Pulau Sipadan' (IBRU Boundary and Territory Briefing 1995); Hooker 222. Both Indonesia and the Philippines claimed title to areas of north Borneo based on pre-colonial claims, as well as the numerous treaties of the colonial period.

[1327] There have also been acts labeled as terrorism by the Malaysian government, carried out by Moro rebels in Sabah, including kidnappings and murder. Ferandez, 55. For a brief history of the 1968 incident, see Al Jazeera, 'Remembering the "Jabidah massacre"' 18 March 2013 (accessed July 2020).

[1328] Republic of the Philippines Department of Energy, 'Frequently Asked Questions. See also US Energy Information Administration, 'Philippines: International Energy Data and Analysis'. The extent of oil and gas reserves under the Sulu Sea is unknown. US Dept of State, 'Limits in the Seas: No. 142 Philippines' (2014). See also Manila Standard Today, 'Total, Mitra Ready Sulu Sea Oil Drilling' (8 March 2015); Government of the Philippines, 'Petroleum Potential of the Sulu Sea Region, Philippines'; Coordinating Committee for Geoscience Programs in East and Southeast Asia, 'Petroleum Potential of West Palawan Basins and Sulu Sea Region'. Note that some oil companies have pulled out, citing insufficient deposits. Philippine Commodities Digest 'Very Thin Prospects for Philippine Oil and Gas Exploration,' (21 Jan 2013).

[1329] E. Watkins, 'ExxonMobil seeks Philippines military security for Sulu Sea site' Oil and Gas Journal (January 25, 2010).

like border security and immigration.[1330] Today there is no Philippines consulate in Sabah due to the ongoing tensions, which impedes any solution to the question of nationality for various groups in Sabah.[1331]

The simmering border dispute between Malaysia and the Philippines as to the sovereignty of north Borneo must therefore be viewed through the prism of oil and gas exploration and, in particular, the requirement that governments exclusively and centrally control the territory where oil and gas is located.[1332] This dispute has had an important impact on the issue of migration to Sabah from the Philippines, as the Philippines continues to produce a large number of immigrants and refugees in Sabah, many of whom have not been able to gain Malaysian nationality.[1333] The Sama Dilaut occupy and uncomfortable place in this dispute, as their seasonal migrations have become the object of scrutiny by both governments and their fishing practices are often presented as violating the ocean security zone the Malaysian government is attempting to create around Sabah.

Yet, as Part 2 showed, it is precisely the historic fishing zones of the Sama Dilaut that are now under the exclusive ownership of the Malaysian government and which contain much of Sabah's most valuable natural resources. As with the Tuareg and the Bedouin, the idea that the Sama Dilaut or other local peoples might have some ownership claims to the oceans off the coast of Sabah is not a topic that is ever entertained by the Malaysian government, as far as this dissertation has been able to ascertain. As noted above, while Aboriginal groups on Peninsular Malaysia have had some success asserting their land rights, the Sama Dilaut have not had similar success asserting their maritime rights.

Today, as discussed above, there is the entrenched view by many officials that all Sama Dilaut are from the Philippines.[1334] The insistence that the Sama Dilaut are not from Sabah has led to all denial of any rights they might have to their traditional fishing zones in Sabah's waters. Undeniably, however, much of Malaysia's oil deposits, wells and infrastructure are located in what were once Sama Dilaut fishing and migration zones. Yet today, oil and natural gas from offshore of Sabah is almost entirely controlled by Kuala Lumpur. As with Kuwait, there seems to have never been a serious conversation in Malaysia over whether or not the local inhabitants of coastal Sabah should have any ownership stake in Malaysia's oil.

[1330] Tan Sri Datuk Amar Steve Shim Lip Kiong (Chairman) and Commissioners, 'Report of the Commission of Enquiry on Immigrants in Sabah,' Royal Commission of Enquiry (2012) 256.

[1331] Navallo, 4.

[1332] P. Ghosh, 'It's Not Just China Vs. Everybody Else: Bizarre, Ancient Conflict in Southeast Asia Between Philippines and Malaysia Intensifies' IBT (March 7, 2013).

[1333] Allerton, Lives, 2014, 5. Indonesian residents, however, would need to register within five years under the pre-2006 law.

[1334] Brunt, Vulnerability, 35-36.

The need to secure offshore oil and gas production has led to a clampdown on maritime activities that are seen as at odds with security, such as small-scale fishing. Beginning in 1992, the Malaysian government instituted an ongoing program of border surveillance and security in the oceans around Sabah, a program which came to sharply curtail Sama Dilaut fishing access.[1335] Border control activities are tightly conducted by the military and police. The creation of the Sabah Oil and Gas Terminal has led to the loss of fishing zones for local fisherman, including Sama Dilaut fishermen. The government has banned fishing within a 200km zone around the Terminal, citing security concerns.[1336] Any small-scale fishing is often blamed on so-called foreigners who are intruding into Malaysian waters.[1337] This feeds the perception that Sama Dilaut fishermen are outsiders with no fishing rights in the area.

But the Malaysian government has not only taken the view that the Sama Dilaut are foreigners without any rights to the oceans around Sabah. It has sometimes adopted the more extreme view that in the past, the Sama Dilaut have no land rights at all because they are nomads. The government has therefore adopted the common position that nomads do not own, but merely wander over, their lands. As a result, most conversations on Sama Dilaut fishing rights that do occur centre on access, not ownership.

In a closely related issue, the government has also claimed that the Sama Dilaut were without a nationality due to their nomadism. In litigation before the International Court of Justice with Indonesia, speaking of the pre-colonial period, the Malaysian government drew a careful distinction between "wandering...sea gypsies" who were "effectively beyond the jurisdiction of any of the States in the region, including the Sultan of Sulu..." and other, settled Bajau groups, who were subjects of the Sultans and, later, nationals of their countries.[1338]

This sort of language echoes the opinions of many colonial administrators of not only the BNBC, but also the Sahel and the Persian Gulf region, as discussed in Part 2. The idea that the Sama Dilaut did belong anywhere and could not own land because of their nomadism, a view that had come up repeatedly during the colonial period in Kuwait and Mali as well, conveniently reinforces the view that the Sama Dilaut have no historical right to ownership

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[1335] Kassim and Zin, 21-22.

[1336] Daily Express, 'Fishermen Lament Loss of 200km Zone' (5 April 2011). For more on the Terminal, see the Sipitang Oil and Gas website.

[1337] See for example Daily Express, 'Encroachments into Oil Platforms at Alarming Levels' (20 August 2015).

[1338] "Indonesia tries to minimize the significance of these (Bajau) local communities by presenting the Bajaus as a single group of sea gypsies, wandering up and down the whole east coast and effectively beyond the jurisdiction of any of the States in the region, including the Sultan of Sulu. It is true that there were Bajau communities along the coast, but these were distinct groups, not a single wandering tribe of nomads. The Bajaus of Darvel Bay had their own leaders and were based on the islands and reefs of the locality. They had a cemetery at Omadal, which still exists. Local leaders were appointed or confirmed by the Sultan of Sulu; they were often themselves Sulu by birth." International Court of Justice, 'Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia): Reply of Malaysia' (2 March 2001) 10.

of their traditional fishing grounds, as well as the view that they have no right to a nationality.

Statelessness has been devastating on the Sama Dilaut on many fronts,[1339] but perhaps no more so than the denial of any ownership or right to occupy their traditional fishing zones. In addition to being unable to access most government services, they suffer from the constant threat of deportation as part of the undocumented population in a highly militarized border zone where the government of Malaysia has asserted exclusive title over most of the ocean. In this way, the move by the Malaysian government to seize exclusive ownership of oil fields resembles that of Kuwait, where the government exclusively controls the land and any competing claims are entirely ignored. Like in Mali, the border zone in Sabah is highly militarized.

As with the Tuareg and Bedouin, the governments of Malaysia and Sabah frequently argue that Sama Dilaut nomads are detrimental to the environment. Yet, the settlement of nomads in Malaysia often takes place alongside government-sponsored logging, which has produced deforestation on a massive scale, oil exploration and large-scale fishing, all of which have serious environmental consequences.[1340] While the Malaysian government pumps thousands of barrels of oil through pipelines in the area, Sama Dilaut communities are often accused of being,

> associated with illegal and destructive practices such as blast fishing, cyanide fishing, coral mining, and the harvesting of protected species..., as well as over-exploiting individual fisheries to the point of collapse.[1341]

The Sama Dilaut allegedly account for a 'disproportionate amount" of small-scale, "artisanal" fishing in the Celebes Sea, but their actual impact on the natural environment is disputed and unclear.[1342]

[1339] Brunt, Vulnerability, 3. See also Navallo, 4.

[1340] Y. Lyons, 'Offshore Oil and Gas in the SCS and the Protection of the Marine Environment, Part 1, A Review of the Context and a Profile of Offshore Activites' Center for International Law, National University of Singapore (2011). See also Andaya 306-307, 322. See also Goh Beng Lan, 'Dilemma of Progressive Politics in Malaysia: Islamic Orthodoxy versus Human Rights' in W. Mee and J. Kahn, *Questioning Modernity in Indonesia and Malaysia* (Nus Press 2012) 306-307.

[1341] See generally J. Clifton and C. Majors 'Culture, Conservation and Conflict: Perspectives on Maritime Conservation Among the Bajau of Southeast Asia' 25 *Society & Natural Resources* (2012) (hereinafter Clifton and Majors). See also J. Clifton 'Achieving congruence between conservation and community: the Bajau ethnic group and marine management within the Wakatobi and south-east Asia' in J. Clifton, R. Unsworth and D. Smith (eds.) *Marine Research and Conservation in the Coral Triangle: The Wakatobi National Park* (Nova 2010).

[1342] See generally Clifton and Majors, 2012.

According to Clifton and Majors, Sama Dilaut subsistence fishers practice a complex system of fish stock management, closely following seasonal fish spawning cycles.[1343] Many Sama Dilaut are subsistence fishers who take only what they need to support their families.[1344] Meanwhile, the competition of large scale commercial fishing, much of which is licensed by the government,[1345] means many Sama Dilaut have adopted engines, nets and other modern fishing aids that have greatly increased their take.[1346] It could be argued, as Clifton and Majors suggest, that it has been the settlement of Sama Dilaut families, rather than their traditional fishing practices, that have negatively impacted the environment, particularly in an environment where large-scale commercial fishing is tolerated and even promoted.[1347]

More so than in Kuwait and Mali, the statelessness of the Sama Dilaut also goes hand in hand with the creation of tourist parks exclusively owned by the government from which they are excluded.[1348] For nomads like the Sama Dilaut who have no legal standing to challenge their removal, such government development projects continue apace and the Sama Dilaut have little say over them.[1349] Malaysia is looking at the creation of the Tun Mustapha Park, the largest of its kind in Malaysia, at the northern tip of Sabah.[1350] This park will not only further limit small scale fishing, but will also greatly increase tourism in the region, a priority for the Sabah government. One study found that the tourism potential of the park outweighed even the value of potential untapped oil reserves in the area.[1351] While the creation of the park calls for the involvement of the local community, the Sama Dilaut are not being included.[1352]

[1343] See generally Clifton and Majors, 2012.

[1344] See generally Clifton and Majors, 2012.

[1345] World Wildlife Fund Malaysia, 'Assessment of Coastal Fisheries in the Malaysian-Sabah portion of the Sulu-Sulawesi Marine Ecoregion' (August 2001).

[1346] Sather, Adaptation, 1997, 79-80.

[1347] See generally Clifton and Majors, 2012.

[1348] See generally Clifton and Majors, 2012.

[1349] The Sama Dilaut are not the only sea nomad group to face fishing restrictions. See for example the Moken and the establishment of pearl fishing and subsequent issuance of licenses in Burma, and failure to issue licenses to the Moken. White, 1981, 70-71, 108.

[1350] R. Jumin and K. Kassem, 'Ecosystem-based Management in a proposed marine protected area: Tun Mustapha Park' (World Wildlife Fund Malaysia 2011). Also see the creation of the Tun Sakaran Marine Park off Semporna in 2004. I am indebted to Helen Brunt for her comments on this point.

[1351] Coral Triangle Initiative, 'Valuation Study of the Proposed Tun Mustapha Park' (17 March 2011).

[1352] Clifton et al., 86. See also Brunt, Stakeholders, 43.

In Part Ten of their report on the creation of Semporna Islands Park, the Semporna Islands Project argues that,

> (t)he high percentage of non-Malaysian citizens living in the proposed park should not be seen as an obstacle. The questions of citizenship can be addressed later, but in the meantime, it is important to establish the park and introduce management strategies for resource use and other activities...The nomadic Sama Dilaut have a unique lifestyle and have been using the area for hundreds of years. They should be allowed into some parts of the park, where they will be required to comply with all regulations concerning resource use.[1353]

Nevertheless, as the report itself points out,

> (t)he Semporna Islands Park will be a special case because it will include State Land, land with Native Titles and land claimed under Customary Rights. The situation is complicated by the fact that there are a number of unresolved land claims, so it is not yet certain who owns what.[1354]

The government must first establish legal title to the land, which means resolving ownership under Malaysia's Native Titles laws, mentioned above. But this will be difficult to do for the Sama Dilaut, as their nationality is not established and, therefore, they have no way of establishing their title to areas in the park. Meanwhile, as the above quotes demonstrate, their right to enter and use their traditional territories is presented not as a right, but instead as largess by the government.

Perhaps the entire counter-intuitive logic of the government position towards the Sama Dilaut is captured in this paragraph:

> The Sama Dilaut should be considered a special case because they are an indigenous people with a unique wandering lifestyle who have been using the area for hundreds of years. Their lack of official citizenship should not be seen as a reason for excluding them from the park. However, it is important to maintain a status quo. Those who have consistently used the area could be allowed to continue to do so, but measures should be taken to ensure that the park does not become a magnet for the many others who might be attracted to the area.[1355]

These quotations show that the Sama Dilaut are viewed less as nationals of Sabah whose opinions must be consulted and whose rights to land must be upheld and more as outsiders without legal standing or rights. At the same time, the paragraph begins by acknowledging the Sama Dilaut's long standing presence in the region as "indigenous peoples." In particular, while it notes the indigenous status of the Sama Dilaut, it in no way makes

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[1353] Semporna Islands Project, 'Management Plan for the Semporna Islands Park (Draft: 1-2001) Part 10: Legal Aspects and Regulations' 133 (hereinafter Semporna Islands Project).

[1354] Semporna Islands Project, 135, 137.

[1355] Semporna Islands Project, 137.

reference to any claims of title this might give them to the oceans which are here assumed to belong exclusively to the government.

In this way, the treatment of the Sama Dilaut mirrors that of other indigenous and aboriginal peoples in Sabah, such as the Batek people, who have been confined by the government to a small area of so-called communal land next to a national park.[1356] The point of these observations is not to question the creation of a marine park, but rather to point out, as Clifton et al. have done, that nomadic peoples cannot have a say in massive government projects regarding their lands unless their rights as nationals are respected. In such cases, the issue of indigenous status is often used or manipulated in ways that deny title to nomads.[1357]

[1356] K. Dickerman and J. Delano, 'The eroding life for the Batek of Kuala Koh, Malaysia's last hunter-gatherers' (November 29, 2019).

[1357] See generally Clifton et al. The Sama Dilaut are not the only group of sea nomads who have felt the effects of ocean conservation projects without consultation due to their statelessness and perceived lack of ownership of the oceans which they have occupied for hundreds, if not thousands, of years. See generally E. Cohen, 'Tourism and Land Grab in the Aftermath of the Indian Ocean Tsunami' 11 *Scandinavian Journal of Hospitality and Tourism* 224 (2011).

Conclusion

It is clear from the examples that the presence of statelessness has been bad for the states of Kuwait, Mali and Malaysia, yet these states have only allowed statelessness to become more entrenched for many of the nomadic populations. The question then becomes, given the negative impact of statelessness on all parties, why haven't states like Kuwait, Mali and Malaysia taken steps to end statelessness or resolve basic questions of inclusion and belonging?

This question cannot be answered simply by a legal analysis. As a result, this section looked beyond the law at political, social and economic factors that drive nomad exclusion in Kuwait, Mali and Malaysia. It would seem that rushing to clarify the nationality status of the population would be a key state goal following decolonization, but as this section has shown, there were often competing concerns that led governments to ignore or even perpetuate the problem of statelessness for nomads and former nomads.

This section in particular focused on two important state goals of the post-colonial period: forging national unity and exclusively controlling land and natural resources. Nationality, along with border security, civil registration and immigration controls, became crucial tools to achieve these two goals. As a result, this section focused on what nationality means to states and how both nationality and statelessness can sometimes be useful to states.

In post-colonial countries like Kuwait, Mali and Malaysia, hostility towards nomadism led to nomads being excluded from registration as nationals because (1) nomads were increasingly seen as detrimental to national unity and/or the balance of power between various political factions, (2) nomad lands were now seen as too valuable for anything apart from exclusive state ownership, and (3) borders placed nomads at the edge of the newly created countries where contested borders raised the risk of separatism and foreign invasion.

As a result, nomads faced relentless discrimination that took a number of forms, including statelessness but also assimilation. Nomadism itself was often redefined as crime or terrorism. Successive governments failed to resolve the status of many nomadic populations in the decades following decolonization, locking nomads in limbo. In the case of the Tuareg, state policies around nationality and inclusion have driven armed conflict and the collapse of northern Mali into a failed state.

One major conclusion of this dissertation is that while the failure of governments to grant a nationality to nomads in states like Kuwait, Mali and Malaysia was caused in part by lack of administrative state capacity, when examined more closely, failure to register nomads and resolve their status also demonstrates a lack of political will, a "moral disengagement."[1358] A bias against nomadism as being somehow incompatible or detrimental to states

[1358] Galaty, 158. See also K. Belton, 'Statelessness: A Matter of Human Rights' in R. Howard-Hassmann and M. Walton-Roberts, *The Human Right to Citizenship: A Slippery Concept* (U. Penn 2015) 35.

continued from colonization into post-colonial politics. The continuity between colonial and post-colonial policy towards nomads is striking.[1359]

As the examples showed, governments continued to forcibly settle nomads and attempt to shift local economies away from pastoralism and mobile, small-scale fishing. Settlement, as the examples showed, was often accompanied by registration, while those groups who remained nomadic found themselves increasingly unregistered and shut out of a nationality. This continued bias against nomads did not occur in a vacuum, but was part of a larger, global push against nomads not only by governments but also western institutions and academia. The view that nomads cannot participate in civic life or own land became somewhat entrenched in the social sciences during the 20th century, adopted by international aid organizations and post-colonial governments alike.[1360]

Nomads and National Unity

As this section showed, the states of Kuwait, Mali and Malaysia often continued colonial policy towards nomads. But they also had extra challenges and goals that extended well beyond the concerns of colonial governments. While the colonizing powers had begun to develop the idea of cultural nationalism and ethnic groups, these ideas arguably exploded in importance during the post-colonial era of fragile new states. The desire for a unified national identity to support state sovereignty and unity would drive post-colonial politics in countries like Kuwait, Mali and Malaysia. This would lead these post-colonial governments to promote policies that excluded or assimilated minorities, including nomads.

Governments created national origin myths, such as the Battle of Jahra, to support the theory of romantic nationality as a basis for nationality. Ethnicity came to be widely employed to justify the territorial state and used as a basis for nationality. In Mali, sub-Saharan African identity was supported by nationality law, re-imagining post-colonial Mali as a reincarnation of ancient Malian civilization. There was little room in these constructs for nomadic minorities like the Sama Dilaut, the Tuareg and many Bedouin tribes.

Importantly, however, settled nomads were often registered as nationals during the transitional periods, meaning that nomadic minorities as nomads, rather than as ethnic, linguistic or religious groups, were most vulnerable to statelessness or receiving a lesser nationality status. Other factors besides mobility sometimes played a role in statelessness,

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[1359] This continuation of colonial policy has also been documented by other scholars in other countries. Aukot describes how colonial authorities labeled pastoral nomads in Kenya as a "problem." E. Aukot, 'Am I stateless because I'm a nomad?' 32 *Forced Migration Review* 18 (2009) 18.

[1360] For examples of expert opinions on nomad land use and statehood from the modern period, see for example E. Marx, 'The Tribe as Unit of Subsistence: Nomadic Pastoralism in the Middle East' 79 *Am. Anthropologist* 346 (2009) 351, 344, 355 (arguing that nomads "secure" and "hold" territory); T. Myers 'Defended Territories and No-man's-lands' 78 *Am. Anthro.* 354 (1975) (arguing that the presence of boundary markings proves nomad land ownership). A good summary of the literature in this debate can be found in Nadasdy's 2002 article on land claims in Canada. P Nadasdy, '"Property" and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations' 104 *Am. Anthro.* 247 (2002). See also Moretti, 38.

however, such as in the case of the Bedouin nomads, where tribal affiliation often made the difference between statelessness and receiving a lesser nationality status. But even in Kuwait, mobility was the key factor in determining who was not considered to be an original Kuwaiti and led to the cultural distinction between Bedu and Hathar.

The theory of Romantic nationalism, first introduced above, became a powerful government tool during the post-colonial period. In particular, the European idea of a "national homeland" was widely adopted in the post-colonial context, as can be seen in the examples of Kuwait, Mali and Malaysia.[1361] As Manby puts it, speaking of the African context, "(a)lthough the laws drafted for the new African states for the most part eschewed in their language the racism of the colonial era, nervousness about the loyalty of certain groups of residents - those most easily asserted to be not 'from' the territory - nonetheless shaped the ways in which they were drafted and above all applied."[1362] The idea of a national homeland was actively promoted despite the relatively recent origins of modern borders of post-colonial states.[1363]

Over time, the conversation over nomad origins evolved to increasingly portray them not as nomads, but as immigrants or foreigners, a portrayal which was used to justify their continued exclusion. Where immigration posed a risk to national unity, nomadism and cross-border movement was increasingly conflated with immigration. Many nomads began the post-colonial period in a state of contested or undetermined nationality, but would become stateless over time, as governments missed multiple opportunities to resolve their status and the very lack of registration and documents became evidence of their foreign, or outsider status.

National identity in the post-colonial context was therefore the deliberate creation of post-colonial governments who use it to foster unity and prevent separatism or claims by neighbouring states.[1364] In the African context, for example, "fear of fissiparous politics and potential state fragmentation creating an overwhelming emphasis on 'national unity..."'[1365] As Manby puts it in the African context, "(a)mong the most difficult challenges of nation-building tasked to the newly independent African States of the 1960s was the

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[1361] See Tendayi Bloom's analysis in Bloom, Members, 2017, 155.

[1362] Manby, Trends, 175.

[1363] "National myths often perpetuate the idea that imagined communities are very old, based on the idea that nations have a long history in a given place, when in fact they are much more recent." A. Jones, *Human Geography: The Basics* (Routledge 2012) 65-66 (discussing the theories of Benedict Anderson.)

[1364] Beaugrand, Transnationalism, 2010, 30. See also A. Smith, 22-23 (discussing how a sacred land or homeland is often used to justify nationalism); Donner, 127; Weis, 3; Verzijl, 7; Miller, 19, 68; Maury, 11-12. Smith explains; "(b)ut the earth in question cannot be just anywhere; it is not any stretch of land. It is, and must be, the 'historic' land, the 'homeland'..." A. Smith, 9. See also Bloom, Members, 2017, 153 (speaking of indigenous belonging in the context of settler states).

[1365] S. Dorman, 'Citizenship in Africa' in E. Isin and P. Nyers, (eds.) *Routledge Handbook of Global Citizenship Studies* (Routledge 2014) 162.

determination of who could claim membership of these polities: the definition of who was a citizen."[1366]

Post-colonial governments struggled to create an organizing principle to justify their somewhat arbitrary borders and unify diverse populations. As this section showed, *jus sanguinis* was sometimes applied in post-colonial states to lock immigrants out of a nationality, even in diverse states with contested borders. This process happened rapidly after decolonization to the bewilderment of many border populations.

As the examples showed, it was arguably used to cement loyalty to the centralized state at the expense of regional, or cross-border forms of social organization. This was devastating for nomads, who frequently found themselves straddling borders and, due to the theory of exclusive allegiance, forced to settle in one state in order to satisfy the requirements of nationality. It is hard to escape the conclusion that the original rational for *jus sanguinis* as way to maintain cultural cohesion in the face of immigration has given way to its use as a tool to deny a nationality to unwanted minorities.

In the cases of the Tuareg and the Sama Dilaut, there is an ethnic and religious dimension to their claimed outsider status and discriminatory application of nationality law and registration procedure. For the Bedouin, discrimination occurred along tribal lines, though even Bedouin granted a nationality ended up with a lessor status and fewer rights. Discrimination against nomadism as a way of life appears to be a primary motivator for nomad statelessness and is well documented in all the examples cited.

The rationale for *jus sanguinis* is that a population centred on a homeland has a special connection to that land and the right to exclude outsiders. But it was unclear in the 1960s, for example, what it meant for there to be a Malaysian nation centred on a Malaysian homeland. Malaysia was a new construction put together out of colonial administrative units, splitting older empires and joining territorial areas that had historical ties, but were not contiguous. As Part 2 discussed, post-colonial governments in Kuwait, Mali and Malaysia therefore began appealing to romantic nationalism in an attempt to unify post-colonial states based on arbitrary borders. *Jus sanguinis* was arguably an important tool to shape post-colonial populations.

It is important to note that in some ways, *jus sanguinis* reflected local modes of belonging that had existed prior to colonization. It brought in elements of belonging that were common in Islamic legal systems and local custom prior to the colonial period, principles that could have been helpful to nomads. But because the creation of a first body of nationals had been based on territorial considerations and exclusive belonging, *jus sanguinis* laws in actual fact failed to promote continuity with the systems of belonging of before and simply perpetuated the rupture with pre-colonial, nomadic systems of belonging. In fact, *jus sanguinis* simply served to lock many nomads out of a nationality once the initial period for registration had closed. *Jus sanguinis* was applied in many post-colonial states despite the fact that the underlying rational for *jus sanguinis,* outlined above,

[1366] Manby, Trends, 172.

the need to protect the indigenous, cultural nation from immigrant populations, was not applicable in many post-colonial contexts and instead, *jus sanguinis* was frequently used to exclude minorities who had been present in the region for centuries.

Nomads and Natural Resources

Though not originally a topic of this dissertation, the correlation between land use issues, the seizure of nomad lands by the state, and nomad statelessness could not be ignored. Control of nomad lands and the natural resources therein has emerged as a major cause of the disenfranchisement of nomads and former nomads through the denial of the claims to land.[1367] Critically, however, as the examples showed, the granting of nationality has not resulting in protections for nomad lands. Rather, civil registration has often been used as a tool to remove nomads from their lands to make way for eminent domain. In other cases, nomad statelessness has correlated closely with their forced removal from land.

As the section on nomads and natural resources showed, in the decades following decolonization, oil, natural gas, and minerals would only become more valuable, while international tourism would push the creation of national parks in so-called remote areas inhabited by nomads in Kuwait, Mali and Malaysia. This discouraged states from solving the problem of the nationality status of nomads, as doing so would arguably justify nomad claims to land, call into question the placement of borders and potentially provide a platform for separatism. The push to claim natural resources has caused conflict and refugee flows in Kuwait, Mali and, to a lesser extent, Malaysia.[1368]

The exclusion of nomads occurred during a period of radical economic transformation that greatly weakened the role nomads played in the regional economy and corresponded with a massive decrease in mobility in parts of the world that had once been typified by mobile lifestyles. As a result of resource extraction, nomad lands, rather than nomad livelihoods, became vital to the economic security of the emerging states in the post-colonial period. Nomads increasingly found nomadism to be economically superfluous to the broader state economy.

Meanwhile, oil, gas, gold, tourism and other uses for land exploded in value. States began to see border control as a greater good than the economic boost that used to be brought by regional trade. As Manby points out in the African context, statelessness, migration, colonial policy, conflict and "land expropriation" are "linked" in many parts of Africa.[1369] Lands deemed valueless during the colonial period, existing as the furthermost outposts of vast empires and, as a result, somewhat overlooked by distant colonial governments, were

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[1367] For other examples of nomad land seizures, see the eviction of the San from the Central Kalahari Game Reserve in Botswana in 2006. F. Ogbuitepu, 'Realising indigenous peoples' rights: The case of the Kalahari Bushmen of Botswana' (Consultancy Africa Intelligence 2011).

[1368] UNHCR points to refugees as being one of the main populations at risk of statelessness. UNHCR, 'Ensuring Birth Registration for the Prevention of Statelessness: Action 7,' (Good Practices Paper 2014).

[1369] Manby, Trends, 172.

now central to the economy of post-colonial states, the generators of extreme wealth and in need of protection from neighbouring states, criminal migrants and other threats.

While nomadic trade could accommodate a wide variety of land uses, from farming to pastoralism to fishing, resource extraction requires centralized control and massive, state-owned infrastructure. Likewise, tourism requires state control. Nomadism went from an activity which generated wealth from areas not suitable for agriculture to a hindrance to massive state-owned programs for resource extraction and security.[1370] Any potential land claims by nomads or former nomads are not even raised as possible topics for discussion. Nomads and former nomads are instead branded as illegal foreign immigrants and a security threat. "Investing in mechanisms that enable the conversion or reversion of risky people to the status of foreigner simplifies the equation of state security..."[1371]

As the examples showed, efforts to settle nomads often went hand-in-hand with removing them from land. Nationality was often used coercively to force nomads to abandon their lands and settle in urban housing projects or towns in exchange for a status.[1372] This occurred in Kuwait, where many Bedouin were encouraged to relocate to urban housing projects, clearing desert areas and providing the state with a workforce. In Mali, many Tuareg were forcibly settled as part of a push towards increased agriculture. In Sabah, many Sama Dilaut were encouraged to settle in coastal towns.

Sometimes, cooperative populations would be granted a nationality, often limited in scope, in exchange for their assimilation. This was the case for some Bedouin in Kuwait and some urban Tuareg and Sama Dilaut. As the Segovia Declaration of Nomadic and Transhumant Pastoralists pointed out, the nationalization of nomadic lands has been a widespread, global problem.[1373] As a result, there has been little incentive for governments to resolve the undetermined status of nomads by granting them a nationality, which might trigger land ownership claims and/or claims for territorial autonomy.

Not only would such programs become regular practice for post-colonial governments, they have also been supported by international organizations as part of economic modernization. Views of state formation, nationality policy, legitimacy and control in the modern period would be merged with environmental and land management theories that disfavoured pastoralism and nomadism in favour of settlement.[1374] As Dawn Chatty puts it,

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[1370] Scott, 2009, 11. See also Chatty, Adapting, 15. See also Clifton et al., 83 (Discussing the impact of the creation of the Coral Triangle Initiative, a massive conservation zone, on Sama Dilaut statelessness.) See also Accialioli et al., 240-244.

[1371] A. Macklin, 'The Securitization of Dual Citizenship' in T. Faist and P. Kivisto, *Dual Citizenship in Global Perspective: From Unitary to Multiple Citizenship* (Palgrave MacMillan 2007) 42.

[1372] Bloom, Members, 2017, 167-168.

[1373] Segovia Declaration of Nomadic and Transhumant Pastoralists, La Granja, Segovia, Spain (14 September 2007).

[1374] As discussed above, nomadism and nomadic land use and social structures became the subject of extensive anthropological study during the 20th century. See for example Sack 27, 56-57, 66 (discussing

"(d)evelopment plans aimed at nomadic pastoral populations in the Arabian Peninsula and Fertile Crescent have meant, as a rule, projects to settle them."[1375] In many ways, these programs mirrored those of colonial administrations as discussed in Part 2, and often used the same tactics to achieve similar goals. They have been continued, for example in northern Mali, where EU aid has now been tied to border security and an end to cross-border movements.

Nomads and Border Control

> Nomadism is most recently associated with a particular threat: terrorism.[1376]

A new factor that was less present during the colonial period, but helped to shape nationality enforcement in the post-colonial period, was borders. Many nomads were now living in contested border zones.[1377] The post-colonial period arguably represents the largest case of succession of states in modern history, a widely acknowledged risk factor for statelessness as it involved the breakup of large colonial units into smaller states and the creation of numerous border disputes worldwide which raise the risk of statelessness.[1378]

Borders, which had either been politically unimportant or non-existent during the colonial period, were suddenly held out as inviolate, splitting many nomadic groups who had ended up in border regions. As well, mobile modes of life did not fit within the centralized political structure being imposed on previously fluid regions, a structure that was heavily territorial in nature, comprised of *circles* and *arrondissements* in the case of French colonies, and was set up, at least in part, to restrain mobility. As Part 2 showed, the goal of establishing exclusive, territorial sovereignty, clear borders and the exclusive allegiance of the population would be inherited by post-colonial states, when they would become even more important.[1379]

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territoriality); Khazanov, Outside, 10, 228-231 (discussing nomadic statehood); Jackson and Smith, 'Ownership or Tenure? A Case Study,' in M. Relaki and D. Catapoti (eds.) *An Archeology of Land Ownership* (Taylor and Francis 2013) 154 (using the term land tenue for nomads); J. Nicolaisen and I. Nicolaisen *The Pastoral Tuareg; Ecology, culture and society, Volume Two (*Thames and Hudson 1997) 204 (on Tuareg land ownership); Sather, Adaptation, 1997, 106-107; Lecocq, Desert, 2002, 132 (discussing Tuareg land use); Chatty, Pastoralists, 81.

[1375] Chatty, Pastoralists, 1.

[1376] N. McDonell, *The Civilization of Perpetual Movement: Nomads in the Modern World* (Hurst 2016).

[1377] See for example Manly, 2014, 108, citing 'UNHCR, Action to Address Statelessness: A Strategy Note' (March 2010) para 35.

[1378] See the Draft Protocol to the African Charter on Human and Peoples' Rights on the specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa, (May 2017).

[1379] "History, tradition, and, above all, the circumstances under which the state is created and its legitimacy is maintained – all contribute to the way citizenship is conceptualized and put into practice." Longva, Citizenship, 197. See also Kasaba, 5-6.

As was pointed out in above, nomads often came to inhabit the border zone between states, as colonial borders were drawn through areas the European empires found less useful to them at the time. Large cities on the coasts or located within fertile, farming regions, became the capitals of post-colonial states. So-called remote areas away from cities and agricultural regions remained marginalized. The defence of borders would become, if anything, of even greater concern to post-colonial governments over time. For nomads, it meant that for the first time, they would clearly and unequivocally have to fall under the exclusive sovereignty and assert exclusive belonging to one state, even in cases where their territories and traditional trading relationships spanned what were now multiple states and multiple governments.

Some experts speak of cross-border movement as a modern phenomenon,[1380] but this was not the case in nomadic regions and trade-based societies. Yet due to the securitization of many borders, nomadism is now presented as an anomaly and a threat. Governments have equated nomadism in northern Mali and coastal Sabah in particular with crime, terrorism, people smuggling and insecurity, branding the regional trade that is the economic contribution of nomadism as a threat to national security. As a result, populations who remain nomadic find themselves increasing cast not as unregistered, rural nationals of the state, but as criminals not deserving of nationality because they are a danger to the state.[1381] As a result, the exclusion of nomads goes far beyond that of many rural, unregistered populations.

Nationality policy in the modern era has become linked to controlling cross-border movement. As Pilgram notes in the EU context, "security concerns...and issues of immigration control play a part in the design of citizenship regimes."[1382] With time, nomad mobility was increasingly inflated with migration, supporting the idea that nomads were not part of the population of the state, but were instead criminal transients. "Militarisation and criminalisation are defensive responses which states use to reassert their sovereignty in the face of transnational migrations."[1383] Nomads became increasingly criminalized as stateless persons and alleged foreigners.

Responses to nomadism in the post-colonial context in the decades following decolonization therefore often fell on a spectrum between "benign neglect", where governments indirectly encouraged settlement as part of forced school attendance or to facilitate the collection of taxes, and "radical government intervention," where pastoral lands were perceived as ripe for agricultural and resource development and forced

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[1380] Benhabib, 23.

[1381] For a discussion of statelessness resulting from perceived risks to the state, see Gibney, 2014, 54.

[1382] Pilgram, 9. See also P. Cole, 'Introduction: 'Border Crossings' - The Dimensions of Membership' in G. Calder, P. Cole and J. Seglow (eds.) *Citizenship Acquisition and National Belonging: Migration, Membership and the Liberal Democratic State* (Palgrave 2010) 4.

[1383] Benhabib, 24.

removal, deportation or forced settlement are the stated goals of the government.[1384] Forced settlement was often used in tandem with the relocation of settled peoples to formally nomadic areas, a process that Scott calls "internal colonization."[1385] Galaty calls such programs "moral disengagement of governments from the plight of the pastoral populace..."[1386] While nomad settlement was also the result of globalization, urbanization and technological change, as the examples showed, states also pursued deliberate policies of exclusion and failed to take steps to resolve nomad statelessness in order to accomplish or further state goals.

Finally, as the case of the Bedouin shows with particular intensity that nationality has often not been a panacea for nomads, particularly when that nationality is decidedly second class. Nationality has been frequently used as a tool for the assimilation of nomads and, in particular, their forced settlement. This mirrors the ways in which registration during the colonial period was used as a tool of assimilation. As Lindsey Kingston points out, a "legalistic focus" can often ignore the "subtle realities" of nationality.[1387] In this case, the problems with nationality for nomads surpass the subtle. Instead of ensuring rights, nationality has been used as a tool to achieve state goals like forced settlement and the removal of nomads from land. This issue touches on the question of "functioning citizenship" for nomads, because nationality was often used not as a tool of empowerment, but as a weapon of assimilation and the destruction of nomadic culture. Granting a nationality to nomads has often resulted in their assimilation and the loss of nomadism as a way of life.

[1384] J. Galaty, 'The Maasai Group-Ranch: Politics and Development in an African Pastoral Society,' in Salzman (ed.) *When Nomads Settle* (Praeger 1980) 158 (discussing the government occupation and development of pastoral lands in the African and Middle Eastern contexts).

[1385] Scott, 2009, 12. See also Minority Rights Group International, 'State of the World's Minorities and Indigenous Peoples' (2016) 25. (on the disastrous consequences of forced relocation and settlement on indigenous and minority groups.)

[1386] Galaty, 158.

[1387] Kingston, Worthy, 17-18. See generally Kingston, Stateless, 2014; Conklin, 196-202; Batchelor, 1998, 158; Handbook, 2014 5; Van Waas, Nationality, 2008, 20.

2.4 The Bedouin, the Tuareg and the Sama Dilaut Today

This section will summarize the nationality and statelessness of nomads today, exploring their general human rights and their ability to access rights and services such as health care, education and work. Some sources for this section are academic in nature, but non-governmental reports, policy documents and news articles will be used to provide statistics, up to date information or to explore the opinions of governments and other key actors.

The *Bidoon* Today

Today, arguably no Bedouin nomads remain in Kuwait, though statistics on the Bedouin are hard to establish.[1388] While all Bedouin in Kuwait are settled, however, many maintain multiple residences, often in several different countries.[1389]

For the former Bedouin, life is now very difficult.

> The living conditions of most Bedouin are substandard at best. Both Jahra and Sulabiya outside Kuwait City are highly populated with Bedouin living in small concrete and aluminium structures, barely resembling a home. Furnishings are limited, and many families sleep in one room on mats on the floor.[1390]

The Kuwaiti government is increasingly concerned not only with the political issue of the *bidoon* population, but also with the growth of so-called "tribal," or Bedu, politics of the naturalized population.[1391] The voting patterns of the Bedu have become an issue of major

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[1388] Al-Nakib 1. Chatty notes that statistics on the remaining Bedouin in Arabia as a whole are difficult to establish. Chatty, Persistance, 17 (citing Syria and Lebanon.) Beaugrand notes that nomadism continues in northern Arabia. Beaugrand, Stateless, 2018, 69.

[1389] Thanks to Dawn Chatty for her comments on this issue. See also Beaugrand, Transnationalism, 2010, 31. See also Al-Nakib, 1.

[1390] F. Diane, 'Nameless, Faceless, Stateless: Bedouin of Kuwait Struggle for Identity' The Arab American News (January 5, 2011).

[1391] F. Wehrey, *Sectarian Politics in the Gulf: From the Iraq War to the Arab Uprisings* (Columbia UP 2014) 163, 166-167, 172. Kuwaiti politics is also dominated by concerns over the Shi'a population, but this is not as relevant to the *bidoon* as the issue of Bedu politics.

concern.[1392] The Kuwaiti government views the Bedu population, even those now long settled and holding a nationality, with a degree of suspicion.[1393]

Meanwhile, the government has yet to resolve the problem of the *bidoon.* At the present time, Kuwaiti nationals remain a minority in their own country.[1394] Because the Bedu in general are often equated with dangerous tribalism,[1395] the idea of enfranchising more Bedu people is vigorously opposed by many Hathar.[1396] In 2000, under increased international pressure, the government made a limited attempt to register some *bidoon*.[1397] These efforts, however, ended up being mostly for show. *Bidoon* were required to prove residence going back to 1965, which was impossible for most families.[1398] Those who were able to register were issued not with a nationality, but with a "security card," or "green card," attesting to their statelessness.[1399] The issue of whether or not *bidoon* are "genuine Kuwaitis" has become so contentious that at one point the government proposed genetic testing, a plan which was later abandoned as impossible.[1400]

By branding the *bidoon* as foreigners, the Kuwaiti government has essentially removed the moral justification for granting nationality to the *bidoon* and tried to transform the debate from one over nomad inclusion to one over immigrant rights. Under these circumstances, talk of eliminating statelessness through the nationalization of the *bidoon* is seen not as rectifying a historical and legal gap, but as rewarding illegal immigration. The lack of clarity over the historical role played by the Bedouin in Kuwait's history continues to influence how they are perceived and Kuwaiti politics continues to blur the distinction between

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[1392] Negative and contradictory views of the Bedouin are not limited to Kuwait, but persist across the Arabian peninsula states as governments have used forced settlement, exclusion, and neglect to assimilate or remove so-called troublesome Bedouin communities. H. Gilbert, 2011, 8 (overview of the ways in which various governments in the region have treated the Bedouin).

[1393] Longva, Citizenship, 193. See also Donner, 137; Van Panhuys, 35; Verwhilgen, 53; Van Waas, Nationality, 32; Boll, 44-48.

[1394] See for example G. Okruhlik 'The Identity Politics of Kuwait's Election' (Brookings Insitute Feb 8, 2012) (accessed July 2020). Dawn Chatty's notes commonalities among government responses to the Bedouin and Bedu accross the region. Chatty, Pastoralists, 165-166.

[1395] Wehrey, 185, discussing government efforts to shut down tribal primaries. See also J. Etheridge, 'Kuwaiti tribes turn parliament to own advantage' Financial Times (2 Feb. 2009).

[1396] See generally Okruhlik, 2012.

[1397] A. Shiblak, 'Arabia's Bidoon' in B. Blitz and M. Lynch, *Statelessness and the Benefits of Citizenship: A Comparative Study* (Oxford Brookes 2009) 89.

[1398] Crystal 178. Refugees International, 'Without Citizenship, Statelessness, Discrimination and Repression in Kuwait (2012).

[1399] Human Rights Watch, 'Prisoners of the Past: Kuwaiti Bidun and the Burden of Statelessness' (June 13, 2011).

[1400] Beaugrand, Transnationalism, 2010, 154.

nomad and immigrant. Today, the notion that *bidoon* are foreigners is firmly established in the minds of Kuwaiti nationals and is largely accepted.[1401] Many *bidoon,* however, argue they are original members of the Kuwaiti body politic and should receive a nationality, while the government continues to reject this contention.[1402]

As discussed above, the Kuwaiti government argues that many *bidoon* are immigrants who have come to Kuwait in recent decades as economic migrants, people who are a security risk due to their alleged ties to Saudi Arabia, Iraq and other Arab states. As well, the government increasingly views the *bidoon* community as a potential source of radical Islamic terrorism, a new factor in the presentation of the *bidoon*.[1403] Ironically, over the decades that many *bidoon* families have been permanently settled in Kuwait, the *bidoon* have only seen the rhetoric against them as outsiders become more entrenched. In 2009, a prominent Kuwaiti politician said that "true" Kuwaitis are the descendants of those who lived inside the walls of Kuwait City and surrounding villages, not Bedu from the desert.[1404]

> There is a misconception in Kuwaiti discourse today that the stateless or *bidun* are people who came from somewhere else (Syria, Jordan, Iraq) and destroyed their original nationality papers.[1405]

As stated above, it is not the aim to argue over the origins of the Bedu who make up the majority of Kuwait's *bidoon* population. The costs of maintaining a stateless population within its borders remains high. The number of *bidoon* in Kuwait may be as high as 100,000. The point of this section is to expose how current Kuwaiti policies have failed to come up with a solution for the *bidoon.* In trying to limit access to nationality and balance various interest groups by excluding those deemed to be problematic, the Kuwaiti government has arguably further divided the population and worsened the very security problems it was seeking to avoid.

> The primary structural division — Kuwaiti versus non-Kuwaiti — splintered into additional and equally problematic oppositions: Kuwaiti men versus Kuwaiti women and their rights; bedu versus hathar; citizen versus bidoun; Muslims versus Christians; and, let's be honest, Sunni versus Shi'a, too.[1406]

The effect of statelessness on the lives of the Kuwaiti *bidoon* population has been devastating. *Bidoon* status prevents many people from accessing their basic human

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[1401] Crystal, 180.

[1402] Beaugrand, Transnationalism, 2010, 29.

[1403] C. Beaugrand, 'Biduns in the Face of Radicalization in Kuwait' The Arab Gulf States Institute in Washington (2015).

[1404] Al-Nakib, quoting Mohammed al-Juwaihel, 11.

[1405] Al-Nakib, 13. See also Crystal, 174-175. But see, contra, Longva, Citizenship, 188.

[1406] M. al-Nakib, 'Unity Without Islamism in Kuwait' Arab Times (July 1, 2015).

rights.[1407] Many live in poverty on the margins of Kuwaiti society with few services and little ability to improve their circumstances.[1408] *Bidoon* cannot work except in the black market, they cannot in many cases attend school or access state run health care.[1409]

Repeated government promises to resolve the situation of the *bidoon* expose the difficulties the *bidoon* community have had in advocating for their inclusion in Kuwaiti society.[1410] In 2011, *bidoon* began organizing for their rights, demonstrating against the Kuwaiti government. The government so far has responded to riots with repression, tear gas and arrests.[1411] The government points to the alleged high rate of crimes committed by *bidoon* as a justification for viewing them as a security threat, though as Beaugrand points out, the government frequently cites to the very "illegal" nature of the *bidoon* presence in Kuwait as evidence of their criminality.[1412] The government also continues to cite their supposed ties to Iraq and Saudi Arabia as evidence of their links to terrorism, criminality and foreign invasion.[1413] In general, the issue of the *bidoon* in Kuwait is usually presented by the government as being a security issue, akin to irregular migration.[1414] The rights of the *bidoon* are now treated as part of the larger issue of migrant rights by both the Kuwaiti government and the international community.[1415]

In 2013, the government of Kuwait promised to grant a nationality to as many as 4,000 *bidoon*, but as of yet, few *bidoon* have benefited from this or other promised naturalization proposals.[1416] The government has set up a central body to resolve the status of the *bidoon*, the Central System to Resolve Illegal Residents' Status, but as of yet, little progress has been

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[1407] Crystal, 176.

[1408] Z. Albarazi and L. van Waas, 'Kuwait clamps down as stateless Bidoons call for citizenship' (Tilburg University 2014).

[1409] Refugees International, 'Without Citizenship, Statelessness, Discrimination and Repression in Kuwait' (2012). For examples of the sorts of jobs occupied by *bidoon*, see Beaugrand, Transnationalism, 2010, 166-167. For the experience of one *bidoon*, see Refugee Appeal No. 74467, No. 74467, New Zealand: Refugee Status Appeals Authority, (1 September 2004).

[1410] Refugees International, 'Without Citizenship, Statelessness, Discrimination and Repression in Kuwait' (2012).

[1411] Refugees International, 'Without Citizenship, Statelessness, Discrimination and Repression in Kuwait' (2012). See also Lund-Johansen 1. Lund-Johansen discusses the reasons why it took so long for *bidoon* in Kuwait to speak up about their status, citing fear, poverty, stigma, lack of unity, and lack of education.

[1412] Beaugrand, Transnationalism, 2010, 191.

[1413] Beaugrand, Transnationalism, 2010, 194.

[1414] United Kingdom Home Office, 'Country Information and Guidance Kuwaiti Bidoon' (3 February 2014).

[1415] Beaugrand, Stateless, 2018, 190.

[1416] S. Reynolds 'Kuwait's Stateless: Not Giving Up the Fight' (Refugees International March 19 2014).

made.[1417] Only small numbers of applicants become naturalized Kuwaiti citizens each year because Kuwaiti law limits the number of citizens that can be naturalized annually to 2000 and Kuwait usually does not meet even this low target.[1418] Most recently, the government has pursued the idea of deporting the *bidoon* to the Comoros Islands.[1419]

Nationality for the Bedouin has always been approached as a gift bestowed by the ruling family on useful Bedouin in order to foster cohesion, balance out competing power-centres amongst the Kuwaiti population, and cement loyalty to the Al-Sabah family, rather than as a right under the law, as it is for so-called "original" Kuwaitis. This is a highly instrumentalist approach to nationality. The passing of many decades has not weakened the historical narrative that the nomadic origins of the Kuwaiti Bedu population justify their treatment as foreigners.

[1417] Human Rights Watch, 'Prisoners of the Past, Kuwaiti Bidun and the Burden of Statelessness,' (13 June 2011).

[1418] Human Rights Watch, 'Prisoners of the Past, Kuwaiti Bidun and the Burden of Statelessness' (13 June 2011).

[1419] Gulf News, 'Kuwait Courts Comoros to Settle Bidoon Issue' (1 June 2016).

The Tuareg Today

> The involvement of some pastoralists in armed conflicts such as in northern Mali has led to an emerging narrative of pastoralism as a security issue (World Bank, 2014) or even the unhelpful perception that pastoralists are terrorists (Global Terrorism Index, 2015). Such discourse feeds into the existing stigmatization of pastoralists as the dangerous 'Other' and obstructs efforts at establishing peaceful and productive relationships between pastoralists and other groups.[1420]

Unlike in Kuwait, many Tuareg remain nomadic or semi-nomadic. In 2009, there were approximately 14.5 million nomads in Mali, including Tuareg, Arabs, Fulani and Moors.[1421] Crossing international borders continues to be difficult for the Tuareg. Despite liberal laws supporting pastoralism, such as the Pastoral Charter, many Tuareg struggle to continue their way of life.

> While Malian legislation on international transhumance is fairly liberal, Malian pastoralists face problems when attempting to cross international borders. One of the major problems concerns the harassment of pastoralists and the levying of informal taxes by the security forces.[1422]

The basic questions of Tuareg inclusion and separatism are still unaddressed. In 2011, a fresh round of fighting broke out in northern Mali, this time involving well-trained Tuareg troops returning from Libya. Gaddafi had from time to time indicated his possible support for an independent Tuareg state and Libya had become the de facto base of the independence movement.[1423]

In 2011, Gaddafi's fall led approximately 2,000-4,000 heavily armed, well trained Tuareg fighters to return to Mali, finding only squalid camps, simmering resentment on the part of the non-Tuareg population, and few job prospects. The new rebellion benefited from the training and weapons of the Libyan army and quickly advanced against poorly equipped Malian troops. By 2012, the Tuareg resistance had managed to take over several key cities, including Gao, and appeared to be pushing southward. Outrage at the Malian government's failure to equip and support its troops led to a coup in 2012, ushering a period of instability

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[1420] Leonhardt, 9.

[1421] République du Mali, '4eme recensement général de la population et de l'habitat de Mali' (2009, published 2011).

[1422] Leonhardt, 46.

[1423] Keenan, Resisting, 219, 226-227.

that led to Mali being suspended from the African Union and asking for French military support.[1424]

By 2012, the Tuareg resistance movement had been taken over by foreign funded Islamic organizations, many with roots in Algeria and Libya.[1425] The connection between the rebellion and Algeria and Libya fuels southern suspicions that the Tuareg rebels are foreign agents.[1426] Throughout this period, the Malian government's view that the Tuareg constituted a national "problem" and a security threat only strengthened. Now, instead of a breakaway province, the government feared a Tuareg takeover.

With French support, the Malian army drove the rebellion back, but returned to treating northern Mali as a police state occupied by hostile foreigners.[1427] The recent upsurge in drug trafficking by Colombian cartels through Mali has only fed the view that the Tuareg are bad for security.[1428] The imposition of conservative Islamic law in northern Mali radically altered life for people living there and caused yet more displacement.[1429]

Many Tuareg see their future in Mali as bleak, and the peace in neighbouring Niger as fragile. The issue of cross-border movement, and the attendant pressures on land and resources, continues to be a point of contention.[1430] Government policy is oriented towards preventing Tuareg returns, forcing or coercing settlement and denying Tuareg land ownership.

UNHCR estimates that hundreds of thousands of people are refugees in neighbouring countries, while tens of thousands more are internally displaced within Mali. In 2012, UNHCR noted that lack of documentation is a major issue for Tuareg refugees.[1431] In refugee camps, UNHCR has been conducting camp registrations and issuing families with refugee cards, yet serious gaps persist. In Libya,

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[1424] Stewart, 37-38.

[1425] Pezard and Shurkin, 1, 6.

[1426] Pezard and Shurkin, 6-7.

[1427] Integrated Regional Information Networks, 'Can Niger offer Mali lessons on the Tuareg?' (11 April 2013) (accessed July 2020).

[1428] Vulnerabilities 5. See also Bourgeot, Sahara, 45; A. Donini and G. Scalettaris, 'Planning from the Future: Component 2: The Contemporary Humanitarian Landscape: Malaise, Blockages and Game Changers; Case Study: Regional Humanitarian Challenges in the Sahel' (Kings College London, Feinstein International Center, Humanitarian Policy Group April 2016) 4.

[1429] Integrated Regional Information Networks, 'Burkina Faso-Mali: We cannot live under the law of strangers,' (3 October 2012) (accessed July 2020).

[1430] See generally Kohl, Ines, and Fischer.

[1431] Integrated Regional Information Networks, 'Libyan minority rights at a crossroads,' (24 May 2012) (accessed July 2020), noting the statelessness of Tuareg who arrived in Libya in the last 50 years.

> (t)he UNHCR identified as many as 25,000 primarily nomadic Tuareg in the southwest who had been living in the country for several decades but held no citizenship documentation. The UNHCR estimated the number of potentially stateless Tuareg and Tebu (another nomadic group) during the year as high as 100,000 and that approximately an additional 50,000 persons were at risk of becoming stateless.[1432]

As refugee children in Mauritania do not receive birth certificates, lack of documentation among Malian refugees in Mauritania is only being compounded.[1433]

As well as struggling to obtain civil documents outside of Mali, Tuareg refugees struggle to return. In 2014 and 2016, bilateral treaties were signed between Mali and Niger, Mauritania and Burkina Faso for the return of Malian refugees to Mali.[1434] In 2013, UNHCR facilitated the return of 2,000 Tuareg refugees to Mali, issuing them with travel documents and facilitating their registration with the Malian authorities.[1435] But as of 2015-2016, UNHCR was still struggling to promote safe return for refugees to northern Mali.[1436] Some Malian Tuareg have been able to return, but the situation in northern Mali remains so unstable, many are not ready to go back.[1437]

As a result, is likely that for many Tuareg returnees, UNHCR refugee cards are the only official documentation they have. UNHCR notes that the rates of documentation of returned refugees is unknown. More research is needed to uncover the extent of Tuareg documentation, or lack of documentation, today.[1438] Mali has recently created a

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[1432] US Department of State, 'US Country Reports on Human Rights Practices for 2013, Libya' (2013). As a recent IDMC report notes, better data is needed. IDMC, '2016 Africa Report on Internal Displacement' (December 2016).

[1433] UNHCR, 'Global Report 2013, Mauritania' (2013) 2.

[1434] Offermann, 58.

[1435] It is important to note that much of the information on Tuareg civic participation and civil registration comes from UNHCR. UNHCR, 'Global Report 2013, Mauritania' (2013) 1 (accessed July 2020).

[1436] UN High Commissioner for Refugees, 'Mali Situation: UNHCR Regional Update, December 2015 – February 2016,' (February 2016).

[1437] UNHCR Niger Factsheet (March 2014) (accessed July 2020). See also Refugees Deeply, 'In Limbo: Malian Refugees in Burkina Faso' (20 April 2016) (accessed July 2020).

[1438] A. Donini and G. Scalettaris 'Planning from the Future: Component 2: The Contemporary Humanitarian Landscape: Malaise, Blockages and Game Changers; Case Study: Regional Humanitarian Challenges in the Sahel' (Feinstein International Center April 2016) 27 (noting that lack of documentation makes it difficult for UNHCR to identify and categorize beneficiaries.) See also, Manby, Citizenship, 2018; Z. Albarazi and L. van Waas, 'Statelessness and Displacement Scoping Paper' (Norwegian Refugee Council and Tilburg University) 21, quoting the Norwegian Refugee Council Mali office. The dispossession and exclusion of Tuareg in northern Mali, along with their lack of documentation, is only part of a larger, regional problem of stateless nomads living throughout West and North Africa, an extensive human rights violation that is only now being

commission to study the issue of statelessness in Mali,[1439] but violence in northern Mali makes a survey of Tuareg documentation extremely unlikely. As the UNHCR Mali office put it in a report,

> L'identification des personnes apatridies, ainsi que les causes et les conséquences de la problématique reste un inconnu pour le HCR et le Gouvernement malien. Le processus de la documentation des Maliens de la diaspora reste imprécis et méconnu. (The identification of stateless people, as well as the causes and consequences of the problem remain unknown for UNHCR and the Malian government. The process of documentation for Malians and the diaspora remains imprecise and badly known.)[1440]

The implications of the lack of documents and contested nationality of many Tuareg in Mali are very serious and go right to the heart of Malian politics and statehood. As one UN aid worker pointed out:

> The fact that displaced people and refugees will not be able to vote (in the 2013 election) will play into the hands of separatists who do not recognise the Malian state. In the worst-case scenario, the National Movement for the Liberation of Azawad will be able to claim that a low voting rate in the north is proof that the region does not recognise the Malian state.[1441]

UNHCR attempted to arrange for out-of-country voting for Malian refugees, including Tuareg, but the program was not implemented by the Malian government.[1442] According to UNHCR, out of about 173,000 refugees in neighbouring countries, only 10,300 were on the voter registries, and only about 1,220 actually voted.[1443]

> To vote, eligible refugees needed to present a biometric ID card (NINA card) with their details. They also needed documentation showing their names and photographs on the electoral lists. Many had one or the other, but not both.[1444]

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publicized. L. van Waas, 'Tilburg University, Statelessness Program, The Stateless Tebu of Libya?' No. 010/2013 (May 2013).

[1439] Mali, Décision No. 2014-0191/MJDH-SG, Création d'un comité interministériel sur l'apatridie (17 November 2014.)

[1440] UNHCR, 'Mali: Population Planning Group' Global Focus Webpage (2016).

[1441] A. Smith, 'Mali Election: thousands of displaced people face exclusion from vote' The Guardian (26 July 2013).

[1442] H. Caux, 'UNHCR helps prepare for refugees to vote in Mali elections, voices concerns over voter registration' UNHCR (23 July 2013).

[1443] See generally Caux, 2013.

[1444] See generally Caux, 2013.

Many were not able to vote in 2018 as a result.[1445] As one UNHCR staff member pointed out, voting was "a sign of renewal, a sign of reconciliation,"[1446] but it is also a sign of the potential political power of the Tuareg as a group and what role they may play in Malian politics. Voting is also a sign of political inclusion and a way to prove membership in Mali. Malian Arabs and Tuaregs felt deeply ambivalent about voting in Mali's elections in 2013, though many saw voter registration as a way to get vital documents.

> Some of those who have registered told Al Jazeera that their real motive is to acquire Malian national ID cards that would hopefully facilitate their movement across the border and within Mali and help them revisit their families back home.[1447]

The issues of voting, registration, land ownership and the right to cross the border are therefore entwined, part of the larger debate over Tuareg inclusion, as can be seen by controversy over the electoral rolls in the election of 2018.[1448]

Currently, northern Mali resembles a failed state, the project of Tuareg incorporation into Mali remains a failure, but there is little hope of a political solution for the time being. What had started as a poorly organized uprising in the newly independent Mali of the early 1960s had morphed into an international war over territory between Algeria, Mali and Libya, with the Tuareg caught in the middle.[1449] The status of the Tuareg therefore must be seen in the context of armed conflict, separatism and refugee flows, while the basic question of whether there should be a Tuareg state remains unaddressed.[1450]

> The militarization of specific areas — northern Mali and the Lake Chad region in particular — is seen as further testing the social contract between the population and ineffective and distant governments and as a challenge for humanitarian access.[1451]

[1445] UN News Service, 'Ahead of polls, UN urges Mali officials to expedite electoral procedures for refugees' (23 July 2013). Interviews, fall 2019, Abidjan.

[1446] Caux, 2013.

[1447] M. Vall, 'Anger in refugee camp ahead of Mali vote: Refugees on Mauritanian border with Mali are angry as they have yet to get IDs ahead of crucial elections' (Al Jazeera 14 August 2013). Tuareg and other nomads also lack of registration and identity documents in Libya. Integrated Regional Information Networks, 'Libyan minority rights at a crossroads,' (24 May 2012). Many Tuareg in Libya do not possess a family booklet or any other identity documentation. See also Office of the Commissioner General for Refugees and Stateless Persons, 'Libya: Nationality, Registration and Documents' (December 2014) 11.

[1448] L'essor, « Le ministre Ag Erlaf à propos du processus électoral : « il n'y a qu'un seul fichier pour les élections générales de 2018 » » Maliweb (25 July 2018) (accessed July 2020).

[1449] Human Rights Watch, 'Mali: New Abuses by Tuareg Rebels, Soldiers,' (7 June 2013).

[1450] Manby, Citizenship, 116.

[1451] Donini and Scalettaris, 19.

Meanwhile, European states have fed the view that the issue of Tuareg belonging is one of border security. Ending migration and drug trafficking are the primary goals in the region.[1452] This has completely side-lined the underlying question, unresolved since colonial independence in the middle of the 20th century, of whether or not the Tuareg require their own state, or whether a different political solution can be found.[1453]

"Azawad is a dream," as a Tuareg man from Niger once put it.[1454] Understanding the exclusion of the Tuareg in Mali requires an acknowledgement that the question of Tuareg nationality ultimately revolves around the question of Tuareg separatism. [1455] Today, many Songhai believe they are the original owners of the Niger Bend region, while the Tuareg are so-called foreigners from north Africa, a viewpoint which has only been encouraged by successive Malian governments.[1456] "It appears that the Malian government considers the recognition of indigenous peoples as a threat for the national unity."[1457]

[1452] Donini and Scalettaris, 20.

[1453] L. Senghor, 'Balkanization ou Federation?' in Afrique Nouvelle (December 1956.)

[1454] Integrated Regional Information Networks, 'Separatists and Skeptics: refugees divided on future of northern Mali,' (19 May 2014).

[1455] The 2015 Agreement of Peace and Reconciliation has again opened up the possibility of peace in northern Mali. But the agreement has been criticized as vague on specifics about how to insure greater political participation by the north in the Malian government.

[1456] Bourgeot, Résistances, 356.

[1457] L. Ag Aly, 'The rights of the indigenous peoples to self determination: Attempts to address the violation of human rights with specific reference to Mali' (2010) 42.

The Sama Dilaut Today

Today, the Sama Dilaut continue to suffer from movement restrictions, lack of documentation and the presumption that they are naturally stateless.[1458] As non-nationals the Sama Dilaut have been subjected to a number of development and modernization programs encouraging settlement and circumscribing their movement without recourse to the courts to challenge such programs or without laws protecting them as a group.[1459] National parks are created around their traditional ocean regions without their input and without compensation, while their culture and languages go without protection. As a result, statelessness contributes to the destruction of Sama Dilaut culture and way of life. Nowhere is the conflict over the status of the Sama Dilaut as an indigenous group and the government of Malaysia more apparent than in the creation of national maritime parks.

Yet, there is evidence that granting a nationality to the Sama Dilaut might accelerate assimilation and settlement.[1460] In Indonesia, other sea nomad groups are recognized as nationals of Indonesia and have been relocated to settlements by the government, often unsuccessfully.[1461] The aboriginal peoples on the peninsula have also been the targets of an aggressive settlement program as part of the government's stated goals of economic development, environmental protection and land reform, though they are recognized as nationals of Malaysia.[1462] Sarawak's nomadic peoples have also seen forced settlement with devastating health and cultural consequences, even when they have been recognized as native peoples.[1463] As a result, it is not clear that nationality would help to prevent this assimilation.

[1458] For a recent overview of movement restrictions as applied to the Sama Dilaut, see N. Stacey, G. Acciaioli, J. Clifton, D. Steenbergen 'Impacts of marine protected areas on livelihoods and food security of the Bajau as an indigenous migratory people in maritime Southeast Asia' (2017).

[1459] See generally Clifton and Majors.

[1460] See generally Clifton and Majors.

[1461] G. Acciaoli (2001) 'Archipelagic culture' as an exclusionary government discourse in Indonesia, *The Asia Pacific Journal of Anthropology*, 2:1, 1-23, 4. See also Brunt, Vulnerability, 11. Chou estimates that as much as nineteen percent of the population of Orang Laut in Indonesia has been supposedly voluntarily relocated to settled villages by the Indonesian government in the 1990s, out of a population of 5,000. Chou Orang i, 14, 107, 138. The government Of Indonesia has called sea nomadism "a misery" and has pushed for the settlement of Orang Suku Laut. L. Lenhart, 'Orang Suku Laut Communities at Risk: Effects of Modernization on the Resource Base, Livelihood and Culture of the 'Sea Tribe People' of the Riau Islands (Indonesia),' 5 *Nomadic Peoples* 67 (2002) 77-79.

[1462] Hooker, 244. See also Andaya, 306; Goh Beng Lan, 'Dilemma of Progressive Politics in Malaysia: Islamic Orthodoxy versus Human Rights' in W. Mee and J. Kahn, *Questioning Modernity in Indonesia and Malaysia* (Nus Press 2012) 306-307. Aboriginal peoples include the Semang and Senoi peoples.

[1463] Goh Beng Lan, 307-308. See also Hooker, 245.

Importantly, however, some aboriginal peoples in Malaysia have used their status as nationals to successfully advocate for their rights and resist coercive settlement and government land grabs,[1464] tactics which are not available to the stateless Sama Dilaut. While the aboriginal population in Peninsular Malaysia have been successful in claiming ownership of their traditional lands as an aboriginal group, the Sama Dilaut are denied all legitimate ownership of their traditional waters.[1465] Likewise, many groups in Sabah and Sarawak, such as the Ibans, are recognized as nationals and have the right to own land, though these rights are constantly under pressure from logging companies and national infrastructure projects, such as dams.[1466] Despite enormous challenges, nationality for some of Malaysia's nomads and indigenous peoples has led to greater access to their rights, especially through the courts, even as it has accelerated assimilation for others.[1467] What is clear is that a nationality for the Sama Dilaut must not come in exchange for their settlement and relinquishment of fishing rights.

The current population of Sama Dilaut is unknown, but in 2002, anthropologist Clifford Sather published an article in the journal *Nomadic Peoples* stating that there were probably only a few thousand Sama Dilaut still practicing nomadism around Sabah.[1468] Today, most of the remaining boat nomads in Sabah are semi-nomadic, though exact statistics are not available, and it is difficult to define nomadism precisely. Publishing in the late 1990s, Sather believed there may have been fewer than 5,000 boat nomads left in Malaysia, living alongside a much larger settled and semi-settled population.[1469] Today, Helen Brunt estimates that "true nomadism" among the Sama Dilaut today is rare, though the numbers are unknown.[1470]

Most Sama Dilaut today are either settled or semi-settled, spending at least a portion of each year on islands such as Pulau Bum Bum or in pile-house villages, such as Bangau Bangau village off the coast of Semporna town.[1471] The link between statelessness, forced settlement and so-called development programs for the Sama Dilaut is similar to those documented for the Tuareg and Bedouin, above. Meanwhile, like many post-colonial states,

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[1464] Hooker, 245.

[1465] As Duraisingam points out, many aboriginal peoples lack birth certificates and are at risk of statelessness. As a group, however, the Malaysian government has consistently recognized the aboriginal peoples as native to Malaysia, in contrast with the Sama Dilaut, who are often treated as foreign. Duraisingam, 3.

[1466] Hooker, 247.

[1467] For a survey of native and aboriginal land rights court cases in Malaysia, see generally Bulan.

[1468] Sather, Commodity, 2002, 23.

[1469] Sather, Adaptation, 1997, 3.

[1470] Brunt, Stakeholders, 27. Because the Sama Dilaut are stateless, their numbers are unknown, reflecting a broader problem with quantifying both nomadic and stateless people discussed above in the introduction. I am indebted to Helen Brunt for her comments on this topic.

[1471] Sather, Commodity, 2002, 23. See also Ali, 159.

the governments of Malaysia and Sabah have struggled to unite disparate groups into a single nationality, fuelling concerns over territorial unity and sovereignty and confusing the issue over what it means to be indigenous to Sabah.[1472]

Closely related to the militarization and centralized control of the ocean in Sabah's border regions, the securitization of immigration and registration in coastal Sabah means that undocumented persons are treated as a security threat. In this way, the current situation of the Sama Dilaut, while less extreme, resembles that of the Tuareg. As discussed above, the association of the Sama Dilaut with alleged criminality, piracy and backwardness was a hallmark of the colonial period. It has become a mainstay of Malaysian government policy towards the Sama Dilaut.[1473] As in both Kuwait and Mali, lack of documents is now used as evidence that the Sama Dilaut are themselves somehow illegal, rather than as evidence of the failure of previous registration efforts and government policies. This occurs even when the government sometimes acknowledges the part played by the Sama Dilaut in Sabah's cultural history. In echoes of the Kuwaiti government's nostalgia for Bedouin history, the statelessness of the Sama Dilaut persists even as they are marketed as a tourist attraction.[1474]

As with the Bedouin and Tuareg, it is not so much that the Sama Dilaut are actually believed to have no historic ties to the area that is now Sabah's territorial sea, but rather that the Sama Dilaut "do not have a homeland" in Malaysia.[1475] The idea of nomads as being incapable of forming or taking part in territorial states, an idea adopted from the western tradition as explained in Part 2, exerts a strong influence over discourse on the Sama Dilaut in Sabah. As a result, the Sama Dilaut are simultaneously presented as a traditional group for tourism purposes and as foreigners for the purposes of nationality.

As Acciaoli puts it, discussing the Indonesian context, the Sama Dilaut are "a people whose continuing lifestyle on the water puts them in opposition to state priorities..."[1476] As the Asia Pacific Refugee Rights Network puts it, "(t)he Sama Dilaut...are arguably some of the most marginalized people in Malaysia..." and "a classic example of a protracted and inter-

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[1472] Brunt, Stakeholders, 38. See also the Malaysia Asia Pacific Refugee Rights Network, 'The Vulnerability of Sama Dilaut (Bajau Laut) Children in Sabah' (2015) 4.

[1473] Eklof, 157.

[1474] For example, the Regatta Lepa promotes the "traditional" boat culture of the Bajau Laut sea gypsies. See for example http://www.pulaumabul.com/regatta-lepa/ (accessed July 2020).

[1475] C. Majors and J. Swiecicka, 'Missing the boat?' Inside Indonesia (July 24 2007) (accessed July 2020).

[1476] G. Acciaoli, '"Archipelagic culture" as an exclusionary government discourse in Indonesia' 2 *Asia Pacific Journal of Anthropology* 1 (2001) 5 (Discussing state policy in Indonesia).

generational statelessness situation."[1477] Undocumented Sama Dilaut today live in fear of various government authorities, afraid of being arrested, detained or even deported.[1478]

> Despite their historical connections with the wider Sulu-Sulawesi region...many Sama Dilaut now find themselves stateless and living in areas where resource use, extraction and access are restricted by legislation.[1479]

The experience of the Sama Dilaut in the decades following colonial independence has been one of forced settlement, exclusion, marginalization and statelessness. They now form part of an undifferentiated group of people of undocumented, or non-national, status, including refugees and irregular migrants from the Philippines, living on the margins of Sabah society.[1480]

Many land Bajau and other inhabitants of Sabah have negative views of the Sama Dilaut as illegal immigrants, pagans and criminals.[1481] As this section has argued, these perceptions, which have greatly impacted the enactment and implementation of nationality in Sabah, stem from the wider political context, where ownership of the ocean border zone is hotly contested and extremely sensitive. The traditional migrations of the Sama Dilaut and their association with the Philippines are causes for suspicion for the Malaysian government, as well as the potential claims to territory that might be made by the Sama Dilaut themselves, appears to threaten the Malaysian government's absolutely ownership of the territorial waters around Sabah.

In the Malaysian context, the Sama Dilaut are simultaneously a traditional people of north Borneo and dangerous, illegal foreigners closely related to the influx of migrants from the Philippines. Government hostility to the Sama Dilaut is closely related to the control over territorial seas containing oil and natural gas that make up much of Malaysia's wealth and how the presence of sea-faring groups raises concerns over border security and the sovereignty of the oceans. In particular, the situation of the Sama Dilaut exposes how the question of indigenous status can be manipulated to perpetuate statelessness.

The typical position of the government can be seen by this quote from a local newspaper "The Star":

[1477] Asia Pacific Refugee Rights Network, 'The Vulnerability of Sama Dilaut (Sama Dilaut) Children in Sabah, Malaysia' (2015) 2.

[1478] I am indebted to Helen Brunt for her comments on this point. See also H. Chiew, 'Bajau Laut: Once sea nomads, now stateless' Malaysiakini (17 May 2019).

[1479] Brunt, Stakeholders, 30.

[1480] Asia Pacific Refugee Rights Network, 'The Vulnerability of Sama Dilaut (Sama Dilaut) Children in Sabah, Malaysia' (2015) 3.

[1481] Sather, Adaptation, 1997, 83, 87.

> Another census on the Palau people or sea gypsies of Semporna will be done in August amid allegations they act as the 'eyes and ears' of cross border criminals, such as kidnappers.[1482]

Such statements echo the treatment of the Sama Dilaut and other seafaring, mobile peoples as pirates by colonial authorities. As put by the former head of the Eastern Sabah Security Command (ESSCom) (which was created in response to the 2013 incursion from the Philippines); "(Sabah) is our birthplace, and that of our children. We do not want Sabah to be colonised, destabilized and its sovereignty challenged by outside elements..."[1483]

In the words of one participant in a workshop in Sabah on the issue of conservation, "The Sama Dilaut are not original people of Sabah. They are from the Philippines...They must learn about religion, education and living in a house."[1484] In the eyes of many Malaysians, the Sama Dilaut are not an indigenous, native or aboriginal population, but rather a "marginal group" of "questionable origin."[1485] This view persists despite the fact that the Sama Dilaut are often held out as one of the traditional ethnic groups for tourist purposes and presented as indigenous to outsiders.[1486]

Today, the rhetoric against the Sama Dilaut as criminals and outsiders feeds the perception that despite their long-standing ties in the region, they are undeserving of nationality. The Sama Dilaut are looked down upon as a so-called pariah people, despite their recent attempts to assimilate by settling and converting to Islam.[1487] Indeed, as Sather points out, the land-based peoples of Borneo were forever trying to explain the Sama Dilaut, giving rise to several origin myths of the Sama Dilaut as a group who had been cast out of Islam and regular society.[1488]

In 2015, Al Jazeera's 101 East released a documentary on stateless children in Sabah, including the Sama Dilaut. They focused on "water villages" settled by both Sama Dilaut and Filipino migrants. "The authorities call some of these villages 'black areas' – hotspots for drug dealers, insurgents and armed intrusion. Police have stepped-up operations to flush

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[1482] See for example The Star Online, 'ESSCOM to hold another census' (11 July 2015) (accessed July 2020).

[1483] ESSCOM Times, 'Unity Among ESSZone Coastal Communities Vital (28 Sept 2015). See also The Star, 'ESSCom Keeping a Close Watch on Sabah's Sea Gypsies' (4 Feb 2015).

[1484] Brunt, quoting a workshop participant, 37.

[1485] Ali 157.

[1486] See for example the Malaysia government tourism website at http://blog.tourism.gov.my/the-regatta-lepa-colourful-and-excitement/ (accessed July 2020).

[1487] Sather, Commodity, 2002, 25, 35. See generally Clifton and Majors.

[1488] Sather, Commodity, 2002, 36-37.

out illegal migrants, smuggling and drug dealing in recent months."[1489] The Sama Dilaut are often mentioned in the same sentence in the media as pirates, criminals and Islamist separatists...[1490] Stateless Sama Dilaut are often blamed for any acts of cross border criminality.[1491] ESSCOM, the Sabah security agency, has taken a census of "water villages" in ten Sabah districts in preparation for their relocation in order to cut down on crime and improve security.[1492] According to the census, "58%" of the water village population in Sandakan are "aliens." The debate around whether or not Sama Dilaut should receive documents therefore centres round whether or not they originate from Malaysia or not,[1493] an unhelpful framing in a region of recent, contested borders and a long history of mobility.[1494] This debate can be seen in local media, which frequently presents the Sama Dilaut as coming from the Philippines, mis-characterizing the history explained in Part 2.[1495]

Recently, the issue of Sama Dilaut statelessness has become more prominent in Sabah. Some NGOs have focused on the human rights of the Sama Dilaut. A review of current news articles shows the diametrically opposed views of the Sama Dilaut as Malaysians whose rights are being denied, often the view of non-profits and civil society groups, versus as foreign infiltrators and criminals seeking to take advantage of Sabah's weak civil registration, often the view presented by various government agencies.[1496] At the time of writing, UNHCR and various local civil society groups in the Philippines are looking at the nationality status of Sama Dilaut settled in the Philippines.[1497] Information on the movements of nomadic Sama Dilaut between the two countries, however, has been impeded by armed conflict.

Today, immigration to Sabah has become one of the most contentious political issues in Malaysia and has become a primary national security concern. For example, immigration to

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[1489] Al Jazeera, 'Meet Sabah's Invisible Children' (1 May 2015). See also New Internationalist, 'Sabah's Invisible Children' (8 May 2015) (accessed July 2020).

[1490] J. Langenheim, 'Blast Fishing in Borneo: bombs are quick, but they kill the coral reefs" The Guardian (1 July 2014) (accessed July 2020).

[1491] Brunt, Vulnerability, 36.

[1492] Tan Sri Datuk Amar Steve Shim Lip Kiong (Chairman) and Commissioners, 'Report of the Commission of Enquiry on Immigrants in Sabah,' Royal Commission of Enquiry (2012) 357-358.

[1493] Ali, 162.

[1494] Ali, 162.

[1495] Qin Xie, 'Last of the sea gypsies: Fascinating images of the nomadic Borneo tribe who spend their lives on the water' (8 Feb. 2016) (accessed July 2020).

[1496] The Star Online, 'Look into the Plight of the Sama Dilaut Urges NGO' (7 July 2015) (accessed July 2020). See also The Malay Mail Online, 'Poor and Stateless: Sabah's 50,000 undocumented children denied access to education, health care' (30 April 2015).

[1497] SunStar Philippines, 'CFSI validate Sama Badjaos status' (2 Sept. 2017) (accessed 2020).

Sabah is managed by a separate federal agency from the rest of Malaysia, the National Security Council of the Prime Minister's Office, rather than the Department of Immigration. Policy on irregular migration is managed by the Special Task Force for Sabah and Labuan.[1498] These moves have taken immigration out of the usual sphere of governmental authority and placed it firmly within the orbit of the state security services.

The issues of irregular migration and border security have also become closely related to that of documentation. In order to stay longer in Malaysia and avoid punishment, imprisonment and deportation, some migrants allegedly purchase fake documents.[1499] The issue has been heavily reported in the media and, as a result, irregular migration has come to be closely linked in the minds of many Malaysians to the issue of fake or fraudulent identity documents.[1500] Malaysia has strict visa requirements, particularly under the Immigration Act of 2002, and often does not issue enough visas to meet demands. The laws include harsh measures such as automatic deportation for pregnant workers, laws that make life for temporary workers in Malaysia very precarious. This creates a market for fake documents, though the actual extent of the problem is unknown.[1501]

For many Malaysians, however, the use of fake and fraudulent documents by some migrants has led to the association of immigrants with criminals, so-called infiltrators, terrorism and voter fraud.[1502] In 2001, a court in Sabah nullified the 1999 election in Likas neighbourhood due to alleged irregularities in the rolls and "phantom voters."[1503] The association between a lack of documents, criminality, terrorism and voter fraud in Sabah mirrors concerns in Kuwait and Mali, discussed above.[1504]

In 2008, in an attempt to resolve the status of stateless persons in Sabah the government issued temporary "green MyKads" to people with Malaysian birth certificates who did not qualify for the "blue MyKad" given to nationals. The program was poorly administrated and highly controversial, as it essentially branded stateless people with Malaysian birth certificates as non-nationals with only temporary status.[1505] This program bares a certain

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[1498] Kassim and Zin, 20.

[1499] Kassim and Zin, 107.

[1500] See for example The Star, 'RCI Report: Who are the Illegals?' (4 December 2014).

[1501] Clark and Pietsch, 170.

[1502] Sadiq, 108-109, 116-117. See also the ongoing debate over security, the MyKad and Islamic terrorism in Sabah. Carruthers 2.

[1503] See also Lim Hong Hai, 116. See also Harris Mohd Salleh v. The Returning Officer, Ismail Majin & Ors (And Another Petition) (2001) 3 CLJ 161.

[1504] Oakeshott, 37-371. It is beyond the scope of this dissertation to go too deeply into the connection between statelessness and insecurity.

[1505] Ali, 163. See also Malaysia Today, 'Thousands register for green MyKad' 19 Nov. 2008, at http://www.malaysia-today.net/thousands-register-for-green-mykad/.

resemblance to that of the *bidoon* in Kuwait. Most Sama Dilaut were left out of this program, however, as it required a birth certificate.[1506]

So controversial has the matter of irregular migration and fake documents become, that the Malaysian government convened a Royal Commission of Inquiry in 2012, tasked with determining if any irregular migrants had been fraudulently issued IDs and, if so, if any had voted.[1507] The Commission also examined allegations that the population of Sabah has increased at three times the rate of neighbouring Sarawak, and whether or not this was part of a deliberate government program to shift the demographics in Sabah. In the press, this alleged program to change the demographics of Sabah by increasing the Muslim population is called "Project IC" or "Project Mahathir," after the former Prime Minister Tun Dr Mohamad Mahathir.[1508] Many non-Malay Sabahans claim that fraudulent documents are being sold to Filipino and other Muslim immigrants to increase Sabah's Muslim population and, by extension, the clout of the ruling United Malays National Organization (UMNO).[1509]

While the Royal Commission did not find that NRD officers had acted inappropriately, nor did they find evidence of a larger political project to affect voting in Sabah, they did conclude that some IDs had been issued to non-citizens, usually because of incorrect information given by village chiefs as to a person's identity and ignorance of the proper procedures by some NRD employees.[1510] The report, while modest in its conclusions, is a valuable record of public and local government opinion on immigration and documentation in Sabah.

The report records the views held by local government officials in Sabah, who testified, for example, that parts of Sabah are now majority Filipino and that "squatter communities" were "hotbeds for illegal activities" and "bad for the environment."[1511] The view of immigrants in the report is overwhelmingly negative, and again and again, Sabahans and local officials link immigrants to criminality, environmental degradation and poor border security. Recently, calls for a revamped ID card for nationals have gotten louder in Sabah, with the *Sabah4Sabahan* movement.[1512] In particular, these movements have grown in non-

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[1506] Ali, 163.

[1507] Tan Sri Datuk Amar Steve Shim Lip Kiong (Chairman) and Commissioners, 'Report of the Commission of Enquiry on Immigrants in Sabah,' Royal Commission of Enquiry (2012). See also Holst 135.

[1508] A. Carruthers, 'Sabah ICs for Sabahans: Will it Help?' Yusof Ishak Institute (2016) 4 (hereinafter Carruthers).

[1509] Sadiq, 102. See also Brunt, Vulnerability, 2-3.

[1510] Tan Sri Datuk Amar Steve Shim Lip Kiong (Chairman) and Commissioners, 'Report of the Commission of Enquiry on Immigrants in Sabah' Royal Commission of Enquiry (2012) 305-308.

[1511] Tan Sri Datuk Amar Steve Shim Lip Kiong (Chairman) and Commissioners, 'Report of the Commission of Enquiry on Immigrants in Sabah' Royal Commission of Enquiry (2012) 261-278, 314.

[1512] Carruthers, 5.

Muslim communities.[1513] A counter-terrorism program begun in 2016 has again raised the "perennial" issue of whether or not the government should issue new ICs, and if so, to whom.[1514] In 2019, Malaysia and Indonesia announced a new initiative to tackle the statelessness of migrants and border populations.[1515] It is not yet clear how this policy will affect the Sama Dilaut.

Civil registration has also become a focus for international and regional organizations. On the topic of birth registration, Malaysia has joined other governments in the region and the United Nations Economic and Social Commission for Asia and the Pacific to "Get Everyone in the Picture" by improving civil registration, including birth registration.[1516] In neighbouring Philippines, Bajau communities have recently benefited from birth registration drives,[1517] yet this has not been the case for the Sama Dilaut in Malaysia Even as the region pushes for greater cooperation and trade and freedom of movement has increased for certain segments of society, such as foreign workers who qualify under the "smart card" program between Singapore and Indonesia, there has been a corresponding increase in restrictions and reduction on mobility for "sea nomads," irregular migrants and other undesirable groups.[1518]

It is not the aim of this section is not to plunge into the debate on fake ICs in Sabah, but merely to provide the context in which the statelessness of the Sama Dilaut is taking place. IC fraud has been cited as increasing security threats to Sabah, including encroachment by factions within the Philippines and potential Islamic terrorism.[1519] The issue of Filipino migrants in Sabah is particularly contentious, due, in part, to the ongoing border and sovereignty dispute between Malaysia and the Philippines. But another view in Sabah is that Filipinos are actually being encouraged by the federal government to come to Sabah to increase the Muslim population.[1520]

[1513] Carruthers, 6.

[1514] Carruthers, 1.

[1515] See for example The Star 'Malaysia, Indonesia to tackle Sabah stateless issue' (24 Apr 2019) (accessed July 2020).

[1516] See the webpage of the United Nations Economic and Social Commission for Asia and the Pacific 'Get Everyone in the Picture at http://www.unescap.org/news/governments-agree-steps-get-every-one-picture (accessed July 2020).

[1517] See for example the Philippine Daily Inquirer, 'Badjaos recognized through pilot birth registration' (17 December 2019) (accessed July 2020). See also R. Lacuata, 'Unlisted no more: Sama Bajaus in Zamboanga City get birth certificates' ABS-CBN News (10 Dec. 2019) (accessed July 2020).

[1518] Chao Riau, 251.

[1519] Sadiq, 102.

[1520] Navallo, 5.

These somewhat contradictory positions illustrate the opinions in Sabah today over the role of immigrants in society. On the one hand, Filipino immigrants share a similar culture, religion and history with many Sabahans. But on the other hand, local communities, fuelled by media coverage, fear the social and economic impacts of continued immigration. These concerns influence the question of Sama Dilaut belonging, as the Sama Dilaut are today grouped by the media, local officials and many Sabahans, and even civil society groups, as part of a larger problem of undocumented immigrants.

Statelessness has affected the lives of the Sama Dilaut in many ways. Stateless Sama Dilaut children continue to lose out in terms of access to education and health care.[1521] Some of the Borneo Child Aid Society's learning centres for Sama Dilaut children have been closed under protest of resources being spent on so-called non-Malaysian children.[1522] When Sama Dilaut do have documents, these are often regarded as forgeries, meaning that even many Sama Dilaut with documents cannot claim their rights. While lack of registration and documents among the rural poor in Sabah is presented as a technical problem that is the responsibility of NRD to solve, rather than as a security or fraud issue, for the Sama Dilaut, lack of registration is treated as a security issue.[1523]

Perhaps unsurprisingly after years of struggle for recognition and negative treatment by successive governments dating to the colonial period, there is a great deal of mistrust and confusion among the Sama Dilaut regarding registration.[1524] The arbitrary exclusion of people from registration by NRD in the Borneo states continues to be a problem today, with many activists calling for clearer rules and a more rigorous system. The Sama Dilaut are often the victims of document scams in their desperation to obtain documents, paying money to swindlers for documents that turn out to be fake, which are then used as further evidence of Sama Dilaut criminality.[1525]

Today, the Sama Dilaut are trapped in a cycle of marginalization and illegality whereby their traditional lifestyle, migrations, fishing and culture are all branded as ipso facto illegal and criminal by the state. Meanwhile, as pointed out above, statelessness enables the government to restrict Sama Dilaut fishing and keep them out of tourist parks and oil fields, impeding Sama Dilaut access to their traditional livelihoods and encouraging yet more

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[1521] Asia Pacific Refugee Rights Network 'The Vulnerability of Sama Dilaut (Sama Dilaut) children in Sabah, Malaysia' (23 March 2015).

[1522] Brunt, Vulnerability, 35.

[1523] NRD is using mobile registration clinics and the internet to get poor, disabled and sick people registered. See for example the Borneo Post, '70,000 Late Registration Cases in Sabah' (18 August 2013) (accessed July 2020).

[1524] A. Unis, 'Government Urged to Solve the Sama Dilaut Identity Issue, Says Analyst" Astro Awani (18 Sept 2013) (accessed July 2020). I am indebted to Helen Brunt for her comments on this issue.

[1525] Brunt, Vulnerability, 4.

settlement in what may be viewed as a continuation of colonial era policy towards the Sama Dilaut.[1526]

[1526] Ali 158.

Nomads Today

Part 2 ends with a discussion of the situation of nomads today. Statelessness and contested nationality have had a devastating effect on the practice of nomadism. As the examples in this dissertation explored, while a tiny minority of nomads continue to migrate across what are now international borders, most nomads are now settled. This settlement took place due to a number of interlocking factors, yet there can be no doubt that aggressive government policy played a large part. Those who remain nomadic either within or between countries face rampant exclusion and statelessness, alongside massive human rights violations. Many nomads cannot access or own their lands, register or access services. They face deportation, fines and imprisonment. Nomadism has been re-branded by governments as dangerous criminal activity or terrorism. "To be stateless is, as we have seen, typically to be dis-empowered."[1527]

For those nomads who remain mobile, what cross-border movement continues today is usually limited, or has been significantly transformed, by modern border restrictions. The government has outlawed economically necessary migrations, which are now labelled illegal. The fact that nomads and former nomads are undocumented is often used as evidence of both their criminality and their foreign status.[1528] As a result, modern nomads are usually labelled as criminal foreigners by their states, rather than as nationals with rights.[1529] A large part of the problem is arguably that many states do not see the nationality of nomads in human rights terms. Rather, as the examples showed, states see the removal and regulation of nomads as an issue of national security and border control, areas of competency that state sovereignty reserves exclusively for states.

Birth registration and the issuance of identification documents remains uneven in many countries like Kuwait, Mali and Malaysia, heavily favouring settled, urban populations.[1530] The Committee on the Rights of the Child has recommended that states increase birth registration particularly for nomads, though, for example, mobile registration clinics.[1531] As the above section showed, however, rampant discrimination against nomads forms a powerful barrier to nomads accessing many civil documentation programs.

[1527] Gibney, 2014, 53. See also Arendt, 1976, 278.

[1528] This issue is discussed in Handbook, 2014, 7.

[1529] While Part 2 focused on three case studies, this has been widely documented in other contexts. See generally F. Caselliy, M. Morelli and D. Rohnerx, 'The Geography of Inter-State Resource Wars', 130 *Quarterly Journal of Economics* 267 (2015). See also M. Klar, *Resource Wars: The New Landscape of Global Conflict* (Holt 2002). See also D. Chatty, 'Multinational Oil Exploitation and Social Investment: Mobile Pastoralists in the Sultanate of Oman' in D. Chatty (ed.) *Nomadic Societies in the Middle East and North Africa: Entering the 21st Century* (Brill 2006) 496-516; Fabietti, 57.

[1530] UNICEF, 'Every Child's Birth Right: Inequalities and Trends in Birth Registration' (2013).

[1531] Committee on the Rights of the Child, Algeria, para 36, quoted in Gilbert, Nomadic, 2014 161.

Evidence that nomads may have a legitimate claim to nationality is ignored or even erased. When nomads interact with officials of the state, a presumption of non-nationality is usually applied to nomads and former nomads. This occurs even in places like Sabah, where the Sama Dilaut are simultaneously labelled criminals and foreigners while also being celebrated as part of Sabah's traditional culture. In fact, using nomads to claim land or for tourism while denying them legitimacy for nationality and rights is present in all three examples. The re-branding of nomads as foreign often goes hand in hand with claims by governments of exclusive sovereignty over nomad lands.[1532] As It is not clear the extent to which nomad statelessness is driven by the desire of governments to exclusively control nomad lands, but there is a strong correlation.

Today, nomadism continues to be characterized as problematic for the environment, such as when the Sama Dilaut are criticized for blast fishing, even as state governments pump millions of barrels of oil nearby and large fishing companies employ drag net fishing. While the examples, above, did not delve into a great deal of detail about the environmental impact of mass settlement programs and the conversion to a wage economy, disturbing evidence exists that such programs, far from being for nomads' own good, have actually devastated sensitive, pastoral and fishing environments. In the case of the creation of Tun Mustapha Park in Malaysia, one can see the preoccupation with nomads as being somehow bad for the environment, pitting nomad rights against environmental protection.[1533]

It is also important to note the negative role played by some academic discourse on the subject of nomadism, which has frequently labelled the nomadic way of life as a problem or barrier to development.[1534] Rather than pushing for nomadic rights, most international efforts in the 1960s and 1970s were actually geared towards eliminating nomadism as a problem for post-colonial states, either on developmental, environmental or political grounds. Current discourse too often focuses on the supposed links between nomadism,

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[1532] Van Genugten et al., 2014, 102. The authors cite the example of Batwa living in the Democratic Republic of Congo.

[1533] While this dissertation has focused on three specific examples, the environmental impact of international development programs targeting nomads have been the subject of frequent, recent study. See for example C. Hesse, « La création de richesses grâce à la variabilité de l'environnement: l'économie du pastoralisme dans les zones arides d'Afrique orientale » in *Pasteurs Nomades et Transhumants Autochtones* (L'Harmattan 2010) 31. See also Hesse, 37-39.

[1534] C. VerEecke, *Nigeria's Experiment with a National Program for Nomadic Education*, (Ohio State U. 1989) 1, (discussing the "problem" of nomad education in Nigeria); D. Morris and J. Francombe, 'The Ngisipet and trachoma prevention: Solving the Latrine Problem in Nomadic Tribes,' (Community Eye Health 2007) (discussing the "problem" of sanitation among nomads); A. Meir, 'Delivering Essential Services to Arid Zone Nomads,' 4 Desert Development 132 (1985) (discussing the "problem" of delivering western development aid to nomads); A. Meir, 'Nomads, Development and Health: Delivering Public Health Services to the Bedouin in Israel,' 69 *Geografiska Annaler* 115 (1987) (discussing the "problem" of delivering health services to nomads in Israel). See contra, J. Simel, « Le pastoralisme et les défis du changement climatique » in M. Jensen, *Pasteurs Nomades et Transhumants Autochtones* (L'Harmattan 2010) 65, where, speaking of African pastoralists, he states, « (b)eaucoup de personnes faisant partie de la société dominante actuelle, soit l'élite politique et les décideurs, voient les pasteurs d'Afrique comme l'incarnation d'une société primitive qui s'oppose au changement et au développement. »

terrorism, smuggling and criminality. The impact of western development agencies, including increased settlement and, in some cases, severe environmental degradation, were highlighted, above, in all three examples.

The question of indigenous status for the former Bedouin, Tuareg and Sama Dilaut has become weaponized, as the nomadic and mobile lifestyle is often used to justify the claim that nomads and former nomads are immigrants and not indigenous. This has allowed states to place them within the context of irregular migration to justify their continued exclusion. In this way, modern debates over nomad nationality often mirror debates stretching back to the colonial period, when a bias developed against nomads and, in some places like the Sahel and the Sulu Sultanate, even prior to the colonial period. This bias continued through the post-colonial period and continues to influence nomad-state relations to this day.

Finally, nationality can bring important human rights protections for nomadic communities, but it can also be used as yet another tool in the state toolbox to encourage settlement and assimilation. For many nomads, receiving a nationality from the government often meant giving up their rights to land, an exchange that hardly comports with the modern view of the right to a nationality. It is therefore important that any solution for nomad statelessness comports with their human rights and provides them with solutions to upholding further rights.[1535]

For example, the granting of nationality will not resolve the issue of nomad education, but it will provide nomads with a platform from which to advocate for culturally appropriate schooling or the legalization of nomad livelihoods, economically necessary movement or the use and protection of traditional lands, either through voting, legislation and/or the courts.[1536] Stateless nomads may not only be unable to attend school, but lose all authority over the curriculum, meaning that schooling ends up being a weapon of assimilation, as it was in Mali during the Keïta regime.[1537]

The question of nomad land rights, however, will likely remain a thorny one for many nomadic groups, even where nationality is established and achieved. While Kingston is right in pointing out that "legal status alone will not cure the social ills affecting the world's *de jure* stateless populations,"[1538] nationality remains vital and irreplaceable for both

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[1535] Van Waas, Nationality, 218.

[1536] See for example the use of strategic litigation in obtaining Roma school desegregation. Open Society Justice Initiative, 'Strategic Litigation Impacts: Roma School Desegregation' (Open Society Foundations 2016). See also S. Pedersen, 'The Coastal Sami of Norway and their rights to traditional marine livelihood' 3 *Arctic Review on Law and Politics* 51 (2012) 60.

[1537] For more on the link between statelessness, assimilation and settlement of nomads and schooling, see H. Alexander, 'The Open Sky or a Brick and Mortar School? Statelessness, Education and Nomadic Children' in Institute on Statelessness and Inclusion (ed.) *The World's Stateless Children* (January 2017).

[1538] Kingston, Stateless, 133.

individuals and groups to enforce their rights and participate in the political process of their states.

Conclusion: Some Root Causes of Nomad Statelessness

> (I)n a world on the move, a fundamental openness is needed to what people contribute to the communities in which they live and work. Citizenship or nationality of a state…has thus become the basis for equal protection, solidarity and a democratic voice in the norms by which citizens feel bound.[1539]

This dissertation explored three example groups to uncover some of the root causes of nomad statelessness. While three examples cannot possible uncover all of the myriad causes of nomad statelessness, they highlighted some important similarities in how governments apply, or do not apply, nationality to nomads, as well as some of the driving factors behind nomad statelessness. The examples explored above highlight the spectrum of exclusion and discrimination faced by many nomads, including many important differences between various groups, while also showing how similar are the circumstances of many nomads today.

Perhaps the most significant cause of nomad statelessness uncovered by the above analysis is the fact that the western system of nationality is inherently biased against mobility and, therefore, does not fit well with nomadism. Heavily reliant on concepts like habitual residence and exclusive allegiance, the system of nationality laws, borders and ID cards is a poor match for the nomadic way of life. This bias against mobility and nomadism as a way of life has left the door open to rampant discrimination against nomads.

Part 2 began with an overview of the three nomad groups used as examples. It explored the nomadic way of life. It explained how nomads related to the pre-colonial kingdoms with whom they had close relations. It showed that far from being outsiders, nomads were important allies, competitors and subjects of pre-colonial kingdoms. It also showed the importance of land to nomadic societies, demonstrating that nomads frequently had sovereignty and control over their territories.

Part 2 went on to discuss the colonial period when nationality law was first developed in Europe and applied, to a limited extent, in the colonies. Nationality laws were developed in Europe during the feudal period. These laws almost universally privileged settlement, exclusive land use and exclusive, centralized systems of government. Colonial administrators gave little thought as to how European concepts like permanent residence would be applied to nomads.

Colonization brought a number of structural changes that were very negative for many nomads, of which nationality was one. During the colonial period, nomads were seen as naturally stateless. The colonial period marked a long period of decline for nomads, with colonial policy centralizing the state around urban centres and concentrating power with settled rulers, even as it mythologized and romanticized some nomads. The colonial period also divided many nomadic areas by borders, placing nomads at the periphery of colonies

[1539] Hirsch Ballin, 2014, 65.

and setting the stage for their political division at decolonization. Nomads were often administrated under separate systems from settled communities, and often placed under military rule. While this may have appeared to give nomads more independence, it set the stage for their supposed outsider status at decolonization.

The settlement of nomads became a major goal of many colonial administrators, fostering distrust and resentment among many nomadic communities and beginning a period, which continues to the present day, where registration and government services were linked to settlement and assimilation. Critically, the power to issue documents and determine status within a colony often vested with settled rulers, who became the governments of the post-colonial period. During colonization, nomads suffered a sharp decline in status.

At decolonization, the separation of colonies into individual states was accomplished quickly and nomads found themselves divided by hard borders, living in what would now become border zones. These contested border zones of foggy sovereignty would quickly become flash points between governments, with nomads caught in the middle.

Decolonization also brought a sudden acceleration of the roll out of nationality law in regions where nomads lived. The government in many of these new countries were the same urban elites who had been handed vast powers under the colonial system. Nomads were now placed under their jurisdiction, even in places like northern Mali, where many Tuareg rulers wished to be independent.

While transitional nationality laws to create the first body of nationals in post-colonial states appeared neutral on their face, in reality, vagueness as to the meaning of key terms like habitual residence and the recent nature of many borders allowed for rampant discrimination against nomads. The suddenness of this process of imposing European legal systems on the colonies cannot be overstated. Within a decade, previous systems of belonging, such as kinship and trade ties, were replaced by a system that focused exclusively on residence and place of birth. Documents and registration became critical. Importantly, nomads were often not granted the presumption of nationality, like other rural peoples, but rather the presumption of foreign status, or even, in the most severe cases, the presumption of statelessness.

Following this arbitrary and discriminatory transitional period, often lasting only a few years, *jus sanguinis* was instituted in some countries. This was done even though the borders of most post-colonial states were new and/or set by disputed, colonial-era treaties. In majority Muslim countries, this use of *jus sanguinis* made cultural and political sense, but following an arbitrary, discriminatory and incomplete transitional period, *jus sanguinis* actually functioned to lock many minority groups out of a nationality, including many nomads. Even in countries where the law provided for protections from strict *jus sanguinis*, these protections were not applied to nomads due to ongoing discrimination.

For the Tuareg, inclusive nationality laws and prior nationality under the French system should have prevent statelessness, but armed conflict and separatism has inhibited a solution. The case of the Tuareg showed that questions over nationality and statehood can sometimes devolve into armed conflict for nomads. The treatment of the Tuareg as enemies

of the state has meant that the Tuareg have not, in many cases, been able to take advantage of civil registration and legal systems.

In the decades following decolonization, states missed multiple opportunities to regularize the status of nomads, opting instead to pass ever stricter laws to exclude foreigners, a category of persons that came to include many nomads and former nomads. This occurred in tandem with the discovery of massive natural resources in "empty" nomad lands. While causation cannot be established, there is high correlation between nomads being moved off their lands and either statelessness or the granting of lesser nationality status.

One important observation of Part 2 is the fact that continued discrimination against nomads, including in the granting of nationality, coincided closely with their relocation off their lands. Many nomad lands have now been found to contain valuable natural resources which were seized for the exclusive use of the state. While more research is needed, the correlation between nomad statelessness, eminent domain over nomad lands, and nationality in exchange for the abandonment of nomad lands to the state, either for oil and mineral exploration or for national parks, should all warrant further investigation.

Instead of resolving nomad statelessness, many governments have simply re-branded nomads as foreigners. The difference between mobility as a way of life and immigration became increasingly blurred. Civil registration requirements have been tightened for nomads, even as states took steps to provide documents to their unregistered rural populations who are settled. Today, statelessness serves not as proof of the failure of state civil registration policies, but instead as proof that nomads are criminals and lawbreakers.

Finally, it is important to note that Part 2 uncovered a serious problem with governments using civil registration as a tool of assimilation. In working to end nomad statelessness, it is therefore important to acknowledge that nationality should always be a human right and a tool of empowerment, not a gift to be bestowed, or a weapon to coerce, assimilate or exclude problem groups. Nor is nationality a bargaining chip to be exchanged for settlement or the relinquishment of claims to land. The forced and coerced settlement of nomads described throughout the examples, a process that was often done in exchange for nationality and/or registration, points to the problems with focusing only on the fact of statelessness among nomads, without accepting the inherent biases baked into the system.

Part 2 identified some of the root causes of nomad statelessness: (1) the creation of nomad statelessness during colonization and the failure to resolve the statelessness of nomads at decolonization or, in the case of the Tuareg, the failure to roll-over colonial-era nationality, (2) the conversion of nomads into minorities living in border zones (3) discrimination against nomads in the granting of nationality, (4) a bias against nomads that is inherent in nationality laws due to an over-reliance on residence, proof of place of birth and documentation.

Part 2 also examined why nomad statelessness persists to the present day, including (5) the application of strict *jus sanguinis* in some countries that locked nomads into inter-generational statelessness, (6) the settlement and assimilation of nomads in order to seize their lands and (7) the link between nomad statelessness and armed conflict in some cases.

Part 3 will examine the extent to which international law provides a solution to nomad statelessness. Part 3 will not be an exhaustive expiration of every aspect of international law that may be relative to nomads, but will instead focus on several key areas. To choose these areas of international law, Part 3 will explore some of the international legal frameworks that appear most relevant to the causes of nomad statelessness identified above. It will also examine the international law frameworks currently being promoted by UNHCR in the global campaign to end statelessness.

These frameworks are: (1) the application of the right to a nationality during the succession of states, (2) the prohibitions in international law against discrimination against minorities in the granting of nationality, (3) the extent to which international law limits the use of *jus sanguinis* to protect against statelessness, and (4) the recognition of statelessness under the law and the laws to resolve it. In so doing, this dissertation acknowledges that there are other international frameworks that may be useful to resolving nomad statelessness, such as the refugee framework and the indigenous rights framework, which will not be discussed in detail here, but which might form the basis for future study.

Part 3: Nomad Statelessness and International Law

Introduction

> I do not think that the issue of statelessness can be addressed simply by throwing money at it, because it is self-inflicted, because it is man-made, because of deep-seated stereotyping, because of discrimination, because of deep-seated pigeon-holing of those individuals who belong and those who do not belong.[1540]

During the latter half of the 20th century, as the unregistered status of many Bedouin, Tuareg and Sama Dilaut slowly ossified into inter-generational statelessness, there were revolutionary developments in the international laws of nationality and the concept of nationality as a human right. Part 3 will analyse if international law, properly applied, provides a solution to the gaps identified in Part 2. To do so, Part 3 will look at a series of Pathways created by combining different facets of existing international law. It should be noted that this exploration is not exhaustive, as many potentially useful areas of international law are not included, such as the refugee protection regime or an exhaustive examination of indigenous rights. But it is hoped that this dissertation will serve as a jumping off point for further inquiry.

Gap (1) was the failure to resolve the statelessness of nomads at decolonization and, in the case of the Tuareg, the failure to "roll-over" colonial-era nationality where possible, creating inter-generational statelessness. It will be the subject of **Pathway I,** which looks at international law on the right to a nationality and the prohibitions against statelessness during the succession of states. It will also look at the closely related right to birth registration. As Part 2 showed, decolonization was a major cause of nomad statelessness in the 1960s and 1970s. Pathway I will examine to what extent, if any, international law can resolve cases of inter-generational statelessness among nomads that arose out of the decolonization process.

Successions of states continue to occur, often as a result of the breaking up of former colonies.[1541] Pathway I will also look at to what extent international law may help to prevent the creation of nomad statelessness during the succession of states. To do so, Pathway I will apply international standards as they exist today, as well as emerging normative developments, to the prevention of statelessness among nomads during state

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[1540] An interview with Benyam Dawit Mezmur, Chairperson of the United Nations Committee on the Rights of the Child, in Institute on Statelessness and Inclusion, 'The Worlds Stateless Children' 137.

[1541] For example, see the separation of South Sudan from Sudan in 2011.

succession. To do so, Pathway I will apply the modern international law framework to the gaps identified in Part 2.

Gap (2) is the conversion of nomads into minorities living in border zones, Gap (3) is discrimination against nomads from the colonial period to the modern day, and Gap (4) is a bias against nomads that is inherent in nationality laws due to an over-reliance on residence, proof of place of birth and documentation. **Pathway II** will explore the international laws prohibiting discrimination in both nationality law and in the registration of nationality to see if they prevent and resolve nomad statelessness.

Gap (5) the subsequent application of strict *jus sanguinis* in some countries that locked nomads into inter-generational statelessness. **Pathway III** will examine how inter-generational statelessness may be solved through the identification of stateless persons examining in particular how the implementation of strict *jus sanguinis* is qualified and limited by states in international law, particularly under the Statelessness Conventions. It will examine to what extent the identification of stateless persons may form part of a solution for nomads under international law.

Gap (6) is the usefulness of both nationality and statelessness to assimilate nomads and seize their lands, which may be providing an incentive to keep nomads stateless or register them as nationals only in exchange for their lands, and Gap (7) is the link between nomad statelessness and armed conflict in some cases. Part 3 will conclude by examining the extent to which international law protects nomads against assimilation and sedentarisation and addresses the link between armed conflict and statelessness. Part 3 does not take an exhaustive look at these issues. It instead represents a jumping off point, rather than a destination, in the search for solutions for nomad belonging.

One facet of nomad statelessness that was not explored in depth by Part 2 is the opinions and views of nomads themselves on nationality. Due to decades of bad experiences with coercive nationality and statelessness, but also bad experiences with the international community and even human rights discourse itself, there is an understandable lack of trust between many nomads and external actors, including at the regional and international levels.[1542] While this dissertation focuses mostly on the views, policies and solutions offered by governments and the international community, true solutions will only come from close cooperation with nomads themselves. As Ekuru Aukot, a member of the Ateker nation with Kenyan nationality, asks:

> What benefits accrue to me from having a nationality since I move through porous borders, de-linked from government machinery? When I come across government agents such as the police, they are more often than not the instruments of persecution. As a nomadic pastoralist, I owe my first

[1542] While this dissertation has focused on three examples, it could be expanded to include many more. See Bloom, Citizenship, 2018, 116, where she discusses the Haudenosaunee of North America. There are many others. It is hoped that this dissertation will be a jumping-off point for future research.

allegiance to the Ateker nation in all its manifestations across four countries.[1543]

[1543] E. Aukot, 'Am I stateless because I'm a nomad?' 32 *Forced Migration Review* 18 (2009).

The International Norms Relating to Nationality

> It is generally accepted today that nationality is an inherent right of all human beings.[1544]

Part 3 will begin in this section with a brief overview of the regulation of nationality in the international sphere and the development of the right to a nationality under international law. As discussed in the section on sources above, Part 3 will focus on treaty law, but it will also canvass the development of international law more generally, highlighting among others draft conventions and declarations, as well as case law, the dicta of courts, the findings of committees and the opinions of experts. For more on sources, see the section on sources in Part 1.

In the 19th and early 20th centuries, nationality was widely thought to be under the almost exclusive purview of sovereign states, part of state sovereignty, as discussed in Part 2. It was therefore largely exempted from the realm of international law, unless as stipulated by treaty. According to influential nineteenth and twentieth century positivist thinkers such as Austin, Westlake and Hart, nationality was a matter for states to decide owing to their absolute sovereignty over domestic matters within their territory. The influence of this conception of nationality in the international sphere can be seen throughout the development of international law of nationality in the early 20th century.[1545] Asked in 1923 whether the League of Nations was competent to settle a nationality dispute between France and England, the Permanent Court of International Justice stated authoritatively that nationality was solely within the competence of sovereign states.[1546]

The 20th century saw the emergence of a framework of norms limiting state sovereignty over nationality in certain cases. This process occurred in tandem with the development of nationality as an area of law and with the decolonization process, described above in Part 2. The Permanent Court of Justice and the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, addressed the issue of how to resolve conflicts between states over nationality.[1547] International and regional courts played an increasing role in

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[1544] Inter-American Court of Human Rights, Case of the Girls Jean and Bosico v. Dominican Republic, Judgment of September 8, 2005 para. 138, quoting Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Series A No. 4, para. 35 (hereinafter Jean and Bosico).

[1545] Edwards, 16. For more on nationality in international law, see de Groot and Vonk. See also Part 2, above.

[1546] Permanent Court of International Justice, Tunis and Morocco Nationality Decrees (1923).

[1547] League of Nations, Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930, League of Nations, Treaty Series, vol. 179, 89, No. 4137. The Convention was ratified by only 20 states and the League of Nations ceased operations in 1946. See also Brownlie, Principles, 383-394; Fransman, 16; Shaw, 2008, 258, 659; Brownlie, Nationality, 285-289; Batchelor, 1998, 156; Van Waas, Nationality, 37.

the regulation of nationality between states. In the early 20th century, states were limited in their right to impose nationality by tribunals such as the American-Mexican Mixed Claims Commission, the Permanent Court of International Justice and the International Court of Justice.[1548] The limits on imposing nationality, however, were mainly presented by these tribunals as necessary to preserve state sovereignty because nationality decisions by states often impacted other states. International law had a duty to prevent states from infringing on the sovereignty of one another.[1549]

The Codification of International Law Conference held at The Hague in 1930 under the auspices of the League of Nations, early in the decolonization process, marked an important attempt to regulate nationality in the international sphere.[1550] Importantly, the Convention in Article 1 reserved the rights of states to determine their nationals and, therefore, supported state sovereignty over nationality. It resulted in the Convention on Certain Questions Relating to the Conflict of Nationality Laws by the League of Nations which codified norms on the nationality of children and married women.[1551]

In 1955, the International Court of Justice handed down an opinion in the *Nottebohm* case on nationalities where the individual did not have an adequate "link," or who was not "closely connected," to the state.[1552] This case marked a departure from the absolute right

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[1548] See for example cases before the American-Mexican Mixed Claims Commission; Nottebohm, 1955 *I.C.J.* 4 (1955). Verzijl, 21, 23-24; Maury, 20.

[1549] Van Waas, Nationality, 35. See also Weis, 65; Lauterpacht, 6; Verzijl, 20; Maury, 20.

[1550] Hague Convention on Certain Questions relating to the Conflict of Nationality Laws (1930). See also Donner, 45; Van Waas, Nationality, 37; Weis, 26; Maury, 9-10, 74; Brownlie, Nationality, 387.

[1551] League of Nations, Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137. The Convention was ratified by only 20 states and the League of Nations ceased operations in 1946.

[1552] (N)ationality 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. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. International Court of Justice, Nottebohm Case (Liechtenstein v. Guatemala), Second Phase, 1955 I.C.J. 4 (6 April 1955) 23.

It is in no way argued, however, that the Court's definition of nationality is universally accepted or definitive, merely to point out that the court in Nottebohm also endorsed the concept of settlement in territory as the foundation of the nationality link. Nottebohm has been highly criticized by international scholars as vague, unsupported by state practice, and incomplete. See for example Slone, 2009, 1 (calling the language of Nottebohm "quixotic"). See also J. Mervyn, 'The Nottebohm Case' 5 *Int. and Comp. L. Q. 230* (1956) 239 (criticising the definition of nationality in Nottebohm, particularly as to its effects on jus sanguinis nationals living abroad); J. Kuntz, 'The Nottebohm Case (Second Phase)' 54 *Am. J. of Int. L.* 536 (1960) 538-539 (for a summary of the numerous articles criticising Nottebohm, concluding that the case is "controversial"). But see contra Brownlie, Principles, 416 and Brownlie, Nationality, 349-350 (arguing that the court's formulation relying on a "social fact of attachment" is merely the distillation of general principles already in existence,

of states to determine nationality, at least when it came to the obligations of other states to respect that nationality.[1553] Yet *Nottebohm* also clearly, if indirectly, emphasized the territorial nature of nationality, with its focus on a state's "population" and on links like birth, residence and descent from a national.[1554] As Part 2 explored, descent from a national was also an expression of the territorial conception of nationality because it granted nationality to the first couple generations derived from the national homeland.[1555] The emphasis on territorial "links" in *Nottebohm* show the continuing emphasis in international law on the feudal conception of nationality, where nationality is linked to settlement, as discussed above in Part 2. As a result, under international law, as under municipal law, "mere physical presence" over the short term is not enough to create a "link."[1556]

Once again, Part 2 briefly summarized the development of nationality in Europe and its application in the colonies, exploring how nationality arose out of the feudal system in Europe and was rooted in the concepts of territoriality and settlement on land.[1557] Throughout the Pathways explored below, echoes of feudalism and the territorial conception of nationality, see in *Nottebohm*, will continue to impact the international laws of nationality and the ways in which they may be applied to nomads.

Traditionally, as Part 2 explored, exclusive allegiance was also a founding principle of nationality, with dual nationality often regarded as big a problem as statelessness. With *Nottebohm,* territoriality and exclusivity were recognized by the Court. As a result, international law supports the territorial approach to nationality discussed at length in

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such as those used for functional nationality); Donner, 59; Van Waas, Nationality, 2008, 31-36, 42; K. Deaux 'Social Identity' *Encyclopedia of Women and Gender* Vols. 1 and 2 (2001).

[1553] De Groot and Vonk 42, 52. See also Handbook, 2014; L. Beckman, 'Is Residence Special? Democracy in the Age of Migration and Human Mobility' in L. Beckman and E. Erman (eds.) *Territories of Citizenship* (Palgrave 2012) 21-22; Shaw, 2008, 647-648; Brubaker, 35; Koessler, 61; Kymlicka, 174; Shachar, 13; Van Panhuys, 195; Courbe, 23; Maury, 28-29.

[1554] In his book on international law, Shaw defines nationality thus: "(s)ince every state possesses sovereignty and jurisdictional powers and since every state must consist of a collection of individual human beings, it is essential that a link between the two be legally established. That link connecting the state and the people it includes in its territory is provided by the concept of nationality." Shaw, 2008, 659. See also Stilz, 188; Shachar, 49-50; Weissbrodt, 26-27.

For more examples of the territorial concept of a "link" see Florence Strunsky Mergé vs. The Italian Republic, Case No. 3, Decision No. 55 and Mazzonis Case, Decision No. 56 (10 June 1955) XIV 249-251 before the Iran-US Claims Tribunal. See also A. Edwards, 'The meaning of nationality in international law in an era of human rights: procedural and substantive aspects' in A. Edwards and L. van Waas (eds.) *Nationality and Statelessness under International Law* (Cambridge UP 2014) 11.

[1555] See Part 2, State Building and the Exclusion of Nomads, Conclusion, Nomads and National Unity, above.

[1556] Verwhilgen, 62. See also Maury, 14.

[1557] Gilbert, Nomadic, 2014, 93.

Part 2. This approach, however, has more recently been tempered by a universal right to a nationality for everyone, including nomads.

The Right to a Nationality Today

Contemporaneously with the development of nationality as one of the most important features of modern life, international law today acknowledges the critical role nationality plays in the life of the individual as part of an emerging body of human rights law.[1558] The right to a nationality today finds support in a large number of international treaties, in the decisions of international tribunals and in universal principles of law.[1559]The right to a nationality limits state sovereignty in critical ways, placing a burden on the state system as a whole to eliminate statelessness. Of foremost importance to the development of a right to a nationality for individuals was the, non-binding, Universal Declaration of Human Rights (UDHR), which guarantees the right to a nationality in Article 15, stating; "everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."[1560] It is important to note that this right is presented as absolute. It is not qualified by reference to territory, settlement, residence, birth or other factors. Yet, it also does not establish to what extent and under what circumstances particular states have a duty to grant nationality.

The International Covenant on Civil and Political Rights (ICCPR), which is binding on States Parties[1561], mandates that; "every child has the right to acquire a nationality" without qualification. Other international treaties that support the right to a nationality include the Convention on the Rights of the Child,[1562] the Convention on the Elimination of All Forms of

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[1558] The International Law Commission has noted the role played by the evolution of human rights law in establishing the right to a nationality. International Law Commission, 'Draft articles on nationality of natural persons in relation to the succession of States with commentaries, 1999' Report of the International Law Commission on the work of its fifty-first session, 24 (hereinafter Draft Articles). See also Jault-Seseke, 43; Edwards, 38-41.

[1559] For a summary, see the Handbook, 2014, 9. See also Pilgram, 2.

[1560] UN General Assembly, Universal Declaration of Human Rights, 217 (III) A (Paris 1948) Art. 15. See also Lauterpacht, 412; Donner, 191; Van Waas, Nationality, 58.

[1561] International Covenant on Civil and Political Rights, New York, 16 December 1966, 23 March 1976, No. 14668. The Covenant has 173 states parties. For a list of signatories and reservations, see the United Nations Treaty Collection website at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

[1562] Convention on the Rights of the Child, New York, 20 November 1989, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 4949(1), 1577 United Nations Treaty Series 3, with 196 states parties (hereinafter Convention on the Rights of the Child).

Racial Discrimination.[1563] The Declaration on the Rights of Indigenous Peoples[1564] also supports the right to a nationality for indigenous peoples, though it lacks the binding nature of the treaties listed above.

Regional treaties establishing the right to a nationality, including those relevant to the right to a nationality in the Gulf region and the Sahel, include the Arab Charter on Human Rights of 2004,[1565] Article 29. The right to a nationality finds further support in the African Charter on the Rights and Welfare of the Child,[1566] Article 6, and the Covenant on the Rights of the Child in Islam, Article 7.[1567] The African Charter on Human and Peoples' Rights[1568] guarantees the right to freedom of movement and to enter and exit one's country in Article 12, rights adjacent to nationality.

Other regional treaties and declarations include the American Convention on Human Rights,[1569] Article 20, and the American Declaration of the Rights and Duties of Man of 1948,[1570] Article 19. In Europe, regional treaties include the Strasbourg Convention of 1963 on the Reduction of Cases of Multiple Nationality,[1571] the 1973 Convention to Reduce the Number of Cases of Statelessness in Europe, and the European Convention on Nationality of 1997.[1572] Treaty bodies and courts have opined upon the meaning of international and

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[1563] International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, United Nations, Treaty Series, vol. 660, 195, with 182 states parties.

[1564] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 13 September 2007. Adopted by UN General Assembly by 144 states.

[1565] League of Arab States, Arab Charter on Human Rights, 15 September 1994, with 22 states parties.

[1566] African Charter on the Rights and Welfare of the Child (1990) (Adopted by the African Member States of the Organization of African Unity, 11 July 1990), adopted by 48 member states.

[1567] Organization of the Islamic Conference (OIC), Covenant on the Rights of the Child in Islam, June 2005, OIC/9-IGGE/HRI/2004/Rep.

[1568] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), with 54 states parties.

[1569] American Convention on Human Rights "Pact of San José, Costa Rica", 18 July 1978, UNTS 1144, 123, with 25 states parties.

[1570] American Declaration of the Rights and Duties of Man (1948) (Adopted at the Ninth International Conference of American States, Bogota, Colombia, 2 May 1948)

[1571] Council of Europe, European Treaty Series-No. 43, Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, Strasbourg, 6.V.1963.

[1572] Council of Europe, European Convention on Nationality, ETS No.166, 01/03/2000 with 10 ratifications.

regional treaties, such as by stating that states have a general duty not to adopt laws that create statelessness,[1573] or by prohibiting the discriminatory withdrawal of nationality.[1574]

The Statelessness Conventions, binding on states parties,[1575] also discussed above in the Introduction, support the right to a nationality, and provide a pathway to a solution for the problems of many stateless people and a framework to prevent statelessness. The Statelessness Conventions may therefore be seen as adding more specificity to the right to a nationality by mandating the conditions under which nationality is established in some circumstances and by creating a duty on the part of states to identify, prevent and resolve statelessness.[1576]

Soft law has also played an important role in guiding state practice. Procedural guidance also plays a role in guiding state practice in ensuring the right to a nationality. Perhaps the most important guidance on statelessness to come out in recent years is the UNHCR Handbook on the Protection of Stateless Persons, which provides guidance for identifying stateless persons in a migratory situation.[1577] It marks a vital step in bringing rigor to the identification of statelessness as a formal category under international law. The lack of a rigorous identification process can impede solutions where identification is critical.

It should be noted, however, that there is no international tribunal tasked with adjudicating cases of statelessness, as would have been created by Article 11 of the 1954 Draft Convention on the Elimination of Future Statelessness. As a result, identification of statelessness falls to national governments, with guidance from UNHCR. The Handbook also provides important guidance and protections for stateless migrants. It asserts, for example, that unlawful presence in a state should not be grounds for states to deny access to a statelessness determination.[1578]

Therefore, while the right to a nationality is commonly recognized as a universal right, there remains a lack of specificity as to the content of this right. As the Pathways below will

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[1573] Jean and Bosico. The Inter-American Court stated that; "(s)tates have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons."

[1574] Human Rights Council, Twenty-fifth session, 'Human rights and arbitrary deprivation of nationality' Report of the Secretary-General (19 December 2013.)

[1575] For a list of signatories and reservations, see the United Nations Treaty Collection website at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=V-4&chapter=5&clang=_en for the Convention on the Reduction of Statelessness with 75 states parties and https://treaties.un.org/pages/ViewDetailsII.aspx?src=IND&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en for the Convention Relating to the Status of Stateless Persons with 94 states parties.

[1576] 1961 Convention.

[1577] Handbook, 2014, 17.

[1578] Handbook, 2014, 28.

also show, much soft law has failed to be adopted by states. While international law mandates the prevention of statelessness,[1579] as Van Waas points out, the provisions in the Statelessness Conventions stop "short of prescribing obligations that will decisively eliminate statelessness in all circumstances."[1580] For example, de-naturalization was widely acknowledged to be a threat to the rights of neighbouring states in the wake of the Second World War, but though limited, it has not, even today, been completely prohibited.[1581] There is also no specific prohibition on a government of one state imposing the nationality of another state on a minority group in order to resolve statelessness, as the government of Kuwait is attempting to do. Such a "solution" would arguably violate human rights law,[1582] but international human rights law lacks specificity in this and several other crucial areas. The lack of specificity in the right to a nationality for nomads will be highlighted at length in the Pathways, below.

The Right to Registration at Birth

The previous section provided an overview of the right to a nationality in international law. There is another area of laws and procedures that is crucial to preventing statelessness, that of civil registration.

> Civil registration is defined as the continuous, permanent, compulsory and universal recording of the occurrence and characteristics of vital events pertaining to the population, as provided through decree or regulation in accordance with the legal requirements in each country.[1583]

Civil registration provides evidence of nationality, for example, by proving birth within the territory of the state, descent from a national, marriage to a national, habitual residence or other evidence required for nationality. Other forms of registration, such as documents like land deeds, leases, bank records and other documents may also be used as evidence towards meeting the criteria for nationality in some cases, particularly by showing residence in the state.

[1579] Statelessness Conventions. See also Maury, 20; Brownlie, Relations, 386.

[1580] Van Waas, Statelessness Conventions, 75-76. She goes on to point out that such a provision was suggested by the Draft Convention on the Elimination of Future Statelessness, but was not adopted in the existing Conventions.

[1581] Weis, 32, 45. See also Verzijl, 19; Maury, 20. Arendt discussed the problem at length in *The Origins of Totalitarianism*, first published in 1951. Arendt, 1976 ,278-279. See also Fripp, 2016, 12; U.N. Ad Hoc Committee on Refugees and Stateless Persons, 'A Study of Statelessness' United Nations, August 1949, Lake Success - New York, 1 August 1949, E/1112; E/1112/Add.1; Lauterpacht, 384; European Court of Human Rights, K2 v UK, First Section Decision, 42381/13 (2017) (finding that it was not a violation of a defendant's human rights to strip UK nationality from a defendant that had another nationality.)

[1582] Donner, 141.

[1583] Department of Economic and Social Affairs, Statistics Division, Statistical Papers, 'Principles and Recommendations for a Vital Statistics System, Revision 3' Series M No. 19/Rev.3 (2014) 65.

Birth registration is now required by states in international law. The right to birth registration is guaranteed in Article 24, paragraphs 2 and 3 of the International Covenant on Civil and Political Rights. The Convention on the Rights of the Child and the Committee on the Rights of the Child also mandate birth registration.[1584] Under current international law, however, the right to civil registration is limited to registration at birth.[1585] The non-binding Goal 16 of the Sustainable Development Goals is to "provide legal identity for all, including birth registration" by 2030,[1586] but international law has not expanded on the types of civil documentation states are required to provide.

The International Commitments of Kuwait, Mali and Malaysia

The examples of Kuwait, Mali and Malaysia were selected to provide insights into the statelessness of nomads more generally, therefore Part 3 will not limit itself to those international and regional treaties ratified by the three countries used as examples. The purpose of this section is instead to explore if international law, writ large, can provide solutions to common causes of nomad statelessness. Nevertheless, ratification of key treaties by particular states is relevant to show the various ways in which international law has, or has not, been adopted and implemented by states in dealing with nomads and the extent to which it has already been used to provide solutions. This section will list the key international treaties ratified by the countries used as examples in this dissertation.

Kuwait has ratified several key international treaties that are helpful to ending statelessness, though it has not ratified the Statelessness Conventions.[1587] Kuwait is a party to the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.[1588] Yet, as Part 2 showed, inter-generational statelessness persists in

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[1584] "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless." Convention on the Rights of the Child, Art. 7.

International Covenant on Civil and Political Rights, Art. 24, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49. See also Office of the U.N. High Commissioner for Human Rights, 'Birth registration and the right of everyone to recognition everywhere as a person before the law: Report of the Office of the United Nations High Commissioner for Human Rights' Human Rights Council Twenty-seventh session, A/HRC/27/22 (17 June 2014).

[1585] Fransman, 43. Though see the Convention on the Issue of a Certificate of Nationality, ICCS Convention No. 28 (1999), which has been signed by a handful of European countries.

[1586] See the U.N. Sustainable Development Goals website at http://www.un.org/sustainabledevelopment/peace-justice/.

[1587] See the Office of the High Commissioner for Human Rights, 'Ratification Status for Kuwait' at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID92&LangĒN. See also Human Rights Watch 'Prisoners of the Past: Kuwaiti Bidun and the Burden of Statelessness' (June 13, 2011).

[1588] See UNHCR, 'States Party to the Statelessness Conventions as of 1st October 2017' map at http://www.refworld.org/pdfid/54576a754.pdf. See also United Nations Human Rights Office of the High

Kuwait. Rather, documentation for stateless children in Kuwait has become simply another tool in the continuation of that statelessness.

Mali has ratified the ICCPR and the ICESCR, the Convention on the Rights of the Child, and many regional human rights treaties, including the African Charter on the Rights and Welfare of the Child in Africa.[1589] It acceded to the Statelessness Conventions in 2016.[1590] Mali has therefore committed itself to ending statelessness.

Mali is also a member of ECOWAS, which has issued the non-binding Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness.[1591] Of particular note, the Abidjan Declaration states that ending statelessness is key to peace and security in the region, recognition of the role statelessness plays in fuelling conflicts like the one occurring in northern Mali.[1592] The agreement has begun being implemented by states and it will be interesting to see what effect, if any, it has on the Mali conflict and the documentation problems of the Tuareg.[1593]

But so far Malian laws and adherence to international conventions has not resulted in inclusion, enfranchisement, or identity documents for the Tuareg. "Although formal legal nationality had been assured in most countries of sub-Saharan Africa at independence, meaningful nationality has remained elusive for individuals who are members of particular groups."[1594] The question is, why? Like many nomads in Africa, problems with registration, failure to register, and stringent registration rules have left many Tuareg without nationality documents to prove their nationality. But the situation in Mali goes beyond poorly implemented laws and neglect. The Tuareg have been the victims of a deliberate campaign of violence, forced removal, coercive settlement and disenfranchisement as a perceived security risk to a level that arguably raises to the level of persecution. Today, northern Mali resembles a failed state. As Part 2 showed, this conflict is deeply related the question of Tuareg belonging, where their nationality is disputed. Though many rural

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Commissioner at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=KWT&Lang=EN for the reporting status of Kuwait on various treaties.

[1589] Information on Mali's treaty status can be found at Claiming Human Rights, Guide to International Procedures Available in Cases of Human Rights Violations in Africa at http://www.claiminghumanrights.org/mali.html. See also African Commission para 82; UNHCR, 'Global Focus, Mali, Strategy for Each PPG' (2016) at http://reporting.unhcr.org/node/10064.

[1590] UNHCR, 'Statelessness in West Africa Newsletter #9 (April – June 2016)' at https://data2.unhcr.org/ar/documents/download/53849

[1591] Regional Treaties, Agreements, Declarations and Related, Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness, (25 February 2015) (hereinafter Abidjan Declaration).

[1592] Abidjan Declaration, 3.

[1593] Manby, Citizenship, 2018.

[1594] L. Smith, 21.

people in Africa lack documents, the Tuareg are facing a crisis of legitimacy and membership that is intimately related to the question of Tuareg separatism, a larger political question which has overshadowed the rights of ordinary Tuareg to a nationality. Yet it is clear that providing a nationality for all Tuareg in the Sahara region will be a major part of any sustainable peace agreement.

Malaysia is not a party to the Statelessness Conventions, though it is a party to the Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[1595] But while Malaysia is not a party to the 1961 Convention on the Reduction of Statelessness, nevertheless, the Constitution of Malaysia provides for the nationality of otherwise stateless persons in the Second Schedule.[1596] Malaysia's federal law also contains strong protections against statelessness by granting a nationality to otherwise stateless children born in Malaysia.[1597] Yet, as Part 2 demonstrated, establishing before the courts that children in Malaysia are being born stateless has not, so far, lead to real solutions.

[1595] See the website for the Office of the High Commissioner for Human Rights, 'Ratification Status for Malaysia' at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID92&LangĒN.

[1596] Malaysian Constitution, Second Schedule, Part 2 (1957) (c) states that nationals are, "every person born within the Federation after September 1962, of whose parents one at least was at the time of the birth either a citizen or permanently resident in the Federation, or who was not born a citizen of any other country..." and Part 2, (e) states that nationals are those born after Malaysia day who are, "...born within the Federation who (are) not born a citizen of any country otherwise than by virtue of this paragraph." Sinnadurai, 321, 332.

[1597] Constitution of Malaysia (1957) 2nd Schedule, art. 1(c).

Pathway I: The Right to a Nationality During the Succession of States

> Whether the creation of a new State on the territory of another results in statelessness of the nationals of the previous State there resident, or an automatic change in nationality, or in retention of the previous nationality until provision is otherwise made by treaty or the law of the new state, is a matter of some doubt.[1598]

Pathway I will look at the right to a nationality during the succession of states. As Part 2 showed, decolonization was a major cause of statelessness for some nomads. There are populations of nomads who have been stateless for at least fifty or sixty years. Decolonization is also an ongoing process that will continue to affect nomads in the future.

As a result, Pathway I will examine to what extent modern international law offers solutions to prevent and resolve statelessness as a result of a succession of states. To do so, it will explore proposed developments in international law to see if statelessness among the Bedouin, the Tuareg and the Sama Dilaut could have been prevented at the time, were these developments to be adopted. It will also explore the extent to which international law may offer solutions to intergenerational statelessness as a result of past decolonization.

In the examples explored above, some nomads entered the decolonization period with a nationality under the colonial system. The Tuareg were granted a nationality under French law prior to decolonization and some efforts were made towards civil registration, but the process remained incomplete at the time of decolonization. Some Sama Dilaut received a nationality under British law based on residence and *jus soli* immediately preceding decolonization, but this law appears to have existed mostly on paper. In Kuwait, the Emir also passed a law granting nationality based on residence, but mass civil registration did not follow until later. As well, under British law, BPP status was available to some, though it was not really a nationality status.

Despite often qualifying for a nationality under colonial-era laws, many nomads entered the decolonization period without any civil documents or with documents that did not establish nationality, but may have established residence. Many nomads had had bad experiences with colonial registration programs that made them mis-trustful of post-colonial registration. As well, the power to issue documents had now vested with settled and urban rulers, meaning that many nomads could not determine their own nationality.

Transitional laws passed by the new states establishing the first body of nationals were usually based primarily on birth and residence within the newly established borders of the state. [1599] Birth created a clear category upon which to grant nationality, though

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[1598] Crawford, 52-53.

[1599] In supporting the continuation of existing borders, the United Nations and international community were following the doctrine of *uti possidetis,* a principle of international law that cements existing borders during

documenting place of birth was not a priority for many nomads. The concept of habitual residence, however, was vague, discriminatory and/or and undefined when applied to nomads, particularly in what were now border areas. For laws based both on birth and habitual residence, many nomads continued to have no documents to prove their eligibility.

Rather than setting up a committee or regional process to regulate the creation and transfer of nationality to ensure that everyone received or retained one during decolonization, nationality was left to the individual states. The United Nations and the international community did not pay enough attention to the risk of statelessness during decolonization for marginalized groups like nomads. While nationality as a question of international relations was taken up by the League of Nations, and later by the United Nations, for Mandate and Trust territories, neither the League of Nations, nor the United Nations, were involved in determining the status of persons in other colonial entities such as Protectorates and Protected States.[1600] When there was international involvement in the decolonization process and the establishment of nationality, such as in Malaysia with the Reid Commission, it was usually from the former colonial entity, in this case, the British Commonwealth. As Part 2 explored, while aware of the problem of statelessness, most colonial administrations were primarily concerned with shoring up borders and centralized governments.

Some of these problems could have been resolved by regional or bilateral treaties, but, as Weis points out, few cases of decolonization were governed by treaty.[1601] While the International Court of Justice ruled on the nationality status of persons in Mandate territories like South-West Africa, it was not asked to decide cases of disputed nationality between sovereign states in most post-colonial states.[1602] Today, there is some evidence the Philippines, Malaysia and Indonesia may embark on such a process, including a recent MOU signed by Malaysia and Indonesia, but nothing like this regional process was done at the time. As a result, gaps were perhaps inevitable and there was a real danger of discrimination against minorities and other vulnerable groups.

As Part 2 discussed, the nationality laws of post-colonial states were often drafted with the help of international experts. Importantly, nationality was often treated during the decolonization process as an aspect of state sovereignty for the newly emerging states, not as an individual right. As Part 2 showed, the focus of the decolonization process was much more on stabilizing borders and regulating relations between the new states than on establishing a nationality for all or registering the population.[1603] In the 1960s,

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independence or state succession and discourages fuzzy or contested sovereignty. Shaw, Boundaries, 1997 478.

[1600] For a summary of nationality in the Mandate and Trust territories, see Weis, 20-22.

[1601] Weis, 153. The countries he cites are Algeria, Burma, Cyprus, and Indonesia.

[1602] See International Court of Justice, International Status of South-West Africa, I.C.J. Reports (1950) quoted in Weis, 22.

[1603] For an overview of the decolonization process, see Crawford 384-388.

international law was also not particularly helpful in guiding states to enact universal registration policies.[1604] International law during decolonization was greatly concerned with self-determination for former colonies, but not necessarily with nationality as an individual right. For example, Article 1 of both the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and Cultural Rights focused on the right to self-determination, not the right to a nationality.[1605]

Yet, despite the lack of attention paid to the problem of statelessness as a result of decolonization, the chances of statelessness and the problems with undocumented persons during decolonization were known at the time. In 1949, the United Nations commissioned a study on stateless refugees and displaced stateless persons.[1606] The study, however, took little note of stateless persons in their own countries, despite the fact that the risk of statelessness occurring from decolonization was noted at the time by experts such as Hannah Arendt.[1607] One notable exception was the adoption, in 1954, of the Convention Relating to the Status of Stateless People, which mandated in Art. 10 that treaties of state succession contain protections against statelessness.

For state succession without a treaty, however, the problem of statelessness did not receive enough attention. Nationality could not automatically transfer where there was no predecessor State, as was the case during decolonization in many places.[1608] As Weis pointed out in 1979, towards the end of the decolonization period, "we cannot assume that the nationality of the extinct State is *ipso facto* replaced by that of the successor State."[1609]

Pathway I will examine the right to a nationality during state succession. As noted above, the right to a nationality has developed extensively since the decolonization period. Could statelessness have been prevented in the examples by the application of modern international laws, norms and principles? Could international law today provide a retroactive solution to nomad statelessness that resulted from the decolonization process?

[1604] For an overview of international law relating to proof of nationality at the time of decolonization and in the decades following, see Weis, 204-236.

[1605] U.N. General Assembly, International Covenant on Economic, Social and Cultural Rights 16 December 1966, United Nations, Treaty Series, vol. 993, 3, with 171 states parties

[1606] U.N. Ad Hoc Committee on Refugees and Stateless Persons, 'A Study of Statelessness' United Nations, August 1949, Lake Success - New York, 1 August 1949, E/1112; E/1112/Add.1.

[1607] Arendt, 1976, 297. As Arendt had pointed out, speaking of Europe, "(s)ince the Peace Treaties of 1919 and 1920 the refugees and the stateless have attached themselves like a curse to all the newly established states on earth which were created in the image of the state." Arendt, 1976, 290. Arendt called the statelessness created in Europe during WWII "the newest mass phenomenon in contemporary history." Arendt, 1976, 277. It should be noted, however, that Arendt did not distinguish between refugees and stateless persons. Nevertheless, her point is compelling.

[1608] Weis, 136.

[1609] Weis, 137.

The Norms of State Succession

Today, there is a clearly established right to a nationality during state succession.[1610] This right is supported by a number of international and regional laws that are binding on states, as well as draft treaties and by the opinions of experts.[1611] This dissertation will look closely at proposed developments in the law, to see if changes to the law could have prevented the statelessness of nomads and provide a pathway to a solution for existing cases of statelessness that resulted from state succession.

Yet it is important to note that the international law of state succession was already quite developed by the time of decolonization, though it had not yet been codified. The breakup of empires had been common in Europe in the 19th and early 20th centuries.[1612] Prior to decolonization, there had also been cases of transfers of territory within the colonial system.[1613]

The general rule establishing nationality during state succession has long been that nationality follows sovereignty.[1614] Under this general rule, which was widely recognized at the time of decolonization as well as today, nomads who held nationality under the colonial system should have automatically received a nationality in the new state. Prior to decolonization, international law cases relied heavily on *birth* and *habitual residence* to determining nationality in cases where nationality was unclear or contested.[1615]

Beginning at decolonization, international law has fleshed out the basic rules for the roll-over of nationality during state succession. Relevant laws include the 1961 Convention on the Reduction of Statelessness, non-binding instruments like the Venice Declaration on the Consequences of State Succession for the Nationality of Natural Persons of 1996 and the Draft articles on nationality of natural persons in relation to the succession of States of 1999.[1616] Regional laws include the Convention on the Avoidance of Statelessness in

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[1610] See generally Van Waas, Nationality, Chapter VI.

[1611] For a summary of the opinions of experts writing during the post-colonial period, see generally Weis, published in 1979. See also M. Sanderson, 'Statelessness and Mass Expulsion in Sudan: A Reassessment of the International Law' 12 *Nw. J. Int'l Hum. Rts.* 74 (2014). For a summary of more recent developments in the norms of state succession and dual nationality, see L. J. van der Baaren, *Emigrant nationality. A comparative analysis of the toleration of dual nationality from an emigrant perspective* (PhD Maastricht 2020).

[1612] Van Waas, Nationality, 122.

[1613] Weis explores several colonial examples of transfers of colonial sovereignty during the late 1800s (Burma and southern Africa). Weis, 139.

[1614] Brownlie, Principles, 656. Van Waas says this reflects "the feudal concept of territorial sovereignty where 'ownership' of population and property follows ownership of the land." Van Waas, Nationality, 126 .

[1615] See for example, Agapios v. Sanitary and Quarantine Council of Egypt, Gazette des Tribunaux Mixtes (1920) cited in Weis, 141.

[1616] International Law Commission, Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries, Yearbook of the International Law Commission, 1999, vol. II, Part

Relation to State Succession by the Council of Europe of 2009[1617], and regional draft laws include the Draft Protocol to the African Charter on Human and Peoples' Rights on the specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa.[1618]

International law supports the regulation of nationality and the prevention of statelessness by succession treaties. Article 10 of the 1961 Convention placed an affirmative duty on states to prevent statelessness in treaty provisions. Draft laws lend further support, including Article 20 of the Draft Protocol to the African Charter on Human and Peoples Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa also addresses succession by treaty, as does the Venice Declaration on the Consequences of State Succession for the Nationality of Natural Persons of 1996[1619] also mandates that states respect human rights and avoid statelessness.

But what about succession in the absence of a treaty, a common occurrence during decolonization? International law has created a duty for stateless to avoid creating statelessness at succession, even in the absence of a treaty. Critically, however, these rules applied only to the nationals of the predecessor state. The 1961 Convention placed a duty on states in the absence of a treaty to confer nationality on those who would otherwise be stateless as a result of succession.

In 1999, the International Law Commission drafted a set of specific articles on nationality during state succession for persons with a nationality in the predecessor state regardless of the existence of a treaty.[1620] While non-binding on states, it is worth examining whether these articles would have prevented nomad statelessness had they been applied at the

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Two. The Draft articles were "adopted by the International Law Commission at its fifty-first session in 1999. At its fifty-fifth session, in 2000, the General Assembly took note of the Articles... By resolution 66/92 in 2011, the Assembly decided that, upon the request of any State, it will revert to the question of nationality of natural persons in relation to the succession of States at an appropriate time, in the light of the development of State practice in these matters." Václav Mikulka, 'Introductory note, Articles on Nationality of Natural Persons in Relation to the Succession of States 1999,' Audiovisual Library of International Law (2020) at https://legal.un.org/avl/ha/annprss/annprss.html.

[1617] Council of Europe Convention on the avoidance of statelessness in relation to State succession, CETS No. 200, Strasbourg, 19/05/2006, with 7 states parties.

[1618] Draft Protocol to the African Charter on Human and Peoples' Rights on the specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa (Draft September 2015) at https://www.achpr.org/public/Document/file/English/draft_citizenship_protocol_en_sept2015_achpr.pdf The draft protocol remains under consideration. https://au.int/en/newsevents/20180507/member-states-experts-meeting-draft-protocol-african-charter-human-and-peoples. See also Manby, Citizenship, 2018.

[1619] Declaration on the consequences of state succession for the nationality of natural persons, CDL-NAT (1996)007rev-e, Adopted at its 28th Plenary Meeting, Venice, 13-14 September.

[1620] International Law Commission, Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries, Yearbook of the International Law Commission, 1999, vol. II, Part Two.

time, or if they provide for a solution to intergenerational statelessness today. Article 1 reaffirms the right to a nationality in one of the successor states, but only for persons who had the nationality of the processor state. Article 2 states that:

> 'Person concerned' means every individual who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may be affected by such succession.

The Commentaries to Article 2 specify that:

> Accordingly, the term 'person concerned' includes neither persons who are only nationals of third States nor stateless persons who were present on the territory of any of the 'States concerned.'
>
> (W)hen there is more than one successor State, not everyone has the obligation to attribute its nationality to every single person concerned. Similarly, the predecessor State does not have the obligation to retain all persons concerned as its nationals. Otherwise, the result would be, first, dual or multiple nationality on a large scale and, second, the creation, also on a large scale, of legal bonds of nationality without appropriate connection.
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> Article 4 does not therefore encompass persons resident in the territory of the successor State who had been stateless under the regime of the predecessor State. The successor State has certainly a discretionary power to attribute its nationality to such stateless persons. But this question is outside the scope of the present draft articles.

The Commentaries then cite to O'Connell where he says, "[t]here is an 'inchoate right' on the part of any State to naturalize stateless persons resident upon its territory." In other words, providing a nationality to stateless persons in their territory is not obligatory for states. Article 2 of the Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession of 2006 and Article 20 of the Draft Protocol to the African Charter, discussed above, likewise limit the right to a nationality in a successor state to persons who had the nationality of the predecessor state.

How must states ensure that no one becomes stateless as a result of state succession? Article 4 of the Draft Articles places an express duty on states to take "appropriate measures" to prevent statelessness during the succession of states for persons with a nationality in the processor state.[1621] Article 19 reinforces the fact that states are not required to grant nationality to persons with no qualifying "link" to their territory, unless the person would become stateless.

[1621] The Commentaries to the Draft Articles cite to the 'Report of the experts of the Council of Europe on the citizenship laws of the Czech Republic and Slovakia and their implementation' (Council of Europe, Strasbourg, 2 April 1996), document DIR/JUR(96)4), para. 54 stating that "there is an international obligation for the two States (involved in a succession) to avoid statelessness."

Article 3 of the Council of Europe Convention also employs the language "appropriate measures" to prevent statelessness for persons with a nationality in the predecessor state. The Committee on the Elimination of All Forms of Racial Discrimination, in General Recommendation 30, has advised states to "(r)egularize the status of former citizens of predecessor States who now reside within the jurisdiction of the State party."[1622]

For persons who were nationals of the predecessor state, soft law supports the use of birth and habitual residence as the "links" used to establish nationality in the new state. The Draft Articles support the automatic transfer of nationality where possible.[1623] They go on to establish in Art. 5 a presumption of nationality based on habitual residence during any transitional period that may elapse prior to the enactment of nationality laws. According to the Commentaries, this presumption is intended to establish nationality during the transitional period if there is a time lag between succession and the passage of a nationality law. It creates a rebuttable presumption of nationality. The use of birth, habitual residence, or "another appropriate connection" are also evoked for cases of state dissolution and state dismemberment in Articles 22 and 24.

For the nationals of the processor state who are habitually resident outside the successor state, Article 8 mandates that successor states grant nationality to such non-residents only to avoid statelessness. The Commentaries to the Draft Articles support the use of birth (if the person would otherwise be stateless) in Article 11 and former habitual residents who were forced to leave as a result of events arising out of the succession, in Article 14 as the "links" upon which a bond of nationality should be founded.[1624] For children of nationals of the predecessor state born after succession, Article 13 mandates that they be granted nationality in the state in which they were born.

Regional conventions also support the use of birth and habitual residence. The Council of Europe Convention supports the right of automatic transfer of nationality during state succession and codifies birth and habitual residence as the "links" to establish nationality for persons holding the nationality of the predecessor state.[1625] In Art. 6, it also creates a duty on the part of the predecessor state not to withdraw nationality if the result would be statelessness and in Art. 9, it supports the facilitation of nationality for habitual residents who are stateless as a result of the succession. The Draft Protocol to the African Charter

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[1622] Committee on the Elimination of All Forms of Racial Discrimination, 64th Session, General Recommendation 30, Discrimination Against Non-Citizens, CERD/C/64/Misc.11/rev.3 (23 February-12 March 2004).

[1623] See generally the Draft Articles. See also Donner, 51; Maury, 11.

[1624] Articles 5, 11, 14. "(P)ersons may have links to two or even more states involved in a succession. In this event, a person may end up with a nationality in two or more states. Under no circumstances, however, shall a person be denied the right to acquire at least one such nationality..." Commentaries, Commentary (5), 25. See the commentary to Article 1 providing for the right to a nationality, the commentary to Articles 4 and 5 on the prevention of statelessness, the commentary to Article 19 on page 40 and the commentary to Article 20, which particular concerns nationality during decolonization. See also the Draft Articles, 28, 40.

[1625] Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession (2009).

creates a presumption of nationality for the holders of nationality in the predecessor state based on habitual residence in the successor state.

The Venice Declaration, another non-binding instrument, also says that states must prevent statelessness as a result of succession for the nationals of the predecessor state. Specifically, it mandates that successor states grant nationality to permanent residents of the territory and persons *originating* in the territory and resident outside the territory who would otherwise become stateless as the result of the succession.[1626] It is not clear what is meant by the term "originating,"[1627] but it is interesting to ask if this term might be defined in a way more friendly to the practice of nomadism, as a replacement for habitual residence. Might "originating" instead refer to pre-colonial histories and modes of belonging?

The review of soft law and regional instruments above demonstrates that there is support for the extension of nationality to those who had a nationality in the predecessor state and would be otherwise left stateless, both when the process is governed by treaty and when it is not,[1628] as well as for birth and habitual residence as the two main "links" creating a duty on the part of successor states to grant a nationality to the nationals of the predecessor state.

While the term "reasonable measures" to ensure that statelessness is not created as a result of state succession appears frequently in these instruments, there is less guidance on what "reasonable measures" entail, even in soft law. Under the Draft Articles, the term "reasonable measures" is not defined.[1629] For example, the General Recommendation 30 of the Committee on the Elimination of All Forms of Racial Discrimination mandate states to "(r)egularize the status of former citizens of predecessor States who now reside within the jurisdiction of the State party." The Draft Protocol to the African Charter, however, creates a duty on the part of states to facilitate naturalization for persons with the nationality of the predecessor state. As well, Articles 15 and 16 of the 1999 Draft Articles and Article 4 of the Draft Protocol to the African Charter also mandate that the process of transferring nationality during a succession of states be accomplished without discrimination. Taking into account soft law sources, therefore, facilitated naturalization and non-discrimination may therefore be regarded as two requirements of "reasonable measures."

The duty of states to establish the nationality of those who are stateless or whose nationality is unestablished or unclear in the predecessor state, however, finds little support even in soft law. For persons who were stateless or of unclear nationality at

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[1626] Venice Declaration on the Consequences of State Succession for the Nationality of Natural Persons (14 September 1996) Article 10.

[1627] Explanatory Report on the Declaration on the Consequences of State Succession for the Nationality of Natural Persons, adopted at its 28th Plenary Meeting, Venice, 13-14 September 1996.

[1628] Batchelor, Statelessness, 1998, 157.

[1629] Draft Articles 5 and 8.

decolonization, there is only the general right to a nationality discussed in the preceding section.

The Right of Option to Choose a Nationality

The right to a nationality for nomads during the decolonization process also raises the issue of the right of option, or the right to choose nationality during a succession of states. This is particularly relevant to nomads with links to two or more states.

At the time of decolonization, the right of option was far from being a universally accepted principle of law in cases of state succession. As Weis noted, traditionally the right of option, or election, was limited to "the right to decline the nationality of the acquiring State implicitly by leaving the transferred territory after the change in sovereignty had taken place."[1630] It did not traditionally include the right of positive, or affirmative, option, whereby an individual would go through an administrative or judicial process to elect nationality.[1631]

A right of option was not always included in treaties of cession[1632] and not always open to all classes of people, though it had been used in countries as diverse as Canada, Cyprus and Algeria.[1633] It was also employed in the early 20th century in Europe[1634] and to certain former colonies.[1635], but subsequent draft treaties have expanded on this right.

[1630] Weis, 156-157. There remains no clear, affirmative right of option under international law today due to the non-uniform behavior of states and the lack of enforceable treaty law. Van Ert, 160 and sub.

[1631] Weis, 156-159. Weis notes, citing Halleck, the problems with an implied option based on physical presence. Weis, 157, quoting H. W. Halleck, International Law, or Rules Regulating the Intercourse of States in Peace and War, 2 vols. 4th English edition (Baker 1908).

[1632] The 1999 Draft Convention Commentaries cites to the right of option in treaties as a way to avoid statelessness. It is a "technique used by the legislators of States concerned in the case of a succession of States is to enlarge the circle of persons entitled to acquire their nationality by granting a right of option to that effect to those who would otherwise become stateless. Examples of provisions of this nature includes section 2, subsection, of the Burma Independence Act, 37 article 6 of Law No. 40/1993 of29 December 1992 on the acquisition and loss of citizen-ship of the Czech Republic,38 and article 47 of the Yugoslav Citizenship Law (No. 33/96)."

[1633] Weis, 157. For an exploration of the right of option in the Canadian context, see Van Ert, 151. See also the summary in Weis, 158-159.

[1634] Weis, 157. The problem of "which state" had come up frequently at the end of World War One. Van Ert ,157. See also Treaty of Peace with Austria (St. Germain-en-Laye, 10 September 1919) Arts. 70-82; UNHCR, 'Nationality Laws of the Former Soviet Republics,' (1 July 1993).

[1635] A right of option based on the concept of "effective link" was applied during the decolonization process in Vietnam. Van Ert, 158. See also Convention Between France and Vietnam on Nationality, (1959) Recueil des traités et accords de la France 62 (16 August 1955).

An affirmative right of option for persons with a nationality in the predecessor state who would otherwise be stateless would be guaranteed by the 1999 Draft Articles. Article 11(2) of the Draft Articles states,

> Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.[1636]

An "appropriate connection" encompasses the "links" used to establish nationality, such as birth and residence, but may also include other types of connections. The Commentaries mention birth and habitual residence. Birth and habitual residence are also mentioned in Art. 20, to be applied during a transfer of territory, in Art. 22, to be applied during the dissolution of a state, and in Art. 24, to be applied during a separation of part of the territory of the state. The Commentaries to Art. 20 cite to "prevailing state practice" in using birth and habitual residence to determine states where an option may be taken.

Article 17 establishes that an administrative procedure is necessary for making an option and mandates that such a procedure be made without undue delay. Decisions should be made in writing and subject to review. An affirmative right of option is also provided for by the Council of Europe Convention[1637] and the Draft Protocol to the African Charter on Human and Peoples' Rights on the specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa guarantees the right of option.[1638] The African Court on Human and Peoples' Rights has also recommended that states observe an affirmative right of option in cases of state succession.[1639] There is room in the right of option, as well, for connections beyond birth and habitual residence to be used to establish nationality. As a result, the right of option finds some support in soft law.

Gaps in the Laws and Norms of State Succession for Nomads Who Were Registered at the time of Decolonization

Several gaps emerge from this analysis. First, it is important to point out that decolonization is not necessarily best categorized as a succession of states. As Weis points out, "decolonization may either be regarded as secession, dismemberment or even cession, or as a special mode of State succession."[1640] Crawford uses the term "devolution,"[1641] noting that decolonization was accomplished by a number of different means, including the

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[1636] Draft Articles Article 11.

[1637] Venice Declaration para. 13.

[1638] Draft Protocol to the African Charter on Human and Peoples' Rights on the specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa, May 2017 art. 20.

[1639] African Court on Human and Peoples' Rights, 'The Right to Nationality in Africa' (2015) 47.

[1640] Weis, 136. See also Beaugrand, Transnationalism, 2010, 39-41.

[1641] Crawford, 330-373.

passage of legislation, the termination of protection agreements, the signing of treaties, or a combination of methods.[1642] It is not the intention of this dissertation to debate to what extent decolonization qualifies as a succession of states, but this dissertation will adopt the view that the laws pertaining to the succession of states may be looked to for solutions to statelessness as a result of decolonization, but the fact that colonies were not states impacts the effectiveness of those laws.

Colonization was marked by a vacuum of state sovereignty, with vast empires existing mostly on maps. Colonial administrators, as Part 2 discussed, did not see themselves as administrating populations of nationals, but populations of colonized persons, many of whom were regarded not as nationals of their colonies, but as the subjects of their local leaders or tribal chiefs, even when the latter had no real authority. In some cases, colonized persons were granted a nationality in the colonial state, but the lack of a civil registration system meant that this nationality existed only on paper, complicating efforts to roll it over.

In some cases, nationality was based on *jus soli* but colonial era borders were almost constantly fluid and changing, calling into question the applicability of *jus soli* in border areas. Some forms of colonial personal status, like BPP status, were never intended to function as a nationality except in the international context. In many cases, decolonization was, at best, incomplete,[1643] calling into question whether a succession had properly occurred. This impacts the effectiveness of the laws on state succession. For example, while the Draft Articles on the Succession of States in Respect of Treaties of 1974 specifically applies to decolonization,[1644] it may not be possible to "roll over" colonial era forms of status that lacked the features of modern nationality.

Registration of all kinds, including civil registration, but also the taking of the census and registration for various licenses and permits, was often done as part of coercive colonial policy or simply to raise taxes, rather than to establish nationality or grant rights. Many people had not been registered during the colonial period in any way. Many groups actively resisted registration as part of the fight for independence, including some nomads, as the Tuareg example above discussed in detail.[1645] Nomads, in particular, tended to be left out of registration. The usefulness of the international law framework is therefore lessened by the

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[1642] Crawford, 331.

[1643] R. Ryser, *Indigenous Nations and Modern States; The Political Emergence of Nations Challenging State Power* (Routledge 2012) 199 (discussing its failure to take into account minority nations.)

[1644] "The expression 'newly independent State', defined in paragraph 1(f), signifies a State which has arisen from a succession of States in a territory which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible…After studying the various historical types of dependent territories (colonies, trusteeships, mandates, protectorates, etc.), the Commission concluded that their characteristics do not today justify differences in treatment from the standpoint of the general rules governing succession of States in respect of treaties." Draft Articles, Art. 2, Commentaries.

[1645] The issue of resistance to the centralized state is a fraught one for many nomads. See the section on the Tuareg for more on this question.

uniqueness of decolonization, where colonial empires were not states with nationals, but empires.

Nevertheless, the international framework, particularly within soft law, contains much that may have been helpful to nomads at decolonization and could be helpful to nomads in future cases of state succession. In particular, proposed international laws on the right to a nationality during the succession of states divide persons into two groups: those with the nationality of the predecessor state and those without. For the former group, the international draft laws are quite specific. As stated above, some nomads entered the decolonization process with colonial-era identity documents of various kinds. In cases like these, applying soft law, nationality could "roll over".

For example, the burden would be on the state to prove that nomads with documents in the predecessor state were not nationals of that state and/or that their documents were invalid for some reason. Should these draft laws be ratified, they would place a burden on member states during future succession of states to allow nationality to roll over.

Yet, there is a not insignificant amount of vagueness in the draft laws described above, particularly when applied to nomads, through which statelessness may occur.[1646] As the Commentaries to the 1999 Draft Articles point out, even in the soft law, reasonable measures to prevent statelessness do not obligate each state to provide a nationality to every person at risk of statelessness that may result from the succession.

Van Waas points to another serious gap in the proposed international norms of state succession.[1647] There is no clear duty on the predecessor state to refrain from withdrawing nationality until possible cases of statelessness have been resolved. As Part 2 showed, there was a rush to withdraw colonial forms of nationality and lay the problem squarely on the shoulders of the new states. Post-colonial states were left with the enormous undertaking of registering populations that had never been properly registered. The extent to which predecessor states may have had more of an active role to play in preventing statelessness is under-addressed in international law, even in draft conventions.

As Part 2 explored, many nomads live in contested border areas, making it difficult to determine from which state they should receive a nationality. More could be done under international law to expand "appropriate connections" for nomads.[1648] Lack of birth registration due to armed conflicts that so frequently occur as part of state successions

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[1646] Van Waas, Nationality, 40. See also Conklin, 14; F. Costamagna, 'Statelessness in the Context of State Succession: An Appraisal Under International Law' in A. Annoni and S. Forlati, *The Changing Role of Nationality in International Law* (Routledge 2013) 36. See also I. Ziemele, 'State Succession and Issues of Nationality and Statelessness' in A. Edwards and L. van Waas (eds.) *Nationality and Statelessness under International Law* (Cambridge UP 2014) 217.

[1647] Van Waas, Nationality, 132.

[1648] Brownlie, Principles, 657; Van Panhuys, 30, 75. "Those properly to be considered nationals of the new state are those who have their permanent domicile in the territory, are born in the territory, or return soon after the change of sovereignty." Donner, 254.

should be more explicitly addressed.[1649] More conformity between refugee law and the laws of state succession may be helpful to resolve gaps. For example, refugees displaced during wars of state succession could have a right of option both in their state of refuge and their state of origin or birth. The concept of residence could be expanded to include the idea of "originating" in a state, mentioned above, which might include historical and pre-colonial connections to the territory that is now the state, moving beyond a focus on borders.

Gaps in the Laws and Norms of State Succession for Nomads without a Nationality at Decolonization

The most serious gap in the right to a nationality during state succession is the lack of specificity even in the soft law as to how to resolve the statelessness of persons who did not have the nationality of the predecessor state and/or who were stateless. Many nomads were already stateless under the colonial system, having been entirely excluded or omitted from colonial-era laws and civil registration and, in many cases, treated as naturally stateless by colonial governments. With some populations of nomads still suffering from inter-generational statelessness, as Part 2 showed, this is problem that may persist and compound in future state successions. Yet, the 1961 Convention does not address how a state should determine if it is the appropriate actor to resolve cases of statelessness.[1650] As Shaw noted, Article 10 lacks specifics as to how unclear or disputed nationality is to be resolved during state succession.[1651] Interestingly, the Draft Convention on the Reduction of Future Statelessness of 1954 would have placed an affirmative duty on states to prevent and resolve cases of statelessness during succession.[1652] This language was removed in the 1961 Convention.

An earlier draft of the 1961 Convention, prepared by the International Law Commission, placed a duty on states to avoid statelessness for their "inhabitants",

> 1. Every treaty providing for the transfer of a territory shall include provisions for ensuring that, subject to the exercise of the right of option, *the inhabitants* of that territory shall not become stateless. 2. In the absence of such provisions, a State to which territory is transferred, or which otherwise acquires territory, or a new State formed on territory previously belonging to another State or States, shall confer its nationality upon the *inhabitants* of such territory unless they retain

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[1649] For a more recent example of the importance of birth registration for refugee children, see Refugees International, 'Senegal: Voluntary repatriation critical for protecting stateless Mauritanians' (9 Feb. 2007).

[1650] See also Edwards, 14.

[1651] Shaw, 2008, 1005. See also Weis, 144.

[1652] UN General Assembly, Elimination or Reduction of Future Statelessness, 4 December 1954, A/RES/896, Art. 10.

> their former nationality by option or otherwise or have or acquire another nationality.[1653]

This clause was removed from the final version. There is evidence from the Commentaries that this removal was deliberate, so as not to burden states by requiring them to automatically grant nationality to all inhabitants in their territory following a state succession, but rather to limit nationality to those who clearly had a nationality in the predecessor state.[1654]

Likewise, the Draft Articles limited themselves to preventing statelessness in persons who had the nationality of the predecessor state. As the Commentaries to the Draft Articles put it,

> (a)ccordingly, the term 'person concerned' includes neither persons who are only nationals of third States nor stateless persons who were present on the territory of any of the 'States concerned'."[1655]

The commentaries cite to D. P. O'Connell, where he states that "(t)here is an 'inchoate right' on the part of any State to naturalize stateless persons resident upon its territory."[1656] The Draft Articles, however, stop short of creating a duty on the part of states to grant nationality to those who were already stateless at the time of succession.

As a result, there is a lack of specificity as to how existing cases of statelessness or unclear nationality are to be resolved during a succession of states. Nevertheless, as Weis puts it, for cases where nationality was not already established prior to succession, there is some support for using birth and habitual residence as links to create a presumption of nationality.[1657] Given the general obligation on states to resolve statelessness, might a duty under international to grant nationality to stateless persons during a succession of states be inferred as part of a progressive interpretation of the law? Could this duty be based on birth and habitual residence in the territory of the state?

[1653] International Law Commission, sixth session, (1954), submitted to the General Assembly, para. 25, Yearbook of the International Law Commission, 1954, vol. II. The term "inhabitants" was not defined.

[1654] "Mr. HARVEY (United Kingdom), explaining the reasons for the submission of his delegation's amendment to article 10...the Commission's text went too far in providing that stateless persons resident in a ceded territory would acquire automatically the nationality of the acquiring...The article should simply provide that persons who possessed a nationality should not become stateless in consequence of a transfer of territory." U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, 26 November 1951, A/C0NF.9/C.1/SR.9, page 2.

[1655] Report of the Commission to the General Assembly on the work of its forty-ninth session, Commentary to Art. 2., Yearbook of the International Law Commission 1997, Vol. II, Part 2 (1997).

[1656] D. O'Connell, *The Law of State Succession* (Cambridge UP 1956), 245, 258, cited in Commentary to Art. 2.

[1657] Weis, 145-146.

Any solution based on birth or habitual residence is problematic for nomads. First, while birth in the territory of the state is a clear category on which to base nationality and birth registration is required by states in international law, place of birth for a nomadic family may be difficult to establish in some cases. Registration centres may be in urban areas and nomadic cultural practice may make registration more difficult than for other groups. There is a risk that place of birth for some nomad families may actually be an inappropriate way of establishing nationality if, for example, the family spends a period of the year outside their state of primary residence. The Committee on the Rights of the Child has recommended that states increase birth registration particularly for nomads, though, for example, mobile registration clinics,[1658] yet there is little guidance from international law as to whether or not states must take extra steps to facilitate birth registration for nomads.

The concept of habitual residence for nomads is even more problematic. It is not a clear category and, as a result, it may mean different things in different contexts, particularly for nomads. It is also nowhere defined under international law. There is no doubt that nomads, like all people, create links and connections to the territories they occupy, but habitual residence implies an exclusive relationship that has always been difficult for mobile peoples to establish, as explained in Part 2.[1659]

Defining "Habitual Residence" for Nomads Under International Law

Various attempts to define habitual residence by experts, treaties and draft laws and other instruments have not been very successful, particular when applied to nomads. Weis attempts to define habitual residence as "those usually called the inhabitants of the territory, it being understood that physical presence at the material time is essential," and excluding "persons who happen to be in the territory accidentally or temporarily."[1660] He notes the importance of some sort of intent on the part of the individual to establish residence. For persons outside of the territory of the state at the time of transfer, "return or travel to the transferred territory with the intention of establishing residence there may be regarded as implicit acceptance (of nationality.)"[1661]

Yet for nomads, seasonal migrations should never be taken as evidence of an intent to establish residence in a particular state to the exclusion of others. This is particularly true under governments that were in conflict with nomadic populations, such as Mali in 1960-1962. Without a formal process to establish that an option has been taken, as discussed above, a reliance on supposed intent as interpreted by the government is unlikely to

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[1658] Committee on the Rights of the Child, Algeria, para 36, quoted in Gilbert, Nomadic, 2014 161.

[1659] See also Gilbert and Begbie-Clench, 2018, 3-4 for a discussion on the challenges nomads face in proving exclusive land use.

[1660] Weis, 146. Here, he cites to a series of British cases on determining the nationality of citizens of Ireland living in the UK.

[1661] Weis, 149.

produce a good result. Here, an affirmative right of option may be helpful, but once again, an administrative or judicial procedure may not be easy for nomads to comply with.

Importantly for nomads, Weis defines residence as occurring in only a single location; it is implied in Weis's reasoning that one cannot be the resident of two or more places. Here, the definition of residence begins to resemble exclusive allegiance, a concept that is difficult for many mobile and nomadic peoples, as well as settled peoples who may maintain multiple residences, such as in the example of former Bedouin. Conklin points out the conceptual vagueness surrounding the use of habitual residence in establishing nationality. "How long," he asks, "does it take for residence to become habitual? What if there is not a perfect fit between a state's border and the habitual residents of its territory? What if a person is unable to return to her/his state of habitual residence?"[1662]

The Draft Protocol to the African Charter, quoting the Council of Europe Convention, defines habitual residence thus:

> 'Habitual residence' shall mean stable factual residence, or the place where a person has established his or her permanent or habitual centre of interests.[1663]

Once again, residence is presented as occurring in a single location. The Draft Articles discuss habitual residence at length, also treating it as an either/or state of being.

Drawing more widely on international law to see if the meaning of habitual residence may be further illuminated, the 1951 Refugee Convention, arguably an important human rights document,[1664] implies in article 10 that residence is a single location.[1665] The European Committee of Ministers defined habitual residence thus: "the place where the person had

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[1662] Conklin, 224-228. Conklin goes on to discuss the concept of "own country" in international law. One may ask what the concept of own country means for nomads.

[1663] Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa: Explanatory Memorandum (2018) at 6, citing to Explanatory Report to EU Council of Ministers Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (known as "Brussels II") prepared by Dr. Alegría Borrás, para. 32.

[1664] Convention relating to the Status of Refugees, Geneva, 28 July 1951, 22 April 1954, No. 2545 with 146 states parties. J. McAdam, 'The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection' UNHCR Research Paper No. 125 (2006).

[1665] UNHCR defines habitual residence as "stable, factual residence," citing a number of international instruments, including, "the Hague Conferences on Private International Law,… Article 1A(2) of the 1951 Convention relating to the Status of Refugees (and) the Travaux Préparatoires of that treaty, (where) it refers to 'the country in which (the stateless applicant) has resided and where he had suffered or fears he would suffer persecution if he returned'." UNHCR Guidelines 9, citing UN Ad Hoc Committee on Refugees and Stateless Persons, Report of the Ad Hoc Committee on Statelessness and Related Persons (Lake Success, New York, 16 January to 16 February 1950), 17 February 1950, E/1618; E/AC.35/5, 39 and the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, paragraph 103.

established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence."[1666] Such definitions, if adopted by international treaty, might be problematic for nomads.

Establishing Alternative "Links" for Nomads

International soft law has attempted to create rules for establishing "links" in the absence of a clear, unitary habitual residence for nomads. The Council of Europe in 1983 recommended, for example, that states recognize a broader set of "links" for nomads:

> For the establishment of such a link, one or more of the following criteria could in particular be taken into consideration:
> a. the state concerned is the state of birth or origin of the nomad or the state of origin of his immediate family;
> b. habitual residence or frequent periods of residence of the nomad in the state concerned provided that the residence in question is not unlawful;
> c. the presence in the state concerned of members of the nomad's immediate family lawfully staying in that state or possessing its nationality.[1667]

While this introduces other elements, it is not clear how useful they are. It is not clear to what extent there is a distinction between "frequent periods of residence" and "mere physical presence," which is not sufficient to create a nationality "link".[1668] The focus on "lawful" residence may also be problematic for stateless nomads. A government may argue that the residency of nomads is illegal because they are stateless or foreign, as Part 2 showed, creating a self-reinforcing cycle of exclusion.[1669]

When writing definitions, international law, including crucial soft law, could do more to take into account the actual modalities and practices of nomadism, including pastoralism, hunter-gatherer lifestyles and peripatetic trade, rather than continuing to employ vague terms like "residence". Article 8 of the Draft Protocol to the African Charter attempts to do so. "Links" for nomads include water points, seasonal grazing zones, and the burial sites of ancestors. Such lists take into account the actual modalities of nomadism, as mentioned above, but in so doing, they raise further concerns. It is not clear if and how having special rules for establishing residence for nomads, a category of persons that has never been

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[1666] Explanatory Report to EU Council of Ministers Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (known as "Brussels II") prepared by Dr. Alegría Borrás, para 32) as quoted in the proposed Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa: Explanatory Memorandum.

[1667] Council of Europe: Committee of Ministers, Recommendation No. R (83) 1 of the Committee of Ministers to Member States on Statelessness Nomads and Nomads of Undetermined Nationality, 22 February 1983.

[1668] Verwilghen, 62. See also Maury, 14.

[1669] Donner, 254. See also Brownlie, Principles, 655-656; Weis, 137.

defined under the law, is a good idea.[1670] Who is the appropriate government authority for determining when such connections between nomads and land become suitable grounds for recognizing a "link" for the purposes of nationality? Using alternative evidence to prove residence also raises the question of discrimination, as any system tailored towards nomads' risks placing nomads in a special category of persons that are treated differently from other residents. The question of discrimination against nomads by states will be discussed extensively in Pathway II.

Establishing "Links" and the Burden of Proof

The extent to which states have a burden to establish nomad residence is also somewhat unclear. For example, the Council of Europe Recommendation 83(1) requires states to "facilitate" the establishment of residence for nomads.[1671] The Recommendation goes on to say, however, that,

> where the link of a nomad with a given state has been established in accordance with principle No. 2 above, this state should take appropriate measures in order to permit him to reside on its territory, to travel abroad and to return to its territory.[1672]

In *Anudo Ochieng Anudo v. Tanzania,* the African Court on Human and Peoples' Rights recently mandated that in the African context, the burden is on the state to disprove nationality for persons who have documents to prove nationality in the predecessor state.[1673] The recent Draft Protocol to the African Charter on Human and Peoples Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa suggests that; "(t)he duty to 'facilitate' acquisition of nationality is a term used in other international treaties that involves at least making such acquisition significantly easier than for foreigners generally, for example by reaching out to communities known to be lacking documentation of nationality, by providing a non-discretionary process of acquisition, such as those known in different countries as declaration, registration or option, or by reducing the period of residence required."[1674] The Draft Protocol also suggests that states take into account oral testimony in determining nomad "links".

International treaties could do more to mandate states parties to accept non-documentary forms of proof to establish residence, including oral testimony, family records and the

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[1670] See Costamanga, 46. See also the section on definitions in Part 1, above.

[1671] Council of Europe Recommendation 83(1) principle 2.

[1672] Council of Europe Recommendation 83(1) principle 3.

[1673] See generally B. Manby, 'Case Note: Anudo Ochieng Anudo v. Tanzania (Judgement) (African Court on Human and Peoples' Rights, APP No. 012/2015, 22 March 2018)' 1 Statelessness and Citizenship Review 170 (2019).

[1674] Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa: Explanatory Memorandum (2018) para. 48.

historical or present-day use of wells and moorage points, though doing so may not resolve the question of residence. Such alternative proofs might also include the recognition of pre-colonial land arrangements, trade agreements, payment under traditional tax systems and genealogies, though the necessity of establishing a single point of residence may continue to be a barrier for nomads. Nevertheless, it would be good for international soft law and legal experts to engage more systematically on this topic, perhaps in consultation with nomad leaders. The 2007 Segovia Declaration of Nomadic and Transhumant Pastoralists, first mentioned in the Introduction, above, calls for the recognition of pastoral land ownership, a potentially key step in helping to prove pastoral residence. The problem of establishing nomad residence, therefore, is linked to the question of nomad land ownership, discussed extensively in Part 2, above.

Experts continue to come up with new ways for nomads to prove land ownership, methods which may provide nomads with a firmer footing to establish their residence for the purpose of nationality. In a recent paper, Jérémie Gilbert and Ben Begbie-Clench argue that a different system of proving land ownership, one they call "mapping," may be used by courts to establish land ownership for nomads.[1675] In some court cases, like a recent case in Sarawak, courts have rejected such efforts as unofficial, but in others, such testimony has been accepted.[1676]

The Segovia Declaration of Nomadic and Transhumant Pastoralists calls for the recognition of, and compensation for, pastoral ownership and loss of land. Such recognition could also be used to establish nomad "links" to the territory of the state for the purposes of proving nationality based on residence. Yet, reliance on proof of land ownership to prove nationality may create a dangerous cycle for nomads, privileging land owners over non-owners and further politicizing both the question of nomad nationality and the question of nomad land ownership. Only intensive consultations with nomad communities can thread this needle.

All of the above risks predicating nationality too much on nomads' land claims and land use. Given that statelessness is a human rights violation, the fact that the Bedouin, the Tuareg and the Sama Dilaut have been present as communities in their regions for centuries or longer renders an individualistic focus on water points and place of birth somewhat bizarre. A more reasonable standard would be to apply a presumption of nationality to all members of a nomadic community with a pre-colonial presence in a certain region who are recognized as members by that community, through whatever internal process that communities has or creates, based on a set of stringent principles and subject to a due, transparent and deliberative process.

Inspiration could be taken from the French principle of *possession d'état de national,* or the idea that a community who prior to colonization had always held themselves out as nationals and been treated as such by their community should be granted state nationality,

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[1675] Gilbert and Begbie-Clench, 2018, 9-11 citing a case over land ownership brought by the Batwa in Uganda.

[1676] Gilbert and Begbie-Clench, 2018, 20.

perhaps based on an agreement between the nomadic community and the state.[1677] If a nomadic individual is accepted by his or her community as a member of that community, nationality is automatically granted by the state. Under this system, civil registration by the state would no longer be needed; validation by nomadic leaders would be enough to confer nationality. This system would predicate nationality in a state on nomadic forms of belonging.

Of particular importance is the question of colonial-era documents. International law does not provide any guidance as to how colonial-era documents that did not explicitly establish nationality were to be used, if at all, in helping nationality to "roll over" at independence.[1678] Even if other types of colonial documents were to be accepted as evidence of colonial-era nationality, which colonial era documents should be used? What, for example, is the role of British Protected Persons passports? What about persons whose names appear in colonial-era registries, or who hold colonial-era land title documents, or membership in colonial organizations? Might such documents be used as evidence of probable colonial-era nationality in a place like the former French Soudan, where the intention of the colonial government was to establish a universal nationality?

The Role of Regional and Bilateral Treaties in Resolving Statelessness Resulting from Decolonization

States, through treaty norms, could also take a more pro-active role in mandating treaties to resolve statelessness resulting from decolonization and other historical cases of succession.[1679] It is interesting to contemplate the potential role of UNHCR, as the mandated agency for the Statelessness Conventions, in drafting model procedures for resolving statelessness originating from the decolonization process. A Memorandum of Understanding has been signed by Malaysia, Indonesia and the Philippines to look into the matter of cross-border statelessness has been reported in the press.[1680] Increasingly, regional organizations have been exploring the use of tripartite agreements and regional action plans to resolve statelessness in such cases, though many of these agreements fall short of directly addressing the problem of disputed and contested nationality of groups that straddle borders, including nomads.[1681] Most rely on the implementation of national action plans and the focus of these efforts remains individualized at the nation-state level.

The Banjul Plan of Action for the ECOWAS system, of which Mali is a member, does contain clauses pertaining to the nationality status of persons living in disputed border regions and

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[1677] Manby, Citizenship, 2018, 13. This concept is discussed in the Tuareg sections in Part 2.

[1678] See for example the discussion in Crawford, 264.

[1679] Batchelor, Statelessness, 1998, 156, 168-169. See also Conklin, 19; Costamanga, 44.

[1680] Star Online 'Malaysia, Indonesia to tackle Sabah stateless issue' (24 Apr 2019).

[1681] See for example the Action Plan of the International Conference on the Great Lakes Region (ICGLR) on the Eradication of Statelessness 2017-2019 and the Banjul Plan of Action of the Economic Community of West African States (ECOWAS) on the Eradication of Statelessness 2017 – 2024.

those who became stateless as a result of the succession of states.[1682] Such clauses may represent the first steps towards a negotiated regional solution for nomads in border zones like the Tuareg (though in the case of the Tuareg, neither Libya nor Algeria are members of ECOWAS).

Dual Nationality

As mentioned above, dual nationality may have been a solution for some nomads during decolonization, particularly those in border zones. As Rubenstein and Lenagh-Magquire note, the *Nottebohm* case served as an important touchstone in the debate over the legality of dual nationality.[1683] The ongoing debate shows the enduring quality of the concept of exclusivity as a central component of nationality, a concept that, it is argued, strongly affected the ability of nomads to claim nationality at decolonization, when their loyalty to a single state was often questioned.

The issue of dual allegiance, or dual nationality, continues to be contentious in modern law, though there has been some acceptance of it by states.[1684] Paul Weis considered dual nationality to be a conflict of laws and a "problem."[1685] The level of acceptance by states of dual nationality today could perhaps be best characterized as ranging from toleration to hostility. As a reflection of this, early attempts to codify rules on nationality often adopted a conservative approach to dual nationality. For example, the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws codifies the general principles in cases where dual nationality is allowed,[1686] but the Convention falls well short of establishing a right to dual nationality and, indeed, one of the goals of the Convention was to reduce dual nationality. The Draft Articles on nationality of natural persons in relation to the succession of States of 1999 also adopted the position that dual nationality on a large

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[1682] "Establish a committee consisting of representatives from ECOWAS, and respective states to confirm the nationality of affected populations living in border / disputed areas with the support of UNHCR." Economic Community of West African States (ECOWAS), Economic Community of West African States (ECOWAS) Plan of Action on Eradication of Statelessness, 2017 – 2024, 2017 (Banjul Plan of Action) Objective 5.3.

[1683] K. Rubenstein and N. Lenagh-Maguire, 'More or less secure? Nation laity questions, deportation and dual nationality' in A. Edwards and L. van Waas (eds.) *Nationality and Statelessness under International Law* (Cambridge 2014) 266-269 (hereinafter Rubenstein and Lenagh-Maguire).

[1684] "Historically, exclusivity has been an essential characteristic of nationality." (The authors note the continuing problem with determining an individual's "own country.") Rubinstein and Lenagh-Magquire, 270-271. See also generally P. Spiro, *At Home in Two Countries: The Past and Future of Dual Citizenship* (New York U. 2016); Brownlie, Principles, 389. As Van Ert notes, the matter of dual nationality in cases of the succession of states remains unsettled. "Attempts are being made to settle this area of law." Van Ert, 152. See also L. J. van der Baaren, *Emigrant nationality. A comparative analysis of the toleration of dual nationality from an emigrant perspective* (PhD Maastricht 2020).

[1685] Weis, 170.

[1686] Hague Convention on Certain Questions relating to the Conflict of Nationality Laws (1930) Art. 3. See also Weis, 186.

scale is not something that international law wishes to promote.[1687] While dual nationality is not prohibited by the Draft Articles,[1688] it is not offered as a potential solution to cases of contested nationality.[1689] As a result, while the implementation of the Draft Articles during the decolonization process would have been greatly helpful to many nomads, much would have still been left up to the discretion of states. Most problematically, dual nationality is framed as something to be avoided, a position taken by the drafters that would have been extremely unhelpful to nomads.

> Historically, exclusivity has been an essential characteristic of nationality...(i)in the absence of any international legal mechanism to regulate nationality in a comprehensive way, dual nationality attracted various legal responses in the international and domestic spheres.[1690]

Today, there is greater acceptance in international law for dual nationality, but more could be done to promote dual nationality as a solution to statelessness for nomads during state succession. It is worth noting, however, that dual nationality would not automatically provide a solution to the question of nomad land rights identified in Part 2. Nevertheless, it could form part of a solution were it to gain greater acceptance under international law. For example, the non-binding 2007 Declaration on the Rights of Indigenous Peoples states that indigenous peoples separated by borders have the right to "develop contacts" across borders, but does not mention dual nationality nor does it present dual nationality as a solution to the question of "which state" during a succession.[1691] Even recent regional instruments fall short of actively promoting dual nationality.[1692] Meanwhile, international law remains a long way from endorsing dual nationality or creating a right to dual nationality and many countries continue to outlaw it or do not recognize it, including Malaysia and Kuwait.

While government hostility to dual nationality may, at first, seem unrelated to their hostility to nomadism, in actual fact, both hostilities stem from the traditional

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[1687] Draft Articles Commentaries, Commentary (6), 28.

[1688] "The recognition of the possibility of multiple nationality resulting from a succession of States does not mean that the Commission intended to encourage a policy of dual or multiple nationality. The draft articles in their entirety are completely neutral on this question, leaving it to the discretion of each and every State." Draft Articles Commentary to Art. 1.

[1689] "When a person concerned who is qualified to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the attribution of its nationality dependent on the renunciation by such person of the nationality of the latter State." Draft Articles Art. 9.

[1690] Rubinstein and Lenagh-Magquire, 265-266.

[1691] U.N. Office of the High Commissioner for Human Rights, The United Nations Declaration on the Rights of Indigenous Peoples, August 2013, HR/PUB/13/2, Art. 36.

[1692] Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa: Explanatory Memorandum (2018), discussing the increasing acceptance of dual nationality in Africa para. 77.

preoccupation in the European system of statehood with the concept of exclusivity, discussed above in Part 2, and a corresponding dislike of mobility. Dual nationality could have been part of a workable solution for many nomads during decolonization, but there is no evidence it was ever seriously entertained, not only by national governments, but by the international community.[1693] In fact, the idea of granting the Tuareg nationalities in Algeria, Mali and Niger would probably have been seen not as a solution but as tantamount to creating an independent Tuareg state and a threat to regional security.

Nevertheless, the provision of dual nationality today could potentially be part of a solution for nomads who straddle boarder regions and migrate across borders, and who therefore lack clearly exclusive ties to a single state. The idea of dual nationality as a solution to statelessness, rather than as a source of problems for state security, is not supported by states in international law in its current form. Rather, dual nationality continues to be framed as an unfortunate by product of the nation-state system, rather than a solution for populations, like nomads, who may have ties to multiple states.

A grant of dual nationality could be part of a negotiated settlement between countries to help resolve tensions over the border and ensure the right to a nationality for cross-border groups like nomads. But this would require an enormous change of attitude on the part of such states regarding the purpose and structure of exclusive nationality and how it relates to allegiance, loyalty, national identity and other issues. Regional solutions are currently under discussion in West Africa under the auspicious of ECOWAS, which might be particularly relevant for Mali. In some cases, however, including Mali, the chance of a negotiated solution seem dim as disputed border areas remain a sense of great tension. Malaysia and the Philippines lack diplomatic relations, in large part because of disputes over their border. A negotiated agreement on dual nationality for border populations is therefore heavily reliant on a political solution.

Arguably, not enough has been done at the international level to promote dual nationality as a solution for mobile and nomadic populations by highlighting dual nationality not simply as a problem for the nation-state system, but as a potential solution in tense border regions. For example, this dissertation was not able to uncover evidence that governments like Mali have even been asked by international organizations to consider dual nationality as part of negotiated peace agreements, for example.

Conclusion

Pathway I explored the right to a nationality at state succession as a solution to nomad statelessness and to prevent possible future statelessness. In addition to the general right to a nationality under international law, the 1961 Convention obligates states to prevent stateless resulting from state succession by treaty. Soft law has also added much specificity in the form of draft treaties and declarations. While the rules on succession of states under these instruments would have much to offer nomads with a nationality in their colonial states, the rules for establishing nationality for persons already stateless, or whose

[1693] Once again, more research on this point is needed.

nationality was simply unclear, are far less articulated even in soft law instruments. These gaps may have serious consequences for nomads in future cases of state succession as a result of the ongoing decolonization process, particularly nomads who live in what may become border zones. More could be done to articulate how a right of option would work for nomads and to guarantee that refugee communities benefit from this right. In particular, habitual residence, a key concept, is too vague even in soft law to properly guide states when it comes to establishing the nationality of nomads, though as Spiro points out, it may become more accepted as a grounds for granting nationality in the future.[1694]

While more recent draft laws have attempted to come up with more precise definitions of habitual residence for nomads, a lot more could be done to clarify to meaning of this term and to move beyond a western-centric conception of how "links" between persons and states are formed. In particular, habitual residence is often treated as occurring in only one location, a problem for nomadic and mobile peoples. As a result, it is not clear that even soft law contains enough specificity to truly resolve the problem.

States, through treaty norms, could promote the use of alternative methods of proof of "links" between states and nomads, such as oral testimony, and revisit the relevance of colonial era documents and records. Archives might prove a fruitful place to begin constructing a history of nomad residence, alongside oral histories, cultural practices and other sources of information that establish residence on a group basis. A holistic approach might be necessary to establish long term nomad residence, though it remains an open question as to whether or not special rules for nomads in the establishment of nationality poses a risk to nomads. Placing questions of belonging in the hands of nomad communities might be another approach. The value of such approaches, however, remains debatable.

One unexplored solution for many nomads would be the right to dual, or even multiple, nationality. At the moment, a historical predilection for exclusive allegiance has done much to harm nomad inclusion. Such a solution could have been offered at the time of decolonization, but it could also be used today.

Finally, Pathway I explored the role of treaties under international law in establishing nationality as a result of historical state succession. The 1961 Convention supports treaties at the time of succession to resolve questions of nationality, but there is no clear mechanism for resolving unclear nationality status retroactively. International law, however, could do more to mandate bilateral, tripartite or regional cooperation today as a means to resolving statelessness resulting from historical cases of succession.

As mentioned above, discrimination is prohibited in the rolling over of nationality at state succession, yet the laws of state succession are less specific about prohibiting discrimination against persons who are already stateless or whose nationality is unclear at the time of state succession. The next section will look at to what extent international law prohibits discrimination against nomads in the granting of nationality to see if anti-

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[1694] P. Spiro, 'A New International Law of Citizenship' 105 *American Journal of International Law* 694 (2011).

discrimination laws, if applied to cases of nomad exclusion during decolonization, could have helped stateless nomads to challenge their continued exclusion.

Pathway II: Prohibiting Discrimination against Nomads in the Application of Nationality

> Rules which appear to apply equally...may, on closer examination, disadvantage stateless children and so amount to indirect discrimination.[1695]

The examples showed that discrimination, defined as "(t)reating one or more members of a specified group unfairly as compared with other people",[1696] clearly played a role in the failure of post-colonial governments to register nomads during decolonization. This occurred despite the fact that the nationality laws in Kuwait, Mali and Malaysia were non-discriminatory on their face. In part, as the examples showed, this discrimination resulted from the structure of European nationality itself, which required settlement in territory to establish residence and a binary choice between discrete nation states. As well, the "broad discretion" given to post-colonial administrators in determining nationality left room for discrimination.[1697] In some cases, discrimination was the result of the deliberate exclusion of nomadic groups based on their history and culture of nomadism.

As the example of Kuwait demonstrated, discrimination against nomadism played a role both in the granting of a lesser nationality status to mobile Bedouin tribes in general and in the prioritization of certain Bedouin clans over others. It played a role in the targeting of the Tuareg as a security threat and a threat to the integrity of Mali's northern border. And it might have also played a role in the exclusion of nomadic Sama Dilaut from registration, though this is less clearly established by the review of literature in this dissertation.

The examples also demonstrated how discrimination continues to play a role in government policy towards nomads, as governments branded nomads as de facto criminals, non-nationals and threats to security. Statelessness itself has now become grounds for the further marginalization of nomads and experts on statelessness have noted that discrimination based on "nomadic lifestyles" plays a role in causing the statelessness of nomads.[1698]

Given that discrimination was a cause of nomad statelessness, can international law offer a solution? Pathway II will examine the international legal framework against discrimination in the granting of nationality and if this framework can offer a solution to nomads. First, Pathway II will summarize the international law relating to discrimination. Then, it will look at the extent to which discrimination against nomads occurred. Finally, it will look at the grounds upon which discrimination occurred and examine to what extent

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[1695] De Chickera and Whiteman, 100.

[1696] This definition is taken from the Oxford Reference Dictionary at https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095721450

[1697] De Chickera and Whiteman, 104.

[1698] De Chickera and Whiteman, 103-104.

discrimination against nomadism as a cultural practice is prohibited under international law.

The International and Regional Laws Prohibiting Discrimination in the Granting of Nationality

Non-discrimination has long been a founding principle of human rights law. International law expressly prohibits discrimination in the granting and withdrawal of nationality for enumerated reasons, in particular, that of race, ethnicity, religion, disability and gender or other status.[1699] Relevant instruments, some of which have been mentioned above in the introduction to Part 3 and in Pathway I, include the Charter of the United Nations,[1700] the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

Other laws that establish the principle of non-discrimination include the ILO Convention concerning Discrimination in Respect of Employment and Occupation No. 111 of 1958,[1701] the UNESCO Convention against Discrimination in Education of 1960,[1702] the UNESCO Declaration on Race and Racial Prejudice of 1978,[1703] and UN declarations such as the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief of 1981.[1704] Non-discrimination is a founding principle of the Convention on the Rights of the Child in Article 2. It is also a principle of Article 5 of the Convention on the Rights of Persons with Disabilities[1705] and the indigenous rights framework, primarily

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[1699] Human Rights Council, Thirty-first session, Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless, Report of the Secretary-General, A/HRC/31/29 4. See also Human Rights Council Nineteenth session, Human rights and arbitrary deprivation of nationality, Report of the Secretary-General, A/HRC/19/43 (December 2011). See also the Universal Declaration of Human Rights, Art. 2

[1700] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

[1701] International Labor Organization, Discrimination (Employment and Occupation) Convention, 1958 (No. 111), with 175 ratifications.

[1702] United Nations Educational, Scientific and Cultural Organization, Convention against Discrimination in Education 1960, Paris, 14 December 1960.

[1703] United Nations Educational, Scientific and Cultural Organization, Declaration on Race and Racial Prejudice, 27 November 1978.

[1704] United Nations, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, General Assembly resolution 36/55 of 25 November 1981.

[1705] United Nations Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, 3 May 2008, No. 44910 with 182 parties.

ILO Convention 169[1706] and the 2007 Declaration on the Rights of Indigenous Peoples, Arts. 15 and 22, discussed above in the introduction to Part 3.

Several international treaties expressly prohibit discrimination in the granting of nationality. The International Convention on the Elimination of All Forms of Racial Discrimination guarantees a right to a nationality without racial prejudice in Article 5, though Article 1, paragraph 2 carefully preserves states' rights to set nationality law.[1707] Non-discrimination on racial grounds expressly extends to non-citizens.[1708] Nevertheless,

> (a)rticle 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[1709]

The 1961 Convention on the Reduction of Statelessness prohibits the withdrawal of nationality for reasons of race, ethnicity, religion or on political grounds. Gender discrimination in nationality law is prohibited by the 1957 Convention on the Nationality of Married Women and the Convention on the Elimination of All Forms of Discrimination Against Women, which in Article 9 guarantees women equal rights with men in obtaining and maintaining their nationality, as well as passing it to their children.[1710] The Convention on the Rights of Persons with Disabilities in Article 18 guarantees the right to a nationality without discrimination based on disability and mandate that states provide for "reasonable accommodation" to disabled persons.

[1706] International Labour Organization, Convention (No. 169) concerning indigenous and tribal peoples in independent countries, Geneva, 27/06/1989, with 23 ratifications.

[1707] See also Interights, 'Non-Discrimination in International Law: A Handbook for Practitioners' (2011) and the High Commissioner for Human Rights, 'Minority Rights: International Standards and Guidance for Implementation' (2010). See also R. Govil and A. Edwards, 'Women, Nationality and Statelessness: The Problem of Unequal Rights' in Institute on Statelessness and Inclusion, *The World's Stateless: Children* 169. See also Van Waas, Nationality, 59; Edwards, 25.

[1708] The Committee on the Elimination of Racial Discrimination, Sixty-fifth session (2005), General recommendation XXX on discrimination against non-citizens.

[1709] Committee on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination against Non-citizens (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

[1710] Prohibitions on discrimination in the granting of nationality for reasons of gender are also supported by resolutions of the UN Human Rights Council. Human Rights Council, Thirty-second session, Resolution adopted by the Human Rights Council on 30 June 2016, A/HRC/RES/32/5 (15 July 2016). See also Human Rights Council, Twenty-third session, 'Report on discrimination against women on nationality-related matters, including the impact on children' A/HRC/23/23 (15 March 2013).

Non-discrimination is a founding principle of international law when it comes to both law and practice. Under international law, discrimination in both purpose and effect is prohibited.

> While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[1711]

Not only may a law violate the norm of non-discrimination on its face, but facially neutral laws may be applied in discriminatory ways. Discrimination in the application of law may take place at the national, regional or local level. It may be committed by all organs of government, including the police, courts, government agencies and others.

Non-discrimination is also central to regional human rights law. It is contained within the African Charter on the Rights and Welfare of the Child, to which Mali is a party, as well as the Arab Charter on Human Rights, to which Kuwait is a party.[1712] Regional human rights courts, including the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission and African Court on Human and Peoples' Rights, have handed down decisions on discrimination in the application of nationality, which will be discussed below.[1713] Non-discrimination in the granting and withdrawal of nationality has been claimed before regional courts and treaty bodies with some success. Litigation can be a particularly effective tool in pressuring states to resolve cases of discrimination.[1714]

Many experts consider the principle of non-discrimination to be *jus cogens.*[1715] Additionally, Kuwait, Mali and Malaysia are parties to several of the binding conventions mentioned above, including the Convention on the Rights of the Child.[1716] Malaysia also ratified the Child Act of 2001, however, where it noted its reservation to Article 7 on the right to a nationality in the Convention on the Rights of the Child. Kuwait and Mali are also

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[1711] UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination (10 November 1989) (my italics).

[1712] League of Arab States, Arab Charter on Human Rights (22 May 2004), reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force March 15, 2008. Additional information on the specific treaty obligations of Kuwait, Mali and Malaysia is available above in the section on the international laws of nationality.

[1713] See for example the European Court of Human rights, K2 v. United Kingdom 42387 (2017).

[1714] See generally L. Bingham and L. Gamboa, 'Litigating Against Statelessness' in L. van Waas and M. Khanna, *Solving Statelessness* (Wolf LP 2016).

[1715] Report of the International Law Commission, Sixty-sixth session, A/69/10 (2014).

[1716] See the above section on the international obligations of Kuwait, Mali and Malaysia.

parties to the International Convention on the Elimination of All Forms of Racial Discrimination, though notably, Malaysia is not.[1717] Mali is also a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, though Malaysia and Kuwait are not. Given the strength of support for non-discrimination, would international law, if applied to nomads in Kuwait, Mali and Malaysia at decolonization, have assisted nomads to register as nationals? Could these laws provide them with a means to challenge their statelessness today?

Applying the International Protections Against Discrimination to Nomads

> (E)xclusion is often experienced in newly independent States that define citizenship in a manner that excludes persons belonging to certain minority groups who are considered as 'outsiders' despite long-standing ties to the territory of the new State.[1718]

Nomads suffered from severe discrimination during the colonial period and post-colonial period in Kuwait, Mali and Malaysia. Nomads continue to suffer from discrimination to the present day. This discrimination has taken many forms. Colonial administrators used registration and forced settlement as forms of coercive assimilation. Colonial borders split nomadic communities, entrenching their status as minorities that were outnumbered and dominated by settled communities.[1719] As a result, nomadic communities entered the post-colonial period as minorities and wary of government registration. Nomads ended up with ties to multiple states, making it more difficult to establish their loyalty and belonging in the rush to register nationality that followed political independence. A lack of civil registration, particularly in rural areas, left nomads without a way to prove their residence or place of birth.

Discrimination against nomads would only continue into the post-colonial period, including in the granting of nationality. While some nationality laws, like that of Mali, contained explicitly, racially discriminatory language, there is no evidence these clauses were used to exclude specific ethnic groups within Mali. Instead, as Part 2 discussed, many post-colonial nationality laws appeared neutral on their face when it came to nomads, but these laws reflected a systemic bias against mobility and nomadism inherent in nationality law. This bias made it difficult for nomads to access at nationality. For example, a reliance on habitual residence in granting nationality during a succession of states is permissible under

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[1717] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, 195 ratified by Kuwait 15 October 1968, by Mali, 16 July 1974.

[1718] OHCHR, 'Fact Sheet No.18 (Rev.1),' Minority Rights 4-6.

[1719] Nomads are not always in the minority in all parts of the world, as the example of Mongolia shows. Even today, one fourth of the population of Mongolia remains nomadic. The government has instituted a number of programs to support nomadism in Mongolia, which is seen as an important part of the country's heritage.

international law, as Pathway I discussed. Yet, habitual residence, as Part 2 showed, may be especially difficult for nomads to establish.

In addition, as Part 2 showed, nationality laws were often applied in a discriminatory way. While in Mali, as Part 2 showed, there is evidence that some Tuareg may have rejected Malian nationality, many others appear to have never had the opportunity to register due to the military crackdown and armed conflict in their region. While some Tuareg leaders resisted joining Mali, promises of an independent state by the former colonial power did not come to fruition. Instead, the Tuareg found themselves being administered by a military government with little interest in civil registration. Rather than reach out to nomadic communities to make sure they were included in registration exercises, some post-colonial governments, like that of Kuwait, actively prevented nomads from registering as nationals and took advantage of many Bedouins' feelings of ambivalence about registering as Kuwaiti nationals. In other cases, like Malaysia, governments failed to reach out to nomads, who were seen as unsuitable for nationality, even as they registered sedentary members of the same community. No effort was made to present the Sama Dilaut with an informed choice about the availability of Malaysian nationality and to what extent registering with the state would remain open to them in the future.

Successive governments in Kuwait, Mali and Malaysia came to view stateless nomads as security threats, terrorists or criminals, while settled communities were not treated in this way. Nomads were sometimes placed under military, rather than civilian rule, or their territories were administered by the military, further restricting their access to civil government and, as a result, civil registration. As Part 2 demonstrated, while many nomads did not see the importance of registering as nationals in the immediate post-colonial period, their descendants sometimes attempted to rectify this problem but found themselves locked out by the introduction of strict *jus sanguinis* nationality laws or by limitations on naturalizations and other restrictions.

Intent on promoting nationality unity, governments pushed to settle nomads and assimilate them into the majority population, or to further isolate and exclude them. Places to register were located in distant, urban areas and nomad forms of belonging were ignored in favour of a system based on documents. The statelessness of many nomadic families became entrenched and inter-generational as governments moved nomads off of valuable lands containing oil and natural resources. As a result, nomads, often more than other groups, were targeted for forced removal from their lands, worsening nomad-government relations.

Coercive settlement policies decimated nomadic populations, further reducing them to minority status. While not tied to nationality on their face, coercive settlement policies and removal from land often went hand-in-hand with civil registration, placing nomadic communities in an impossible position and linking nationality to assimilation.

Is such discrimination against nomads and mobile groups prohibited by states in international law and/or regional law? It is hard to charge individual states with discrimination against nomads given the systemic bias against mobility in nationality law. It is the purpose of nationality laws to draw a distinction between an in-group and an out-

group.[1720] Drawing distinctions between foreigners and nationals is considered to be a permissible function of nationality and, in fact, is one of the principle functions of nationality. It is not required under international law that states grant a nationality to immigrants,[1721] only that they apply immigration laws without discrimination on the basis of other grounds, such as race. The grounds on which distinctions are drawn are therefore critically important to determining when a violation of international law has occurred. The next sections will examine to what extent nomads were discriminated against in the application of nationality on grounds that are not permissible under international law.

Discrimination Against Nomads Based on Race, Ethnicity, National Origins and Historical Migration

The power to exclude foreigners as a class of people is not prohibited by states in international law, unless such exclusion is discriminatory because it is on account of certain prohibited grounds like race.[1722] The United Nations Human Rights Council has specified that failure to grant nationality to a child for reasons of discrimination based on "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status" amounts to an arbitrary deprivation of nationality.[1723]

Regional courts and commission have given guidance on how treaties prohibiting discrimination should be applied to individual cases. In *IHRDA v. Mauritania*, the African Commission on Human and Peoples' Rights held that illegal, racial discrimination was the cause of the denationalization and expulsion of black Mauritanians from Mauritania that began in 1989 under a racially targeted program of "Arabization".[1724] Such expressly racial

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[1720] As Van Waas puts it, an important function of nationality is to decide, "...who is 'us' and who is 'them'..." Van Waas, Nationality, 2008, 31. See also E. Isin and P. Nyers, who call it "inside/outside logic." Isin and Nyers, 2014, 4. For a detailed discussion of nationality's innately discriminatory purpose, see also Habermas, 107; Crawford, 263.

[1721] Except in limited humanitarian circumstances, such as by providing a pathway to nationality for refugees under the 1951 Refugee Convention.

[1722] UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXX on Discrimination Against Non-Citizens, (1 October 2002).

[1723] Human Rights Council, Thirty-first session, 'Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless' A/HRC/31/29 (16 December 2015) 3. See also Brownlie, Principles, 384.

[1724] IHRDA v. Mauritania, African commission on Human and Peoples' Rights (May 11, 2000). In 2006, applicants filed a case before the European Court of Human Rights arguing that the removal of at least 18,000 ethnic non-Slovenians from the civil registry, including many Roma, was discriminatory under Article 14 of the European Convention. The Court applied other legal grounds and did not make a finding on the discrimination claim. Case of Kurić and Others v. Slovenia, third section, European Court of Human Rights (13 July 2010) 80-82.

grounds for failing to grant a group of nationality is clearly prohibited under international law.

Indirect, or *de facto*, racial discrimination is also prohibited:

> The Special Rapporteur would like to highlight that the prohibition on racial discrimination in international human rights law aims at much more than a formal vision of equality. Equality in the international human rights framework is substantive, and requires States to take action to combat intentional or purposeful racial discrimination, as well as to combat de facto or unintentional racial discrimination.[1725]

Regional courts have also established that discrimination in the granting and withdrawal of nationality is prohibited on the grounds of national origins. In *Yean and Bosico v. Dominican Republic,* the Inter-American Court of Human Rights clarified that national origins cannot be grounds for discrimination in the granting of nationality. The case concerned the Dominican Republic, a country that follows *jus soli.* The Inter-American Court of Human Rights addressed the issue of withdrawal of nationality from persons of Haitian descent whom the government had labelled as being the descendants of "transients" not permanently settled in the Dominican Republic, despite being born there.[1726] This case dealt with both ethnic and racial discrimination, but also discrimination based on national origins.

The Inter-American Commission had previously argued that the government had violated the *jus soli* provision of its own Constitution by denying birth certificates to qualifying children born in the territory of the state for improperly discriminatory reasons based on race.[1727] The Court argued that migratory status of one's parents or grandparents can never be a condition of nationality in a *jus soli* country.[1728] It therefore concluded that the law was discriminatory on the basis of national origins.

In 2011, the issue of discriminatory nationality laws for reasons of national origins and ethnicity was also adjudicated by the African Committee of Experts and the Rights and Welfare of the Child, the treaty body for the African Charter on the Rights and Welfare of the Child.[1729] Nubians in Kenya were brought to the country by the British during the colonial period. Because the government had decided that children of Nubian descent in Kenya did not have an "ancestral homeland" in Kenya, they were deemed to not qualify as

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[1725] Human Rights Council, Thirty-eighth session 'Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance' (18 June – 6 July 2018) 6.

[1726] Jean and Bosico. The case dealt with the refusal of the government of the Dominican Republic to issue birth certificates to certain children based on their national origin.

[1727] Jean and Bosico, paras. 111 and 112.

[1728] Jean and Bosico, para. 156.

[1729] See generally Nubian Children.

Kenyan nationals.[1730] This case turned on the use of nationality to exclude an ethnic group that was claimed to be an immigrant group by the Kenyan government, despite being long settled in Kenya since prior to decolonization.

In this case, the government clearly pushed for a definition of nationality based on a combination of ethnic grounds and national origins. The Committee, however, rejected the argument that discrimination on the basis of ethnicity and national origins is permissible under regional human rights law and found instead that discrimination against children of Nubian descent clearly violated their human rights. The migration history of the ancestors of the Nubian population was not enough to justify the continued denial of nationality. In short, the historical migrations of a community going back several generations were simply irrelevant to their current nationality status.

How might this case be applied to nomads? Under this case, discrimination in the granting of nationality in *jus sanguinis* countries is impermissible when done on grounds of ethnicity and/or historic migration to the region, where the migration stretched back to colonial or pre-colonial times. Importantly, however, the non-nationals in this case were long settled in the territory of the state, not practicing a mobile, cross-border lifestyle.

> It is unacceptable to describe the alleged victims in this case as foreigners in transit, since those who live for 10, 15 or more years in a country cannot be described as transients.[1731]

In *Nubian Children* before the African Court on Human and Peoples' Rights, also discussed above, the Nubian population in Kenya is clearly and indisputably long settled in Kenya, not migrating across an international border. Beyond the vulnerability of cross-border populations, even former nomads may find it difficult to prove their long-standing settlement in the area. As well, labelling nomads as historical migrants or persons of a different national origin risks reinforcing the idea that nomads are immigrants who lack long-standing ties to the territories in which they now live, reinforcing government arguments in favour of their exclusion and the seizure of their lands.

How might these cases be applied to nomads? Classifying nomads as racial or ethnic minorities may be appropriate in some contexts but not in others, depending on the group and the circumstances. As Part I showed, the concept of nomads as separate, distinct races or ethnicities was a colonial construction. This is not to say that discrimination against nomads as a perceived race or ethnicity is never useful, rather that classifying nomads as separate ethnicities or races may not be universally accepted and may continue to impose an external world-view on them. Also, it can be difficult to link the supposed race or ethnicity of nomads, or their language or religion, to their statelessness because, as Part 2, it is the practice of nomadism, more than any other factor, that has led to discrimination in the granting of nationality by states. While race, ethnicity, language and religion may all be factors contributing to discrimination against nomads, particularly as part of an

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[1730] Nubian Children, para. 3.

[1731] Jean and Bosico, 111.

intersectional approach,[1732] the centrality of discrimination against mobility and nomadism as a way of life cannot and should not be overlooked.

Meanwhile, classifying nomads as "historical migrants" is also problematic as it implies that nomads are from somewhere else, a claim that many states have used to justify persecution of nomads and their removal from their lands. Such a "solution" therefore risks entrenching anti-nomad bias, rather than supporting nomad rights. Furthermore, *Jean and Bosico* reaffirms the principle under international law that nationality is tied to residence and settlement, a principle that may be challenging for nomads who wish to continue practicing a mobile lifestyle, particularly a cross-border mobile lifestyle. Because nationality is tied to settlement and long-term residence, the international and regional laws of nationality appear themselves to reinforce discrimination against mobility and nomadism. Labelling nomads as historical migrants or persons of different national origins risks entrenching, rather than solving, their exclusion.

What emerged most clearly from the analysis of the root causes of nomad statelessness is the centrality of discrimination against nomadism and mobility as a way of life and cultural practice in the three examples discussed above, yet nomadism is not articulated as one of the grounds for protection from discrimination under international law. Discrimination against nomadism is therefore often the central factor in nomad statelessness, though other factors like ethnicity and religion play an important role. The question then becomes whether or not discrimination in nationality law based primarily the practice of a mobile lifestyle, particularly a cross-border mobile lifestyle, might be inferred under international law? This question is particularly thorny, as was highlighted above, because of the systemic bias against mobility and, by extension, nomadism that is baked into nationality law, even at the international level.

Discrimination on the Grounds of Minority Status

Non-discrimination in international law is also closely tied to minority rights. Under the non-binding United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, minority status may be protected on grounds of nationality, ethnicity, culture, religion or language.[1733] Discrimination frequently targets minorities and, as Part 2 discussed, many nomads now find themselves as ethnic, religious, or linguistic minorities in every state in which they live. They are also minorities based on their nomadic lifestyle.

[1732] Human Rights Council, Thirty-eighth session 'Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance' (18 June – 6 July 2018) 9-12.

[1733] U.N. General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 3 February 1992, A/RES/47/135.

Minorities may be simply defined as "[a] group numerically inferior to the rest of the population of a State..."[1734] or as,

> a non-dominant group of individuals who share certain national, ethnic, religious or linguistic characteristics which are different from those of the majority population.[1735]

Under the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, minorities have the right to fully exercise their human rights and to practice their cultures, languages, religions, traditions and customs.[1736] Particularly important for nomads, cross-border minorities have the right to participate in decision-making on both the national and regional level and maintain contacts with one another across borders. Minorities have the right to participate in public life.

The International Covenant on Civil and Political Rights (ICCPR), binding on states, in Article 27 prohibits discrimination against ethnic, linguistic and religious minorities specifically in the practicing of those minorities' cultures, languages and religions. As the Human Rights Council specified,

> The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party... migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights.[1737]

In the context of discrimination, minority status is often based on a characteristic such as ethnicity, language or religion. Under Article 27 of the ICCPR, ethnic, linguistic and religious minorities have the right to practice their own culture, languages and religions.

[1734] Castellino and Doyle, 16, quoting F. Capotorti, Special Rapporteur, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc E/CN.4/Sub.2/384/Rev.1 (1977).

[1735] OHCHR, Fact Sheet No.18 (Rev.1), Minority Rights.

[1736] U.N. General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 3 February 1992, A/RES/47/135, Art. 4.

[1737] Human Rights Committee general comment No. 23 (1994) on the rights of minorities, quoted in Note by the Secretary-General, Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/74/160 (15 July 2019) 16. Minority may also be defined as "[a] group numerically inferior to the rest of the population of a State." Castellino and Doyle, 16, quoting F. Capotorti, Special Rapporteur, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc E/CN.4/Sub.2/384/Rev.1 (1977).

> (A minority is a) non-dominant group of individuals who share certain national, ethnic, religious or linguistic characteristics which are different from those of the majority population.[1738]

Also:

> An ethnic, religious or linguistic minority is any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language, or a combination of any of these. A person can freely belong to an ethnic, religious or linguistic minority without any requirement of citizenship, residence, official recognition or any other status.[1739]

Minority rights include special rights to protect against assimilation.[1740] The 1992 Declaration supports the rights of minorities to their own cultures.[1741] As well, the ICCPR protects the rights of ethnic minorities to practice their cultures and minority status regularly is defined by, among other attributes, the practice of a common culture. It is less clear, however, to what extent minority rights protect the right to a nationality, the right to civil registration and protect against statelessness.

As Part 2 discussed, many nomads became minorities during the colonial period, when they were divided by colonial borders. Aggressive settlement tactics have only shrunk many nomadic populations, further reducing them to minority status. Many nomads are minorities and have suffered ancillary discrimination on account of their language or religion, enumerated categories under minority rights. The link between non-discrimination for minorities and their right to a nationality under international could be clearer. This is particularly important for groups, like nomads, who do not always easily fit under the categories of race or national origin. For nomads who identify as linguistic, ethnic, religious and cultural minorities, protections against discrimination in the granting of nationality on account of their minority status could be more strongly articulated under international law. The minority rights framework could also do more to specifically prohibit discrimination in the granting of nationality and accessing civil rights.

Minority rights could also be strengthened by specifically listing nomadism as a cultural practice. While nomads are frequently discriminated against based on language, religion and ethnicity, defining nomadism as a type of cultural practice would make this

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[1738] OHCHR, Fact Sheet No.18 (Rev.1), Minority Rights.

[1739] Note by the Secretary-General, Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/74/160 (15 July 2019).

[1740] P. Brett, 'Discrimination and Childhood Statelessness in the Work of the UN Human Rights Treaty Bodies' in Institute on Statelessness and Inclusion, *The World's Stateless: Children* (Wolf 2017) 169-178. See also Arendt 1976 273, where she discusses the dangers of assimilation for minorities.

[1741] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135, 18 December 1992.

discrimination, which was described at length in Part 2, above, clearly prohibited under international law.

Nomadism and Indigenous Status

The indigenous rights framework protects indigenous persons from discrimination in the granting of nationality. Over the course of the last few decades, international law has increasingly recognized collective rights, or the rights of groups to make claims against their governments on a group basis.[1742] The theory of collective rights underpins the indigenous rights framework, including the United Nations Declaration on the Rights of Indigenous Peoples, the flagship, though non-binding, international instrument enumerating indigenous rights.[1743]

Article 6 of the non-binding 2007 UN Declaration on the Rights of Indigenous Peoples states that "every indigenous individual has the right to a nationality."[1744] It goes on to protect indigenous ways of life and outlaw discrimination based on indigenous status. The Declaration on the Rights of Indigenous Peoples in Article 2 prohibits discrimination against indigenous persons on the bases of indigenous identity:

> Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.[1745]

The indigenous rights framework has assisted in raising the profile of indigenous rights, including the rights of many nomads.[1746] Nomadism may be framed as a protected cultural practice under the indigenous rights framework. Nomadism as an indigenous cultural practice may therefore be related to nomadism as a cultural practice for the purposes of minority status. The two frameworks would therefore complement each other. Nomadism

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[1742] Kymlicka, 3, 7, 34. See also Miller, 86.

[1743] United Nations Declaration on the Rights of Indigenous Peoples, resolution adopted by the General Assembly, 2 October 2007, A/RES/61/295. See also Crawford 112; Van Genugten et al., 2014, 98; Castellino and Doyle, 8.

Kuwait, Mali and Malaysia all voted in favor of the Declaration. For more on indigenous rights, see generally the International Work Group for Indigenous Affairs at http://www.iwgia.org. Kuwait, Mali and Malaysia all voted in favor of the Declaration. For more on indigenous rights, see generally the International Work Group for Indigenous Affairs at http://www.iwgia.org.

[1744] UN Declaration on the Rights of Indigenous Peoples Article 6. 144 states voted in favor. See also Van Genugten et al., 2014, 99.

[1745] UN Declaration on the Rights of Indigenous Peoples Article 2.

[1746] "(I)ndigenous groups have managed to establish alternative routes to recognition and voice, leading to the creation, for example, of the UN Working Group on Indigenous Populations and the 2007 Indigenous Declaration which aimed to alleviate this exclusion from international systems (e.g. see OHCHR 2013), as well as through resistance and protest." Bloom, Members, 2017, 166.

could also be classified as a "traditional economic activity" protected under Articles 3, 5 and 20 of the Declaration on the Rights of Indigenous Peoples and under Article 27 of the ICCPR.[1747] As with the minority rights framework, however, the indigenous rights framework could be more specific in defining nomadism in these ways.

While many nomads identify as indigenous peoples, however, this framing may not be ideal for others. In cases where a group's indigenous status may be disputed by the government, it is important to note that there is no settled definition of indigenous, nor methods by which such disputes could be settled.[1748]

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[1749]

Legal experts have offered varying opinions on how to define indigenous status. Some scholars argue that first occupancy of land lies at the heart of the concept of indigenous, but others dispute this claim.[1750] Others argue strongly in favour of self-identification and of identification by other indigenous groups, akin to the recognition that states give to other states, the approach taking by ILO Convention 169, which emphasizes state recognition of indigenous or tribal status.[1751] The United Nations Development Group, which provides guidance on mainstreaming the sustainable development goals, cites a variety of factors that may be relevant to the identification of indigenous peoples, including most importantly self-identification, but also historical continuity with pre-colonial societies, priority in time, a strong link to particular territories and natural resources, distinct social systems and culture from the majority population, and a history of discrimination.[1752]

[1747] Gilbert, Still, 2004-2005, 144-145, 159.

[1748] Concerns over the lack of a definition of indigenous status were raised during the drafting of the UN Declaration. See Castellino and Doyle, 27.

[1749] Statement of the former United Nations Special Rapporteur on Discrimination against Indigenous Populations, José Martínez Cobo at http://indigenousfoundations.web.arts.ubc.ca/global_actions/.

[1750] For a brief overview of the debate, see Castellino and Doyle, 17-18.

[1751] International Labour Organization, Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169 (1989), Art. 1. See also Castellino and Doyle, 19.

[1752] United Nations Development Group, 'Guidelines on Indigenous Peoples' Issues' (New York and Geneva 2009) 8-9. See also Gilbert, Territories, 2007, 12. Gilbert notes that the United Nations, World Bank and

As Part 2 explored, governments often refuse to recognize nomads as indigenous, framing them instead as immigrants. Using the indigenous rights framework as a pathway to a solution for nomads therefore carries the risk that the right to a nationality for nomads gets lost in a debate over the status of nomads as indigenous persons. The framework is frequently applied in so-called "settler states," where the majority population are recent immigrants, but this is not the case in many parts of the world where nomads live.[1753] It is not always easy to apply this framework in places like Malaysia and Mali, where the government sometimes treats nomads like the Tuareg and Sama Dilaut as either immigrants or foreigners.[1754] As Castellino and Doyle point out, other international frameworks, such as minority rights, might be more appropriate for nomads in some cases.[1755]

In states like Kuwait, Mali and Malaysia, concepts of indigenous rights have often been employed to justify nomad exclusion. Indigenous is often used as a synonym for native, implying that an indigenous group was present in a location before colonization.[1756] This view, that indigenous implies first in time, appears to have been at least implied by the Government of Kenya in *Endorois* case.[1757] "(P)articular importance is always placed on the requirement that the group...must have occupied and used a fairly definable territory before present day state borders..."[1758] As Part 2 explored, the claim of being "first in time" or present in a certain territory before a certain date may be difficult for nomads to defend.

Recently, however, indigenous rights have begun to move away from its classical colonial framing of "first in time."[1759] For example, the Inter-American Court of Human Rights

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International Labor Organization have all offered working definitions, with self-identification as the foundation. Gilbert, Territories, 2007, 14.

[1753] See generally Bloom, Members, 2017, 155-156 for a discussion of the usefulness of the indigenous rights framework to indigenous statelessness.

[1754] For a discussion of nomads as indigenous peoples, see Gilbert, Territories, 2007, 695. See also Gilbert, Nomadic, 2014, 57; S. Imai and K. Buttery, 'Indigenous Belonging: A Commentary on Membership and Identity in the United Nations Declaration on the Rights of Indigenous People' 49 *York UP* (working paper, 2013) (hereinafter Imai and Buttery).

[1755] Castellino and Doyle, 25-27.

[1756] Van Genugten et al., 2014, 100.

[1757] Endorois, 139, 159-160.

[1758] M. Ahren, 'The Provisions on Lands, Territories and National Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction' cited in Castellino and Doyle, 30.

[1759] See for example the courts language in Endorois, para. 154, where it says, "(t)he African Commission is also aware that though some indigenous populations might be first inhabitants, validation of rights is not automatically afforded to such pre-invasion and pre-colonial claims."

"Some suggest that a state has a right to territorial sovereignty if the individuals who constitute the state can prove that they are the original occupants (or their rightful successors) of the territory in question." C. Hanjian, *The Sovrien: An Exploration of the Right to Be Stateless* (Polyspire 2003) 116-117. Hanjian goes on to

extended indigenous status to a group descended from African slaves brought to Suriname in *Saramaka v Suriname*. This broadened the definition of indigenous to groups who arrived to what is now Suriname during the colonial period.[1760]

Speaking of the African context, Castellino and Doyle say,

> (i)t is not the issue of aboriginality, who came first, that is a fundamental aspect of the definition of indigenous peoples, as suggested by the states, but rather the current relations of oppression within those African societies.[1761]

The extension of indigenous rights to groups who were not "first in time" shows a possible way forward for some nomads.[1762] A progressive interpretation of indigenous may make the indigenous rights framework helpful to a broader class of nomadic peoples.

As a practical matter, however, it can be difficult to establish indigenous status when indigenous practices and lifestyles are gone.[1763] For example, as Part 2 explored in detail, it may be difficult to define the *bidoon* as an indigenous group, since some *bidoon* are not descended from Bedouin groups and are not indigenous to the region. In other cases, *bidoon* families may have no way to prove their family history. Changes to group identity over time may therefore complicate indigenous status.[1764]

The point of this section is not to voice an opinion one way or another as to whether nor not specific nomadic groups are indigenous, but to point out that many factors, including government programs of assimilation, the risk of conflation between nomadism and migration, the long-term removal of nomads from their lands, as well as the fact of mobility itself, sometimes make the indigenous rights framework difficult, or maybe even risky, to apply to nomads. Nevertheless, with state buy-in, the indigenous rights framework remains a potential tool to preventing discrimination and, critically, assimilation for some nomads. It may be used in tandem with minority rights to protect nomads from discrimination in the granting of nationality.

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ask, "Which...criteria (are) to be used to determine the first occupants? Who has the legitimate authority to decide this matter?"

[1760] Endorois, 159-160. For more on recent developments on this question, see F. MacKay, 'The Rights of Maroons in International Human Rights Law' Cultural Survival Quarterly Magazine (December 2001); C. Tavani, C*ollective Rights and the Cultural Identity of the Roma: A Case Study of Italy* (Brill 2020) 48-49.

[1761] Castellino and Doyle, quoting Regino, Montes and Cisneros, 29.

[1762] F. MacKay, 'The Rights of Maroons in International Human Rights Law' Cultural Survival Quarterly Magazine, (December 2001).

[1763] Endorois, para. 161.

[1764] For more on how governments themselves construct and influence indigenous identities, see the discussion in Bloom, Members, 2017, 166.

Nomadism as an "Other Status" under International Law

Does international law provide other solutions? Under the Universal Declaration of Human Rights, Art. 2 and the International Covenants, the inclusion of a category for "other status" has potentially opened up protections from discrimination to a broader class of persons. Could nomadism be considered to be an "other status" under the Universal Declaration of Human Rights and a progressive interpretation of international law? This approach has had clear success when it comes to discrimination based on sexual orientation, in part because the United Nations has made such a progressive interpretation a focus of its work.[1765] Could a similar progressive interpretation be made for nomadism? Put another way, is there an express right to be nomadic under international law?

Freedom of movement is a fundamental human right. Does it support the right to be nomadic? For example, the International Covenant on Civil and Political Rights guarantees freedom of movement in Article 12, including the right to enter and leave one's country. The Universal Declaration of Human Rights does so likewise in Article 13. The American Declaration of 1948 in Article 8 guarantees that; "every person has the right to fix his residence within the territory of the state of which he's a national..." Freedom of movement in the 1951 Refugee Convention is closely tied to the establishment of a residence in Article 26.

Though the right to freedom of movement, in the sense of changing residence within a state, is well established in international law, the right to engage in a mobile lifestyle arguably is not.[1766] Gilbert notes that right to freedom of movement is designed not to support a mobile lifestyle but to allow settled people to change residence.[1767] As Gilbert points out, "international law is fundamentally in favour of settled societies in supporting predominantly sedentarist States to the detriment of nomadic forms of organization."[1768] Gilbert also notes that "(f)ree movement being the essence of nomadism, it is surprising how little the right to free movement has been associated with a nomadic lifestyle."[1769]

The Council of Europe Recommendations on Stateless Nomads and Nomads of Undetermined Nationality (R 83(1)) and on the Social Situation of Nomads in Europe (R 75(13)) contain support for nomadism as a way of life, a right that is supported by the freedom of movement generally enjoyed within the European Union. These Council of

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[1765] J. Gary and N. Rubin, 'Are LGBT rights human rights? Recent developments at the United Nations UN Matters,' *Psychology International* (June 2012).

[1766] Human Rights Committee, 'General Comments Adopted by the Human Rights Committee Under Article 40,' Paragraph 4, of the International Covenant on Civil and Political Rights, Addendum General Comment No. 27(67): Freedom of Movement (article 12).

[1767] Gilbert, Nomadic, 2014, 75.

[1768] Gilbert, Nomadic, 2014, 58.

[1769] Gilbert, Nomadic, 2014, 72.

Europe Recommendations are two of the few instruments that expressly mention a right to be nomadic.

Some support for the right to cross borders and maintain a mobile lifestyle as part of seasonal transhumance may be found under the ECOWAS framework, such as in the ECOWAS Protocol on Transhumance (1998) and supporting Regulation (2003), where it states that ECOWAS should take measures to "facilitate" transhumance.[1770] As well, there has been some acknowledgment of nomadic peoples' rights to cross international borders as part of the freedom to enter or leave one's country, such as via the Jay Treaty between the United States and Canada.[1771] The International Labor Organization Recommendation 104 recommends that government protect tribal rights to cross borders.[1772] In general, however, the practice of nomadism and/or a mobile lifestyle lacks clear protections under both regional and international law. The rarity of such clauses points to a gap in international law on guaranteeing the right to be nomadic. This is not a coincidence, but is deeply related to the systemic bias against nomadism in nationality law.

While support for protections for a mobile lifestyle or cultural practice remains thin under international law, there are signs this is beginning to change. In Europe, with respect to the nomadic Roma, there has been some acknowledgment that freedom of movement might entail freedom to maintain a mobile residence and practice a mobile lifestyle as a cultural practice and identity. This progression may be assisted by a growing right to freedom of movement in the European Union, though more research on this topic is needed. Such developments point to growing recognition of the Roma not only as an ethnic minority, but also as a *mobile minority*, where mobility is central to their minority status. For example, Recommendation 14 (2004) of the Committee of Ministers of the Council of Europe recommended expanding freedom of movement to include the right to maintain a mobile residence.[1773] Much more could be done, however, to expressly prohibit the discrimination in nationality law on the basis of mobility and nomadism.

It is quite possible that a progressive interpretation of international law would find that nomadism is protected as a type of "other status," but this requires stronger articulation. In particular, any classification of nomadism as a protected status when it comes to the granting of nationality should be explicit under international law to combat the systemic bias against mobility in nationality law and the nation-state system. Strong, unequivocal support from United Nations organs in the recognition of nomadism as a protected cultural

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[1770] Forty-ninth Session of the Council of Ministers, Regulation C/REG.3/01/03 Relating to the implementation of the regulations on Transhumance between the ECOWAS Member States (Dakar 26-28 January, 2003) Article 2(5).

[1771] See generally Standing Senate Committee on Aboriginal Peoples, 'Border Crossing Issues and the Jay Treaty' Senate of Canada (June 2016).

[1772] ILO Recommendation 104, quoted in Gilbert, Nomadic, 2014 82-83.

[1773] Recommendation no. 14 of the Committee of Ministers to member states on the movement and encampment of Travelers in Europe (2004), quoted in Gilbert, Nomadic, 2014 77.

and economic practice is needed. In particular, a right to dual or multiple nationality for nomadic and mobile peoples may be necessary in order to preserve and protect the right to be nomadic as part of nomadic peoples' special status or indigenous status. The right to freely cross borders may need to be asserted. There remains the open question as to what extent a special package of rights for nomads may need to be given special status, or whether all human beings have the right to maintain a mobile lifestyle if we choose.

Statelessness as "Other Status"

An important body of law also protects both recent migrants and stateless persons from discrimination *vis a vis* other non-nationals. Might this framework offer additional protections to nomads from discrimination in the granting of nationality? Under a progressive interpretation of international law, might statelessness itself be a kind of "other status"?

As the examples showed, statelessness itself is often used as a justification for discriminating against nomads in the granting of nationality, by inferring that these groups are somehow naturally criminal or transgressive and, therefore, not deserving of nationality. This can be seen in the example of the Sama Dilaut, whose historic migration has been branded by governments as inherently criminal since the colonial period.

This circular logic has a long history. As Arendt points out, "(t)he stateless person, without right to residence and without the right to work, had of course constantly to transgress the law."[1774] The labelling of stateless people as criminals today is frequently linked to public rhetoric against undocumented people more generally, including immigrants, where the lack of a government status is, itself, used as evidence of criminality and foreignness.

> States may limit the enjoyment of certain human rights to nationals, but any such restriction must nevertheless meet stringent conditions so as to comply with the principle of non-discrimination.[1775]

While stateless persons and non-citizens are not entitled to be granted the nationality of a specific state, they must be treated the same as other immigrants. Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[1776] prohibits discrimination against migrants and protects the right to a nationality for the children of migrants. The Committee on the Elimination of All Forms of Racial Discrimination in General Recommendation 30 recommended to states that they ensure non-citizens and stateless persons were also protected from racial

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[1774] Arendt, 1976, 286.

[1775] Human Rights Council Nineteenth session, Human rights and arbitrary deprivation of nationality, Report of the Secretary-General, A/HRC/19/43 (December 2011) 3. See also the Guidance Note of the Secretary-General on the United Nations and Statelessness (June 2011).

[1776] United Nations, Treaty Series, vol. 2220, p. 3; Doc. A/RES/45/158, with 55 states parties.

discrimination.[1777] The Committee advised states to remove discrimination against groups with regard to access to nationality and naturalization and to regularize the status of the nationals of predecessor states. Article 32 of the Convention relating to the Status of Stateless Persons mandates states to facilitate the naturalization of stateless persons and the Statelessness Conventions require that children born otherwise stateless be granted a nationality. According to the Committee, states must not create unreasonable barriers to naturalization for long-term residents. Finally, international law mandates that states protect the basic human rights of non-nationals and stateless persons.[1778]

As De Chickera and Whiteman point out, however, prohibiting discrimination against stateless persons does not find the same level of obvious support in international law as race, ethnicity and the other factors described above.[1779] The Statelessness Conventions lack a treaty body of their own, meaning that the issue of discrimination against stateless persons must be addressed through other treaty bodies such as the Committee on the Rights of the Child.[1780] As the Office of the High Commissioner for Human Rights has observed, freedom from discrimination against stateless persons does not require that the state in question grant stateless persons a nationality, only that they be given the same treatment as other non-nationals.[1781] As a result, the failure of governments to provide a nationality to nomads because of their statelessness is not prohibited under international law unless this failure is on account of their race, religion, ethnicity or another prohibited ground discussed above.

Rather than providing a pathway to a solution, the Statelessness Conventions would only place nomads in the same position as other foreigners, reinforcing their status not as *de facto* nationals but as foreign. As well, labelling nomads as stateless risks perpetuating the view that they are "naturally stateless" and unable to form or participate in states, a view that has done incalculable damage to nomads, as discussed at length in Part 2.

Conclusion

Part 2 exposed a substantial bias against mobility and nomadism in nationality law. Inevitably, this bias encouraged the assimilation and settlement of nomads. As Pathway II

[1777] Committee on the Elimination of All Forms of Racial Discrimination, 64th Session, General Recommendation 30, Discrimination Against Non-Citizens, CERD/C/64/Misc.11/rev.3 (23 February-12 March 2004).

[1778] See generally the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 (16 December 2005). See also Donner 194; Van Waas, Nationality, 15, 28, 36, 40, 50; Van Waas, Statelessness Conventions; Donner, 29; Verzijl, 48.

[1779] De Chickera and Whiteman, 111.

[1780] See generally Handbook, 2014.

[1781] U.N. Office of the High Commissioner for Human Rights, Fact Sheet No. 18 (Rev.1), Minority Rights, February 1998, No. 18 (Rev.1).

has shown, this bias extends into international law. While discrimination against nomadism is often a central cause of nomad statelessness, international law does not directly address this discrimination. Stronger and more specific protections for nomadism are needed.

Specific protections for nomadism are largely missing from the international laws and declarations prohibiting discrimination in the granting of nationality. Nomadism is not expressly defined as a cultural practice under the ICCPR or as a type of indigenous identity under the Declaration on the Rights of Indigenous Peoples. Other areas of human rights law do not necessarily support the right to maintain a mobile or cross-border lifestyle. Meanwhile, requiring that nomadism be framed as a type of historical migration or national origins risks promoting settlement as the "solution" to the problem of nomad statelessness.

While anti-discrimination laws have much to offer nomads, it is not always easy to link the statelessness of nomads to their status as ethnic, religious, linguistic or racial groups without acknowledging the centrality of nomadism as the cause of their exclusion. In order to resolve this oversight, language protecting nomadism as a way of life and prohibiting discrimination against nomads on account of their mobile way of life, including in the granting of nationality, would need to be included in an international treaty or other binding instrument of law.

This dissertation advocates that nomadism and mobile lifestyles be more clearly treated under international law not as types of cross-border mobility, but instead as a cultural practice and economic activity firmly distinct from immigration or migration and protected from discrimination under international law, particularly when it comes to the granting of nationality. A progressive approach, like that encouraged by the U.N. General Assembly,[1782] to indigenous and minority rights might more clearly frame nomadism as a group identity and a cultural practice in need of protection.

Such express support for nomadism is particularly necessary given the powerful bias against mobility that is baked into nationality law at every level. Simply drafting a new treaty to protect nomads from discrimination, however, may not be enough to remove this bias. Nationality law has proven to be, in and of itself, an engine of nomad assimilation and settlement in many places. Nomad nationality in existing nation-states tends to be accompanied by settlement and the abandonment of nomadism. Even explicit protections for nomadism as a cultural practice may not be enough to counteract the bias against mobility and, in particular, cross-border mobility that is a founding principle of nationality law.

[1782] The UN General Assembly is mandated to encourage a progressive approach to international law under Article 13, paragraph (1)(a), of the Charter of the United Nations. See Codification and Progressive Development of International Law website at https://legal.un.org/cod/.

Pathway III: Identifying and Resolving Inter-generational Statelessness

> The adoption of sanguinis by post-World War, newly independent states, has often had a discriminatory impact in favour of the dominant ethnic group on the states' territories.[1783]

As Part 2 discussed, the modern concept of *jus sanguinis* fit well with the systems of belonging in many pre-colonial societies, particularly those based on Islam, where belonging was passed down along the paternal line. Yet, *jus sanguinis* in post-colonial states often followed a relatively short period creating the first body of nationals, a period that was marked by unclear laws, poor administration and rampant discrimination against certain groups like nomads. As the examples showed, the feasibility and appropriateness of the rapid and strict adoption of *jus sanguinis* by numerous post-colonial states was never questioned during the decolonization process, despite the arguably high risk of creating statelessness as a result.[1784] As a result, minority populations, border groups and many nomads were locked out of a nationality.

As Part 2 demonstrated, the enactment of strict *jus sanguinis* laws without exceptions to prevent statelessness was a cause of inter-generational statelessness for nomads and former nomads in countries like Kuwait. In other countries, like Malaysia, limits on *jus sanguinis* have either not been implemented or are implemented in a way that excludes many nomads and former nomads.

Pathway III will look at breaking the chain of inter-generational statelessness for nomads through the application of international law. Pathway III may be necessary to resolve cases of nomad statelessness that cannot be resolved by the first two Pathways, though, for reasons explored below, it carries considerable risks. Pathway III will first look at solutions for persons who would be otherwise stateless at birth. Pathway III next will look at facilitated naturalization for stateless persons to see if identifying nomads as stateless can lead to a solution.

Beyond looking at treaties, Pathway III will also look at court cases on establishing statelessness at birth, and guidance from UNHCR. Highly relevant to understanding how treaty law might be applied to the benefit of nomadic communities are the 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.[1785] Also

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[1783] Conklin, 98.

[1784] A widely cited risk factor for statelessness is the strict application of *jus sanguinis.* See for example, C. Dumbrava and R. Bauböck (eds.) 'Bloodlines and belonging: Time to abandon *ius sanguinis*?' European Union Democracy Observatory on Citizenship (2015). It should here be noted that the use of *jus soli* nationality law does not preclude statelessness, nor does *jus sanguinis* automatically result in statelessness. But in some cases, *jus sanguinis* can add to the risk.

[1785] 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, HCR/BS/12/04 (21 December 2012) 3

relevant, the European Court of Human Rights recognized that nationality was an integral part of a child's identity,[1786] as did the African Committee of Experts on the Rights and Welfare of the Child in *Nubian Children*, discussed above in Pathway II.

The International Laws Applicable to Children Born Otherwise Stateless

Pathway III will first focus on the body of laws that mandate that children born otherwise stateless in the territory of the state be granted a nationality. These laws include the Convention on the Reduction of Statelessness of 1961, which mandates in Article 1 that all persons born in the territory of the state who would otherwise be stateless be granted a nationality. [1787] Other relevant treaties include the American Convention on Human Rights[1788] and the African Charter on the Rights and Welfare of the Child.[1789] Important soft law contributions include the Draft Protocol to the African Charter.

It should be noted that this process may be automatic under Art. 1(1)(a), or subject to conditions, like habitual residence, under Art. 1(1)(b).[1790] According to UNHCR, which provides guidance on the implementation of the 1961 Convention, if a state imposes conditions, they must not result in leaving the child stateless for a "considerable" period of time.[1791] The condition of habitual residence cannot be for longer than 5 years and lawful residence is not required.[1792]

The first step in applying international legal limits on strict *jus sanguinis* for children born otherwise stateless is the granting of a birth certificate. It is important to note that absence of birth registration should not be a barrier to implementing Article 1 of the 1961

(hereinafter UNHCR Guidelines on Statelessness No. 4), citing the American Convention Art. 20(2) and the African Charter Art. 6(4).

[1786] Menesson c. France, 65192/11, Cour européenne des droits de l'homme, 5e sect., (26 juin 2014).

[1787] Convention on the Reduction of Statelessness.

[1788] American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). For a list of states parties see: https://treaties.un.org/pages/showdetails.aspx?objid=08000002800f10e1

[1789] Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990). For a list of states parties see: https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf.

[1790] For example, the state may fix a period of 3 to 10 years of habitual residence depending on the circumstances. Convention on the Reduction of Statelessness, Article 1(1)b.

[1791] UNHCR Guidelines on Statelessness No. 4, 8.

[1792] UNHCR Guidelines on Statelessness No. 4, 9.

Convention, but in practice, birth registration is likely to be an important part of ending intergenerational statelessness for nomads under Article 1 of the 1961 Convention.[1793]

The birth certificate is crucial to proving the child was born in the territory of the state and establishing the child's parentage for the purposes of establishing their statelessness. The Convention on the Rights of the Child mandates in Article 7 that all children born in the territory of a state be issued with a birth certificate and establishes the principle of the "best interests of the child" in Article 3.[1794]

Establishing that Children are Born Otherwise Stateless

Assuming the Convention on the Rights of the Child were implemented, no nomad child in countries like Kuwait, Mali or Malaysia would be unable to prove their birth in the territory of the state, establishing the first part of the conditions laid out in Article 1 of the 1961 Convention. Most nomad children with birth certificates also have important evidence of their parent's nationality, or demonstrate that they cannot establish a link to their parents that satisfies the law, for example, in countries where parents must be married to pass on their nationality or where only fathers can pass on nationality.

The child must also be established as having been born otherwise stateless, fact which usually requires more inquiry into the circumstances than is provided on a birth certificate. UNHCR Guidelines on Statelessness No. 4 provide guidance on how such an inquiry should be made. The definition of statelessness for children is that found in the 1954 Convention.[1795] Importantly, the standard "best interests of the child" applies and, as interpreted by UNHCR, requires that the child's statelessness must be resolved as quickly as possible.[1796]

According to UNHCR,

> a Contracting State must accept that a person is not a national of a particular State if the authorities of that State refuse to recognize that person as a national. A State can refuse to recognize a person as a national either by explicitly stating that he or she is not a national or by failing to respond to inquiries to confirm an individual as a national. A Contracting State to the 1961 Convention cannot avoid the obligations to grant its nationality to a person who would otherwise be stateless under Articles 1 and 4 based on its own interpretation of another State's nationality laws where this conflicts with the interpretation applied by the State concerned.[1797]

[1793] UNHCR Guidelines on Statelessness No. 4, 12.

[1794] Convention on the Rights of the Child, Art. 7(2).

[1795] UNHCR Guidelines on Statelessness No. 4, 4. See also 1954 Convention.

[1796] UNHCR Guidelines on Statelessness No. 4, 3.

[1797] UNHCR Guidelines on Statelessness No. 4, 4.

Following this guidance, Malaysia's national laws, discussed above in Part II, should have led to the granting of Malaysian nationality to adopted children born otherwise stateless, once the court and parents had made a good faith attempt to establish the children's nationality elsewhere. But important gaps remain in UNHCR's Guidance. It is not clear, however, what qualifies as a "failure to respond" to inquiries. Here, the UNHCR Guidelines could better take into account the guidance from the Committee on the Rights of the Child and better harmonize the 1961 Convention with the Convention on the Rights of the Child and the standard of "best interests of the child."

The example of Kuwait is also instructive on this issue. Many *bidoon* children are now registered as *bidoon* at birth.[1798] Were Kuwait to ratify them, this would violate Article 1 of the 1961 Convention and Article 7 of the Convention on the Rights of the Child. Yet, even were the Kuwaiti government to ratify and follow the 1961 Convention and the Convention on the Rights of the Child, the fact of birth in Kuwait by itself would not automatically establish the rights of *bidoon* children to Kuwaiti nationality. Some sort of procedure involving communications with neighbouring states Saudi Arabia and Iraq would be required. When countries do not have bilateral relations with the necessary states, or when relations are strained, the process of establishing that a child is stateless risks become snarled in international relations.

UNHCR also permits states to give children a designation of "undetermined nationality" while a determination of their nationality or statelessness takes place.[1799] This "solution," however, may contradict the 1961 Convention if the procedure becomes an excuse to delay a resolution. It weakens the protections of the 1961 Convention if the nationality of children at birth becomes bound up in red tape and negotiations between governments. It should be noted that a finding of "undetermined nationality" is not possible under Art. 20 of the American Convention on Human Rights or Art. 6 of the African Charter on the Rights and Welfare of the Child.[1800]

Crucially, under the 1961 Convention, states may also require parents to satisfy a residency requirement. Yet, as discussed at length above, it may be difficult for nomadic families to satisfy the residency requirements under the law.

According to UNHCR,

> It follows from the factual character of "habitual residence" that in cases where it is difficult to determine whether an individual is habitually resident

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[1798] Committee on the Rights of the Child, Sixty-fourth session, 'Item 4 of the provisional agenda: Consideration of reports of States parties: List of issues in relation to the second periodic report of Kuwait' (CRC/C/KWT/2) (16 September – 4 October 2013).

[1799] UNHCR Guidelines on Statelessness No. 4, 6.

[1800] Organization of American States (OAS), American Convention on Human Rights, 'Pact of San Jose,' Costa Rica, 22 November 1969 Art. 23.1(b). Organization of African Unity (OAU), African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). See also UNHCR Guidelines on Statelessness No. 4, 8.

> in one or another State, for example *due to a nomadic way of life*, such persons are to be considered as habitual residents in both States.[1801]

Given the challenges in establishing residence for nomads, discussed above, UNHCR could provide more guidance on this point.

The International Norms on the Identification of Statelessness and Facilitated Naturalization

International law also provides facilitated naturalization as a solution for stateless persons under the 1954 Convention relating to the Status of Stateless Persons.[1802] This process may provide a solution via the identification of stateless persons in Article 1 and access to facilitated naturalization in Article 32. While this solution is highly problematic for nomads for a variety of reasons discussed below, it remains a possible solution under international law that should be explored.

In addition to the international norms discussed above, this solution draws on the soft law guidance of the UNHCR Handbook on the Protection of Stateless Persons and case law. Also relevant are the Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa and the Draft Articles on the Protection of Stateless Persons and the Facilities for their Naturalization.

Recent support for the naturalization of stateless persons is found in draft laws such as the Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa.[1803] In 2017, UNHCR issued Draft Articles on the Protection of Stateless Persons and the Facilities for their Naturalization.[1804] The Draft Articles provide, in addition to other benefits, the removal of residency and language requirements for stateless persons in order that they may naturalize.

[1801] UNHCR Guidelines on Statelessness No. 4, 10 (my italics).

[1802] Convention Relating to the Status of Stateless Persons.

[1803] Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa May 2017 art. 18. Recent developments in international law further support a pathway to facilitated naturalization for stateless migrants. The Draft Protocol to the African Charter on Human and Peoples Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa would place a clear duty on states to facilitate naturalization for stateless migrants.

[1804] U.N. High Commissioner for Refugees, Draft Articles on the Protection of Stateless Persons and the Facilities for their Naturalization, February 2017. "The duty to 'facilitate' acquisition of nationality is a term used in other international treaties that involves at least making such acquisition significantly easier than for foreigners generally, for example by reaching out to communities known to be lacking documentation of nationality, by providing a non-discretionary process of acquisition, such as those known in different countries as declaration, registration or option, or by reducing the period of residence required." Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa: Explanatory Memorandum (2018) para. 48.

UNHCR advises, however, that statelessness determination procedures "may only be appropriate for the minority of the world's stateless persons who are in a migratory situation" and "a different approach is called for in the case of stateless persons who are in their own country, recognizing their profound connection with that State through, for example, birth or longstanding residence." [1805] According to UNHCR guidance, *in situ* populations should instead be treated as *de facto* nationals.[1806]

Yet, the difference between *in situ* stateless populations and those in a migratory context is often difficult to delineate,[1807] particularly, as Part 2 showed, for nomads. As Part 2 discussed at length, the question of nomad "residence" is a fraught one. If a nomad community has been split by a colonial border, which country is their "own country"? Is it the responsibility of one state or another to decide this question? There are few guidelines as to when "being in a migratory state" ends and *in situ* status begins.[1808] As these terms are not defined under international law, there is a risk of compounding or validating the tendency of states to class nomads as foreigners, as was discussed at length in Part 2. It is imperative to note as well that this solution requires labelling nomads as stateless, a practice with a long and troubled history, as also described in Part 2. Without identifying nomads as stateless, however, facilitated naturalization under the 1954 Convention does not appear possible without further developments the law.

Establishing Statelessness and the Burden of Proof

Proving statelessness for either children or adults raises the question of the burden of proof, a question that is not answered by either the 1954 or 1961 Convention. The process of establishing statelessness often requires that the individual or family provide extensive documentary evidence which might be very difficult for many nomads. The question of the burden of proof for children born otherwise stateless has been addressed both by UNHCR and by national courts.

> In most legal systems, a claimant bears the initial responsibility of substantiating his or her claim. Because of the difficulties that often arise when determining whether an individual has acquired a nationality, the burden of proof must be shared between the claimant and the authorities of

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[1805] Handbook, 2014, 3, 25-26, 57. The phrase "own country" is taken from the International Covenant on Civil and Political Rights, Art. 12(4). See also European Network on Statelessness, 'Statelessness Determination and the Protection Status of Stateless Individuals' (2013) 5, citing UNHCR guidelines. For a detailed discussion of the concept of "own country" in international law, see C. Vlieks, 'Contexts of statelessness: the concepts "statelessness in situ" and "statelessness in the migratory context"' in T. Bloom, K. Tonkiss, P. Cole (eds.) *Understanding Statelessness* (Routledge 2017) 40-42 (hereinafter Vlieks).

[1806] Handbook, 2014, 1.

[1807] This observation is made by Oakeshott in his article on statelessness in Southeast Asia. N. Oakeshott, 'The Search for Solutions to statelessness in Southeast Asia: State practice and recent developments' in L. van Waas and M. Khanna (eds.) *Solving Statelessness* (Wolf L.P. 2016) 349.

[1808] Vlieks, 41.

> the Contracting State to obtain evidence and to establish the facts as to whether an individual would otherwise be stateless. The claimant and his or her parents/guardians have the responsibility to cooperate and to provide all documentation and information reasonably available to them while the relevant authority is required to obtain and present all relevant evidence reasonably available to it.[1809]

This appears to shift the burden of proof somewhat from the child to the government. For a statelessness determination procedure, according to the UNHCR Handbook on the Protection of Stateless Persons, the burden of proof to prove statelessness is "shared," part of a "collaborative" effort, and that statelessness should be established to a "reasonable" degree.[1810] This sentence is vague. It is not clear what the standard for reasonableness should be.

It is not clear if a different standard of proof should be applied to a statelessness determination procedure for an adult versus determining if a child would be otherwise stateless. Are these different standards, or the same? For children, the human rights norm of the "best interests of the child" would seem to weigh in favour of a lower standard of proof for children. As UNHCR goes on to stipulate, to be in compliance with the Convention on the Rights of the Child, the burden placed on the family to provide evidence of a child's statelessness must be reasonable,[1811] but once again, there is little clarity of what this stand means in general, or what it might mean for nomads.

In both cases, there is the additional problem of types of proof, which tend to involve documents that nomads may struggle to provide. The UNHCR Handbook, section D, lists the types of evidence used to establish statelessness, including responses from foreign governments on the question of nationality, identity documents, including travel documents, immigration documents, employment documents and school records.[1812] On the list of forms of evidence, only the testimony of the applicant and of neighbours and community members are things that many nomads will be able to provide. In the end, however, such a document-focused determination procedure may be impossible for stateless persons and families to comply with.

Courts have often imposed a high burden of proof on stateless persons to prove their statelessness. In *Hoti v Croatia,*[1813] the European Court of Human Rights determined the applicant to be stateless based on a thorough investigation into his various attempts to establish his status in multiple countries following the dissolution of the former

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[1809] UNHCR Guidelines on Statelessness No. 4, 5.

[1810] Handbook, 2014, 34-35.

[1811] UNHCR Guidelines on Statelessness No. 4, 5.

[1812] Handbook, 2014, 32-22.

[1813] Hoti v Croatia, European Court of Human Rights, First Section, Application No 63311/14 26, 26 April 2018.)

Yugoslavia.[1814] The court undertook a thorough review of the individual's documentation and interactions with various authorities. What is notable about this case is the high burden of proof placed on the stateless person to prove their own statelessness. The applicant interacted with various consulates and government agencies in multiple countries, creating an administrative trail that could be evaluated by the courts.

What burden of proof might national courts impose on stateless children to establish their statelessness as part of a procedure under the 1961 Convention? As Part 2 noted, in 2017, the Malaysian Federal Court and Home Ministry granted nationality under Malaysia's Constitution to stateless children who had been adopted by Malaysian parents and had no documents, showing a path forward for some stateless children, even those who did not have a birth certificate. Yet the burden placed on the families in these cases was very high and some families were not able to prove their children were stateless.

Recent court cases in Australia have shown that the burden often falls on children to establish their own statelessness. In *Re DLSV and Minister for Immigration and Border Protection,* the Australian Administrative Appeals Tribunal held that while a child was eligible for a nationality in another country (Zimbabwe,) established as the country of nationality for the parents, the policies of various Zimbabwean authorities had made it impossible for the child to obtain proof of this nationality even after repeated attempts at different offices/consulates in different countries. As a result, the Court held that child was stateless.[1815] This case placed a high evidentiary burden on the child to furnish considerable evidence of the attempts made on the child's behalf to establish its nationality.

Placing the burden clearly on states in international treaties to prove cases of statelessness and mandate a bilateral or regional process where necessary would do much to make this process fairer to nomads. UNHCR has advocated for limiting to five years the period that a state has to establish the child's nationality in another country.[1816] Such limitations should be codified in international law to provide clear limits on the ability of states to drag out the process through burdensome litigation. Some experts argue for an even higher burden on states. Worster, for example, argues that, "(t)he burden is on the birth state to show that another state has definitively exercised jurisdiction, for example, by acquiring a passport in hand."[1817] There is also the question of whether the standard of proof should be lower for certain groups like nomads. The UN Committee on the Elimination of Discrimination Against Women has noted that naturalization procedures may be particularly burdensome

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[1814] Cited in K. Swider, 'Case Note: Hoti v Croatia (European Court of Human Rights, First Section, Application No 63311/14 26, 26 April 2018)' 1 *Statelessness and Citizenship Review* 184 (2018).

[1815] Re DLSV and Minister for Immigration and Border Protection (2017) AATA 2999 (27 November 2017), cited in K. Rubenstein and E. Harris, 'Case Note: Re DLSV and Minister for Immigration and Border Protection (2017) AATA 2999 (27 November 2017)' 1 *Statelessness and Citizenship Review* 177 (2019).

[1816] UNHCR Guidelines on Statelessness No. 6.

[1817] W. Worster, 'The Obligation to Grant Nationality to Stateless Children Under Treaty Law,' 24 *Tilburg L. R.* 204 (2019).

on specific groups or categories of persons, creating discrimination even when appearing to be facially neutral.[1818]

Finally, it is again worth noting here the risks for nomad communities in establishing statelessness, whether at birth or later in life. While most nomads would likely be considered *in situ* populations by the international community, many states frequently label nomads as foreign. Establishing that a nomadic individual is stateless risks lending credence to this framing, whether at birth or later in life.

Conclusion

Pathway III looked at solutions to inter-generational statelessness. In particular, it looked at solutions that would resolve statelessness for nomad communities who are currently stateless. In some cases, this inter-generational statelessness is caused by the strict application of *jus sanguinis*. International law has created a solution to the inter-generational statelessness caused by strict *jus sanguinis* by requiring that children born in the territory of the state have birth certificates and acquire a nationality if otherwise stateless. International law has also created a procedure for the identification of stateless individuals and their facilitated naturalization. Pathway III explored the extent to which these solutions might work for nomads. It is not clear which route is preferable for nomads, but stronger protections clearly exist for statelessness children and for resolving statelessness at birth.

Mandating that all children be issued with birth certificates has done much to guarantee that solutions are available for nomad children to break out of inter-generational statelessness, but birth certificates alone cannot resolve the problem in *jus sanguinis* countries because such countries may require under international law that a child first establish he or she is stateless. Under the "best interests of the child" standard, the burden to establish statelessness would be mostly on the government and the procedures must be designed to resolve the status of the child as quickly as possible. UNHCR and other soft law guidance, however, could be even stronger on this point and states could codify a low burden of proof for children in these cases.

A high burden of proof may be placed on stateless individuals to prove their statelessness in order to access facilitated naturalization. The burden may unfairly disadvantage certain groups, like nomads, even while appearing neutral on its face. States could be clearer in placing the burden squarely on themselves in treaties and norms, perhaps by creating bilateral or regional processes or by creating a rule that states reach out on behalf of applicants within a certain time frame. Such a solution could form part of a progressive interpretation of the Statelessness Conventions by courts.

Any solution that relies on identifying a nomadic individual as stateless also risks entrenching the widely held view, much documented in Part 2, that nomads are, by their

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[1818] UN Committee on the Elimination of Discrimination Against Women, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, 5 November 2014.

nature, stateless. Solutions for nomads that involve formal identification as stateless, even at birth, should therefore be treated with extreme caution.

Conclusion

> (Nomads') occupational and social relationships lack the fixed territorial situs presupposed in treaty and customary doctrinal norms.[1819]

This dissertation sought to make a contribution towards answering the following questions: (1) What are some of the root causes of nomad statelessness? (2) Why does nomad statelessness persist? (3) Does international law provide solutions to nomad statelessness? (4) Are these solutions consistent with the human rights of nomads?

Part 2 identified some of the root causes of nomad statelessness by exploring nomadic and previously nomad groups in three example countries: Kuwait, Mali and Malaysia. It explored nationality and belonging for nomads in the pre-colonial, colonial and post-colonial periods and summarized how nationality developed as a concept and as an area of law in tandem with the colonial and de-colonial processes.

Part 2 came to a number of important conclusions. Colonial policy was extremely biased against nomadism. Nomad areas were declared empty and many colonial governments and administrators sought to settle nomads and convert them to so-called productive activities like farming. Nomad areas were divided by borders, transforming many nomads into minorities. Colonial registration favoured settled peoples and registration was often used to coerce nomad settlement. As a result, many nomads entered the post-colonial period with no identity documents and unclear residence and belonging, though some nomads had gained colonial-era nationality.

The international community mostly ignored the problem of nomad statelessness during the period of decolonization, even as millions of colonized peoples gained a nationality for the first time. Many nomads could not prove habitual residence in order to qualify for nationality and many of those with colonial-era documents were not issued post-colonial documents. The power to draft nationality laws had often vested with settled, urban rulers who adopted forced and coercive settlement policies towards nomad minorities, as had their colonial predecessors. Registration and access to nationality were tightened over time as discrimination against nomads only increased. Nomads who had been practicing their way of life for centuries as linch-pins of the economy were often branded a threat to nationality unity and national security.

The post-colonial period also saw the wholesale seizure of nomad lands as these previously remote areas in border zones were now found to contain huge quantities of natural resources. Nomad economic importance declined, while their lands became extremely valuable to the state. The link between the seizure of nomad territories and nomad

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[1819] Conklin, 122.

nationality and statelessness remains underexplored, but this dissertation uncovered a correlation between the two.

Synthesizing the conclusions enumerated above, Part 2 therefore uncovered the following root causes of nomad statelessness: (1) the failure to resolve the statelessness of nomads at decolonization or, in the case of the Tuareg, the failure to "roll-over" colonial-era nationality, (2) the conversion of nomads into minorities living in border zones (3) discrimination against nomads in the granting of nationality, (4) a bias against nomads that is inherent in nationality laws due to an over-reliance on residence, proof of place of birth and documentation.

Part 2 also examined why nomad statelessness persists to the present day in Kuwait, Mali and Malaysia. It uncovered several root causes, including (5) the application of strict *jus sanguinis* in Malaysia and Kuwait that locked nomads into inter-generational statelessness, (6) the settlement and assimilation of nomads in order to seize their lands for resource extraction and (7) the link between nomad statelessness and armed conflict in Mali.

Part 3 was devoted to examining the solutions currently available under international law, focusing particularly on those being promoted by UNHCR and the international community, such as the right to a nationality, the prohibitions against statelessness and relevant parts of the human rights framework. The solutions explored included the right to a nationality during state succession, the laws prohibiting discrimination in the granting of nationality, the granting of nationality to children born otherwise stateless and facilitated naturalization for stateless persons. Part 3 also examined to what extent these solutions are consistent with the human rights of nomads.

As Part 3 showed, international law, if and when implemented, has much to offer nomads by way of solutions. In spite of the articulation on paper of the right to a nationality as a fundamental human right, to be enjoyed by everyone, the substance of this norm does not fully account for the specific challenges that arise in protecting *nomads* from statelessness. International law has evolved such that, for example, there is clear recognition for the prohibition of racial discrimination in the regulation of nationality. However, when it comes to guaranteeing the right to a nationality in the context of nomadism, the relevant treaty norms, jurisprudential precedents and soft law standards are not sufficiently pronounced.

Many of the binding norms may be useful to nomads. For example, the norms prohibiting discrimination in the granting of nationality for reasons of race, ethnicity or religion could, if implemented by states parties, help some nomads to gain a nationality. Mali, for example, has ratified the International Convention on the Elimination of All Forms of Racial Discrimination, discussed above. If discrimination against a nomadic group like the Tuareg is framed in racial terms, this Convention has much to offer by way of a solution. Given that much of the discrimination suffered by nomads is on account of their nomadic way of life and not necessarily on account of their race, ethnicity or religion, however, the international framework could be updated by states to specifically include nomadism as a way of life. Yet a review of the soft law pertaining to discrimination shows that nomadism as a discriminatory category is missing from the broader discussion amongst experts and

UN bodies. Likewise, the attempts in soft law to define the meaning of "habitual residence" for nomads, while potentially helpful in some regards, stop well short of resolving the tension between the exclusivity that lies at the heart of the nationality "link" between individual and state and the necessities of the nomadic lifestyle.

Pathway I established that the right to a nationality during state succession may provide an important solution to prevent statelessness for nomads as a result of successions of states and may do much to help avoid nomad statelessness during future cases of succession, particularly if the standards articulated in draft conventions were adopted by states. But serious normative gaps remain. Most importantly, for nomads who were already stateless at decolonization, such as many Sama Dilaut, and who may be stateless during future state successions, the laws on the succession of states provide few solutions. For nomads with a nationality in the predecessor state, the emphasis on birth and habitual residence creates barriers to a solution for nomads. Alternative modes of proof of residence tailored to nomads might be necessary, yet this would move away from the universality of the right to a nationality. International law, including soft law, provides only nascent authority on this point.

There are also implementation problems in crafting a solution based on the norms of state succession. Bilateral or tripartite agreements between states during state succession may prevent the creation of statelessness, but international law does not provide clear guidance on how such a process might work retroactively. International law, including soft law, does not provide a straightforward pathway to a solution for intergenerational statelessness resulting from state successions in the past.

Pathway II explored the laws prohibiting discrimination in the granting of nationality. This framework currently offers what are likely the strongest and most explicit prohibitions against nomad statelessness. The anti-discrimination framework, however, could be stronger and more specific when it comes to nomads. There are several normative gaps, in particular, because one of the key functions of nationality law is to discriminate against cross-border mobility. Anti-discrimination laws could be more successful for nomads when nomadism is framed as a cultural and economic activity. Such protections exist under the indigenous rights framework, the minority rights framework and human rights more generally, but could be incorporated more clearly into treaty law.

Automatically granting nationality to nomad children born otherwise stateless is another possible solution that was explored in Pathway III. States should re-examine the legitimacy of *jus sanguinis* following a succession of states. It would be helpful to update clauses from the 1961 Convention that allow states to place additional burdens of proof for stateless children. Apart from these normative issues, there are problems with the implementation of this solution. Currently, courts place a high burden of proof on stateless children to prove that they do not qualify for a nationality in a foreign country. This creates a high bar for many nomad families.

Pathway III also explored facilitated naturalization for stateless nomads. Once again, there are serious problems in implementing this solution. A statelessness determination procedure risks labelling *in situ* populations as stateless, particularly for nomads, who have

frequently been labelled foreigners or as naturally stateless throughout their history. Part 2, above, explored this painful and harmful history for nomads and the many ways it has harmed their rights, particularly their rights to land. Such a solution should not be put into place in countries with stateless or at-risk nomadic populations without consultations with this community and without a hard look at the possible risks involved.

Most importantly, Part 3 uncovered a bias against mobility and nomadism inherent to nationality which also influences international law and makes solutions for nomad statelessness difficult to construct out of existing principles. There is something odd in finding a solution to nomad statelessness in the very legal tradition that created nomad statelessness in the first place and is derived, as Part 2 showed, from a school of thought that often branded nomads as incapable of statehood. It is perhaps therefore not surprising that Part 3 uncovered several serious normative gaps, even within soft law instruments. As explored in Part 2, examples of this bias include the long-standing and entrenched preference for exclusive allegiance and long-term settlement on land, particularly the productive use of land.

This bias also manifests as a preference for habitual residence in the territory of the state, centralized administrative structures located in towns and cities and hard borders that cut across areas not being used for agriculture. As a result, nomad statelessness is often entrenched and the barriers to solutions are systemic and are present in international law as well as in municipal law. This deep, structural bias against nomadism is inherent in nationality law writ large and therefore cannot be easily overcome by drafting new treaties or strengthening existing principles within the international legal system. One overarching conclusion of this dissertation is that the very system of nationality, including within the international legal framework, is structured to limit mobility, promote settlement and support state sovereignty over borders and is therefore at odds with nomadism.

Nevertheless, advances in international law are possible and a great deal may still be done to protect the right to a nationality for nomads. Protecting nomad rights might require significant advances in international law, including for example support for a right to dual, or multiple, nationality and greater support for special rights, like the freedom to pursue a mobile lifestyle, the right to cross borders and the right to be registered by nomad community leaders, rather than government authorities. Such solutions should be the subject of further study.

Important advances in international law may also be made through addressing areas of nomad rights that are currently overlooked. The Pathways did not clearly address all of the gaps identified in Part 2 in part because the current international norms do not address these issues in any systematic way. For example, Part 2 also discussed the long-standing, historical connection between nationality and land ownership. It exposed a strong correlation between nomad statelessness and the seizure of nomad lands. Importantly, sometimes nomad lands were taken by governments in exchange for nationality. Yet, not only does international law, as Gilbert points out, lack "specificity," on how nomad land

rights might be achieved in general,[1820] it has little that is specific on the correlation between nomad stateless, nomad nationality and nomad land rights. While nomad land rights are included under the indigenous rights framework, even here, the link to nationality is under-articulated. The intersection between nationality and nomad land rights is something that could be addressed more specifically by states in international law. In particular, the use of nationality as a tool to assimilate and settle nomads is in urgent need of examination.

The question of to what extent nomad nationality must contain extra, group-based rights is particularly salient for nomads, who have often been subjected to nationality as part of coercive assimilation, rather than as a pathway to their human rights. For nomads, nationality should provide protection and support for their way of life, a right to be nomadic, along with access to mechanisms, like voting and the courts, that can be used to protect nomadism. For example, a nationality for nomads should guarantee them not only access to education, but the ability to shape and influence that education to include nomadism. Yet the current international framework does not acknowledge that nationality may, in and of itself, serve as a form of assimilation for nomads and the link between group rights and nationality remains underarticulated. As Part 2 explored, nationality and, in particular, civil registration has often been offered to nomads in exchange for settlement and the abandonment of nomadism as a way of life, yet this problem is not addressed by the current normative framework, even in soft law.

The question of group rights for nomads and how they link to nationality also raises the question of parallel systems of indigenous, or nomadic, citizenship, an issue not explored in the Pathways above.[1821] The indigenous rights framework points to a possibly way forward for nomads who wish to both have a nationality but avoid its assimilative affects, but to date, international law falls well short of providing explicit and detailed solutions. International law is mostly silent on whether nomad nationality should be the same, or different, from nationality for other groups. While nationality is a universal right, it may be necessary to ensure this universal right through a framework that provides extra protections for nomads.

One further, vital conclusion of this dissertation is that only nomads and mobile peoples themselves can articulate what the right to a nationality would look like to them. This dissertation has focused mainly on the actions and legal frameworks created by states, both at the municipal level and through the medium of international law. This dissertation has

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[1820] Gilbert, Still, 2004-2005, 159.

[1821] For example, Article 36 of the 2007 Indigenous Rights Declaration specifies that states must support the rights of indigenous peoples separated by borders to retain contacts with each other through a system of indigenous passports. It is not clear what sort of contacts are mandated or how this requirement would fit with border restrictions, but indigenous passports can provide a method for nomads to travel freely across a border under a special agreement, though in practice, many indigenous, nomadic groups cannot maintain ties across borders, even with indigenous passports. Imai and Buttery, 18.

attempted to highlight some possible solutions under international law that would make accessing the right to a nationality easier for some nomads and bring the institution of nationality more into line with the human rights of nomads. As explained, however, the international system of laws is derived from the very state-centric system that rendered some nomads stateless. Fully articulating the right to a nationality for nomads, one that truly comports with nomadism and a mobile way of life, will require a substantial rethinking of the entire institution of nationality from the nomadic, and not from the state, perspective.

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This dissertation relied on a number of academic sources on the relevant nationality laws, including the laws of the British and French empires and of Kuwait, Mali and Malaysia. A non-exhaustive list of sources includes: Jacques Maury, *Nationalité: Théorie générale et droit français* (Paris Recueil Sirey 1931); Fabienne Jault-Seseke, *Droit de la nationalité et des étrangers* (Presses universitaires de France 2015); Ko Swan Sik, (ed). *Nationality and International Law in Asian Perspective* Martinus Nijhoff (1990); Anh Nga Longva "Citizenship in the Gulf States: Conceptualization and Practice" in *Citizenship and the State in the Middle East* (Nils A. Butenschon, Uri Davis and Manuel Hassassian (eds.) Syracuse 2000); Maximilian Koessler, 'Subject, Citizen, National and Permanent Allegiance' 56 Yale Law Journal 58 (1946); Patrick Weil, *Qu'est-ce qu'un français? histoire de la nationalité française depuis la Révolution* (Bernard Grasset 2002); L. Fransman, *Fransman's British Nationality Law: Third Edition* 3rd (ed.) Edition (Bloomsbury 2011); C. Parry, *Commonwealth Citizenship with Special Reference to India* (Indian Council of World Affairs 1954); R. Hansen, *Citizenship and Immigration in Post-war Britain* (Oxford UP 2000); D. O. McGovney, 'French Nationality Laws Imposing Nationality at Birth' 5 Am. J. of Int'l L. 325; B. Manby, *Citizenship in Africa: The Law of Belonging* (Hart 2018); J. Hampshire, *Citizenship and Belonging: Immigration and the Politics of Demographic Governance in Postwar Britain* (Palgrave Macmillan 2005); Frederick Cooper, (Princeton UP 2014); Paul Decheix, "Le Code de la nationalité Malienne" 697 *Penant* 300 (1963); G. Parolin, *Citizenship in the Arab World* (Amsterdam UP 2009).

Sources on Nationality Theory and History

Many of the sources for this dissertation are drawn from the fields of history, geography, anthropology, ethnology, philosophy and sociology. These provide context to the legal

analysis of Part 2, and are not exhaustive. In part, these sources reflect the fact that much of the scholarship on nomads is limited to the fields of anthropology and ethnology.

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Africa; Dynastic Monarchy, Taxes and Tributes, War and Slavery, Kinship and Territory (Edwin Mellen Press 2009); Pierre Boilley, *Les Touaregs Kel Adagh: dépendances et révoltes: du français au Mali contemporain* (Karthala 1999); Baz Lecocq, *Disputed Desert: Decolonisation, Competing Nationalisms and Tuareg Rebellions in Northern Mali* (Brill 2010); Dodo Boureima, 'La constitution d'un réseau régional avec les communautés pastorales d'Afrique de l'Oust : le Réseau Billital Maroobe' in *Pasteurs Nomades et Transhumants Autochtones* (L'Harmattan 2010).

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Sources on Land Rights, Armed Conflict and Resource Extraction

Dawn Chatty, 'Adapting to Multinational Oil Exploration: the Mobile Pastoralists of Oman' in Stefan Leder, Bernhard Streck, (eds.) *Akkulturation und Selbstbehauptung, Beiträge des Kolloquiums am* (Halle 2002 Orientwissenschaftliche Hefte 4, Mitteilungen des SFB "Differenz und Integration"); Abdulkarim Al-Dekhayel *Kuwait: Oil, State and Political Legitimization* (Ithaca Press 2000) 1; Jacqueline Ismael *Kuwait: Dependency and Class in a Rentier State* (U Press of Florida 1993); D. J. Stewart, *What's next for Mali? The Roots of Conflict and Challenges to Stability* (US Army War College, Strategic Studies Institute 2013).

Sources on Statelessness and Nationality in Kuwait, Mali and Malaysia

Claire Beatrix Marie Beaugrand *Statelessness and Transnationalism in Northern Arabia: Biduns and State Building in Kuwait, 1959-2009* (London School of Economics, PhD dissertation 2010); Marie Brokstad Lund-Johansen, *Fighting for Citizenship in Kuwait* (University of Oslo 2014); Claire Beaugrand, 'Framing Nationality in the Migratory Context: The Elusive Category of Biduns in Kuwait' (Author's Manuscript) 6 Middle East Law and Governance 1 (2014); C. Beaugrand *Stateless in the Gulf: Migration, Nationality and Society*

in Kuwait (Tauris 2018). M. Offermann, « Les risques d'apatridie au Mali et pour les Maliens vivant à l'étranger en application des législations et pratiques relatives à la nationalité, au Mali et dans les pays d'accueil de Maliens » (UNHCR 2020).

Helen Brunt, 'The Vulnerability of Sama Dilaut (Bajau Laut) Children in Sabah, Malaysia' Asia Pacific Refugee Rights Network (2015); Julian Clifton, Greg Acciaioli, Helen Brunt, Wolfram Dressler, Michael Fabinyi, Sarinda Singh, 'Statelessness and Conservation: Exploring the Implications of an International Governance Agenda' 19 *Tilburg Law Review* 81 (2014). Greg Acciaioli, Helen Brunt and Julian Clifton, 'Foreigners Everywhere, Nationals Nowhere: Exclusion, Irregularity, and Invisibility of Stateless Bajau Laut in Eastern Sabah, Malaysia' 15 *J. of Imm. and Ref. Studies* 232 (2017).

Non-academic Sources

Where necessary to flesh out academic materials, this dissertation will also cite to NGO reports, reports by economists, security services and others, as well as articles by the media and others to provide context.

Sources on International Law

Important sources on the international laws of nationality and the right to a nationality under international law include:

Paul Weis, *Nationality and Statelessness in International Law* (Brill 1979); Anthony Smith, *National Identity* (U. of Nevada 1991); Patrick Courbe, *Le nouveau droit de la nationalité* (Dalloz 1994); G. Benko and U. Strohmayer, *Human Geography: A History for the 21st Century* (Arnold 2004); Willem van Genugten, Anna Meijknecht, Bas Rombouts, 'Stateless Indigenous People(s): The Right to a Nationality, Including Their Own' 19 *Tilburg Law Review* 98 (2014); J. H. W. Verzijl, *International Law in Historical Perspective,* (Martinus Nijhoff 1998); James Crawford, *The Creation of States in International Law* (2nd edn., Oxford University Press, 2006); Van Panhuys, *The Role of Nationality in International Law: An Outline* (A. W. Sythoff 1959); Michel Verwilghen, *Conflits de nationalités, Plurinationalité et apatridie,* Collected Courses of the Hague Academy of International Law, vol. 277 (1999); G. R. de Groot and O. W. Vonk, *International Standards on Nationality Law: Texts, Cases and Materials* (Wolf 2016); C. Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' 10 *Int'l J. of Refugee L.* 156 (1998); Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart 2016); I. Brownlie, 'Relations of Nationality in Int'l L.' 39 *British Yearbook of Int'l L*. 284 (1963); Manby, B. 'Who Belongs? Statelessness and Nationality in West Africa' Migration Policy Institute (7 April 2016).

Summary

The United Nations has identified nomadic groups around the world as stateless or at risk of statelessness. While research exists on the statelessness of individual nomadic populations, less has been done to compare the experiences of various groups to uncover the root causes of nomad statelessness and explore why nomad statelessness persists. As well, international law is often proposed by actors such as the United Nations as a solution for statelessness, but little research has been done as to whether international law can provide a solution for nomads.

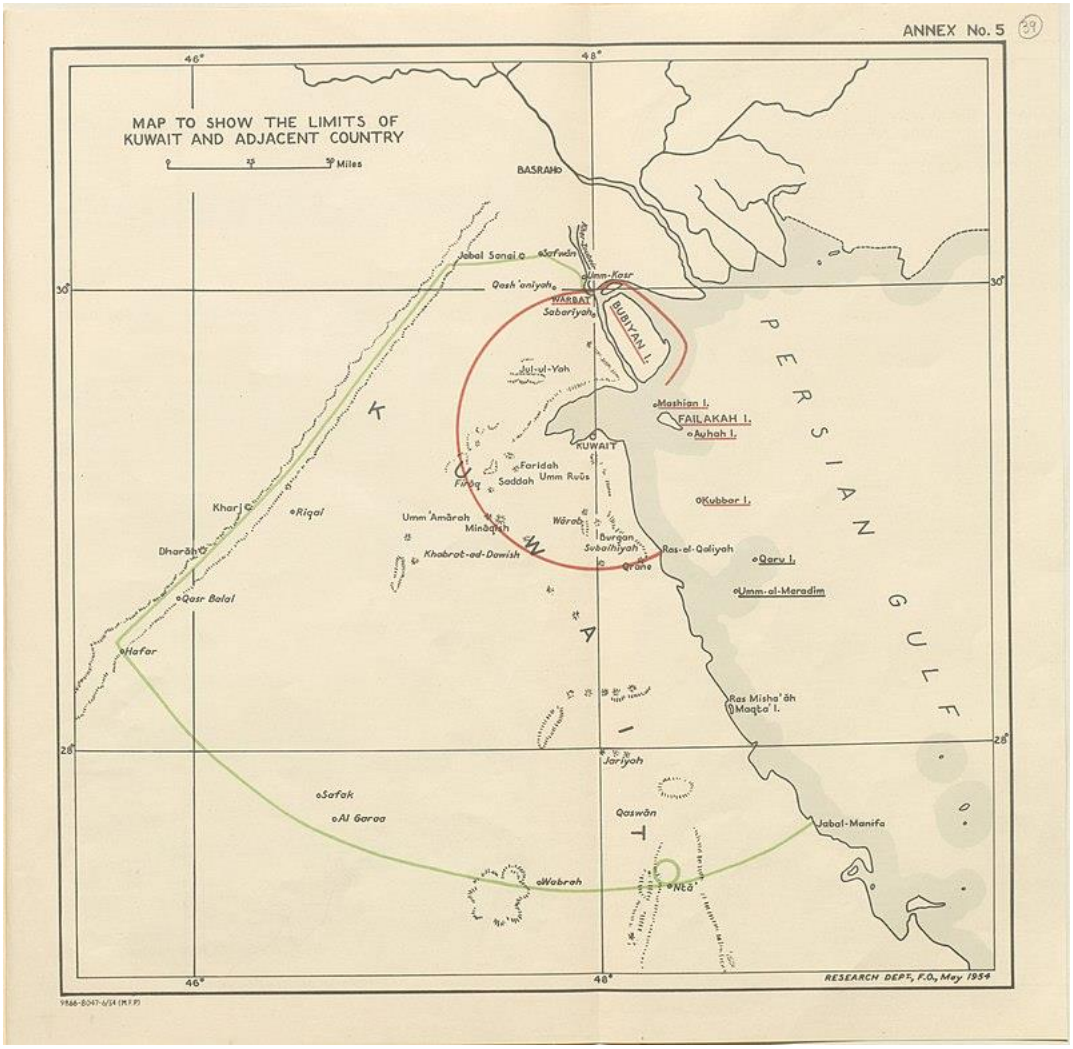
This PhD dissertation draws together existing research on former Bedouin in Kuwait, the Tuareg in Mali and the Sama Dilaut (Bajau Laut) in Malaysia to answer the following questions: (1) What are some of the root causes of nomad statelessness? (2) Why does nomad statelessness persist? (3) Does international law provide solutions to nomad statelessness? (4) Are these solutions consistent with the human rights of nomads?

As this dissertation explores through an examination of existing research in law, the social sciences and other disciplines, the root causes of nomad statelessness include: (1) the failure to resolve the statelessness of nomads at decolonization or, in some cases, the failure to "roll-over" colonial-era nationality, (2) the conversion of nomads into minorities living in border zones, (3) discrimination against nomads in the granting of nationality, (4) a reliance on residence, place of birth and documentation to establish nationality, (5) the application of strict *jus sanguinis* in some countries, (6) a correlation between statelessness and the seizure of nomad lands for resource extraction and (7) the link between nomad statelessness and armed conflict in some countries. Most importantly, this dissertation identifies a significant and systemic bias against nomadism in nationality law. Nationality as a modern institution is simply not working for nomads at a very basic level.

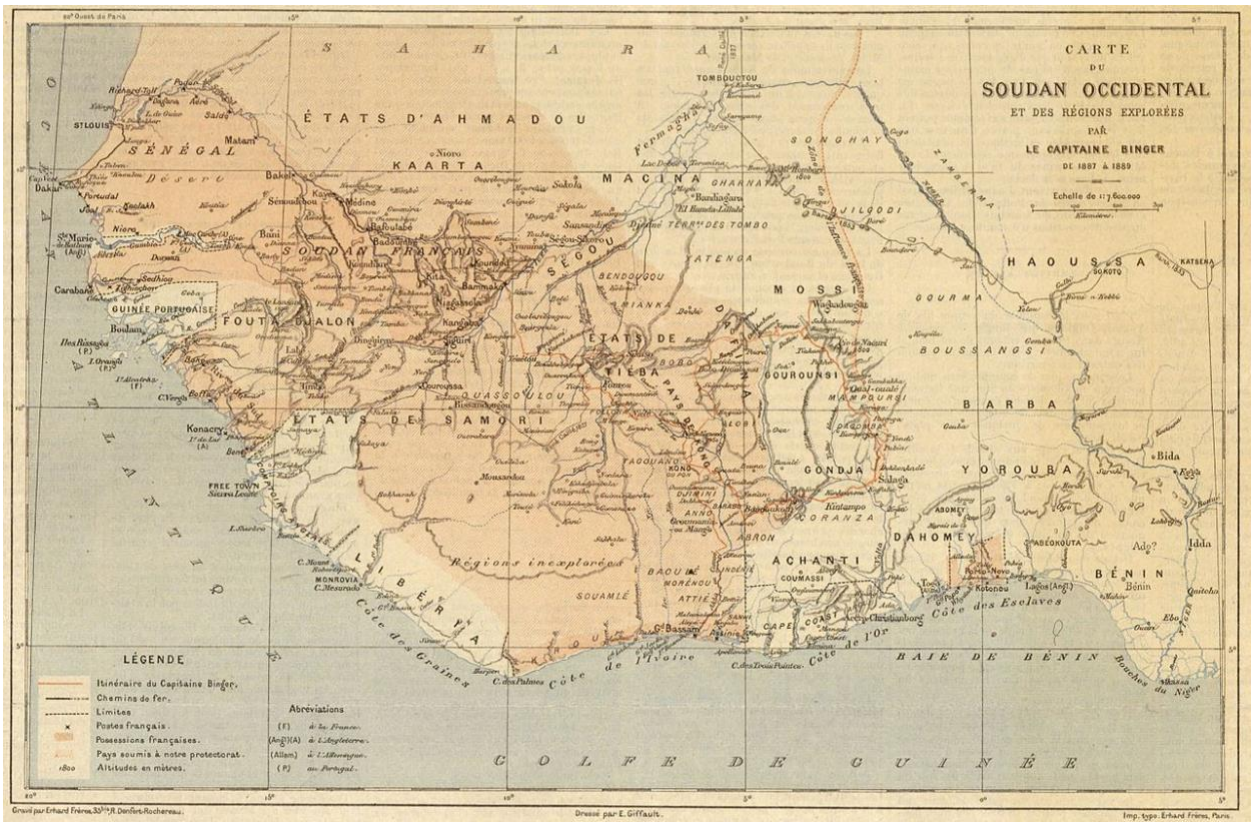
This dissertation goes on to examine possible solutions to nomad statelessness under international law. In particular, this dissertation examines the following areas of international law that have often been invoked by international actors and states as solutions for statelessness: (1) the right to a nationality under international law, (2) the laws to identify, prevent and reduce statelessness, including through registration and the issuance of birth certificates (3) the prohibitions against discrimination in the granting of nationality and (4) the prevention of statelessness during the succession of states.

This dissertation identifies several specific ways in which international law could be reformed to better protect the right to a nationality for nomads. Some of these recommendations include: States should re-examine the legitimacy of *jus sanguinis* laws following a succession of states. International law should provide clear guidance on the prevention and resolution of statelessness during state succession. Anti-discrimination laws should more clearly prohibit discrimination against nomadism and strengthen existing protections. The intersection between nationality, statelessness and nomad land rights is something that could be addressed more specifically in international law. In particular, the use of nationality as a tool to assimilate and settle nomads is in urgent need of examination. Due to the systemic bias against nomadism in nationality law, however, even were international human rights norms and the right to a nationality applied perfectly by all states, significant gaps for nomads would likely remain.

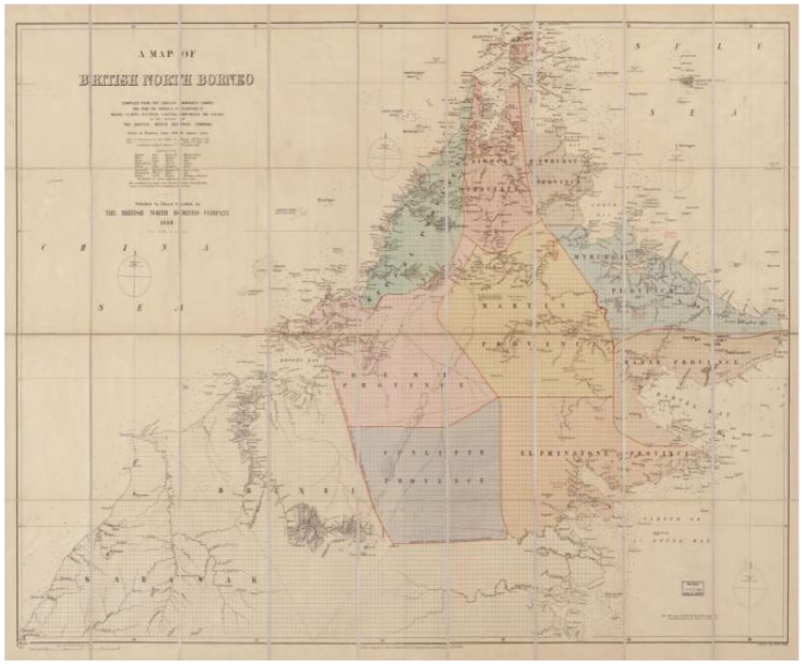
Maps



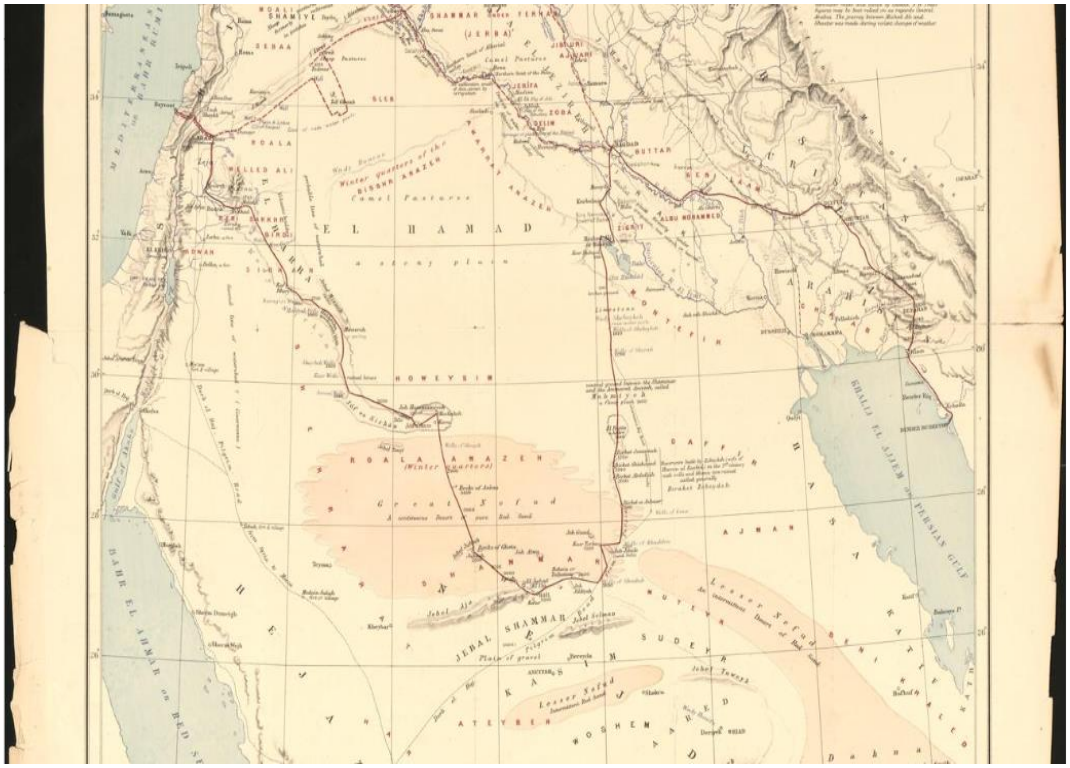
Kuwait, 1954



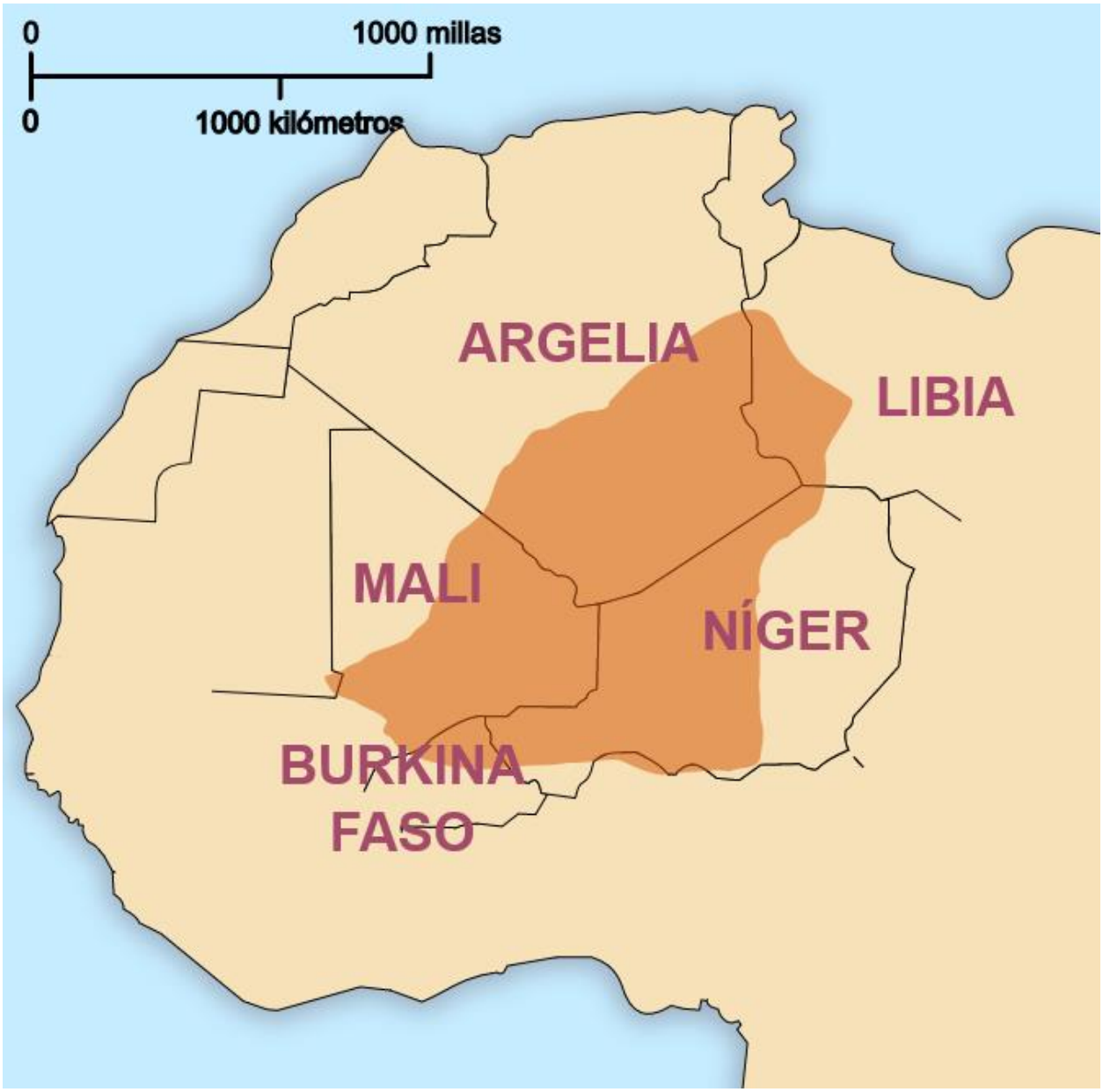
West Africa, 1887-1889



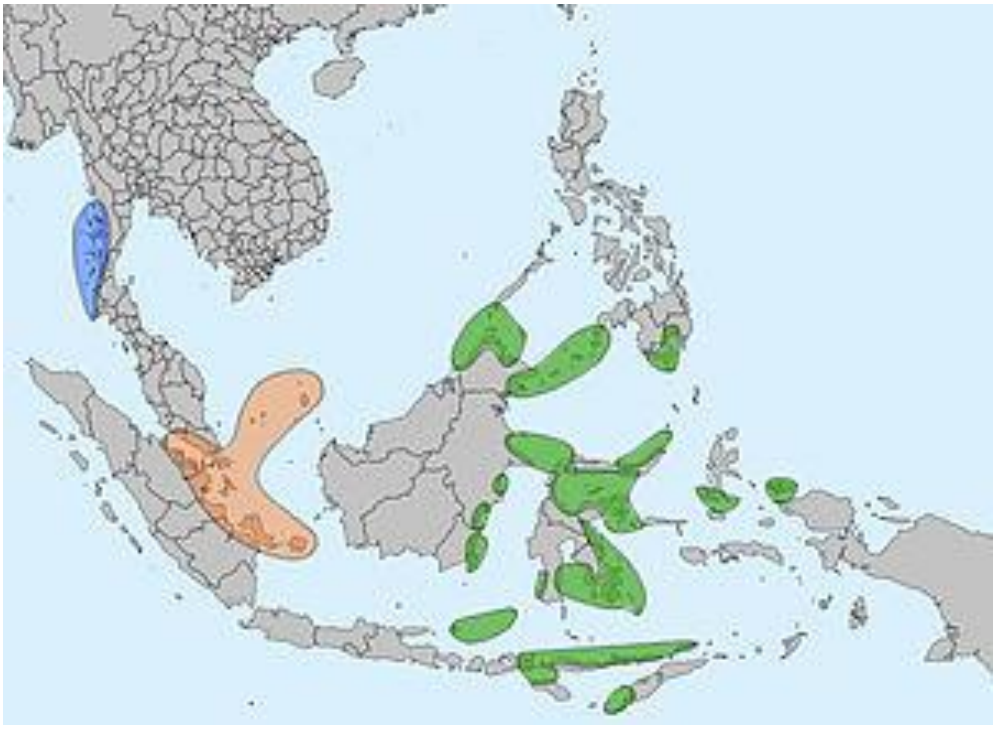
British North Borneo



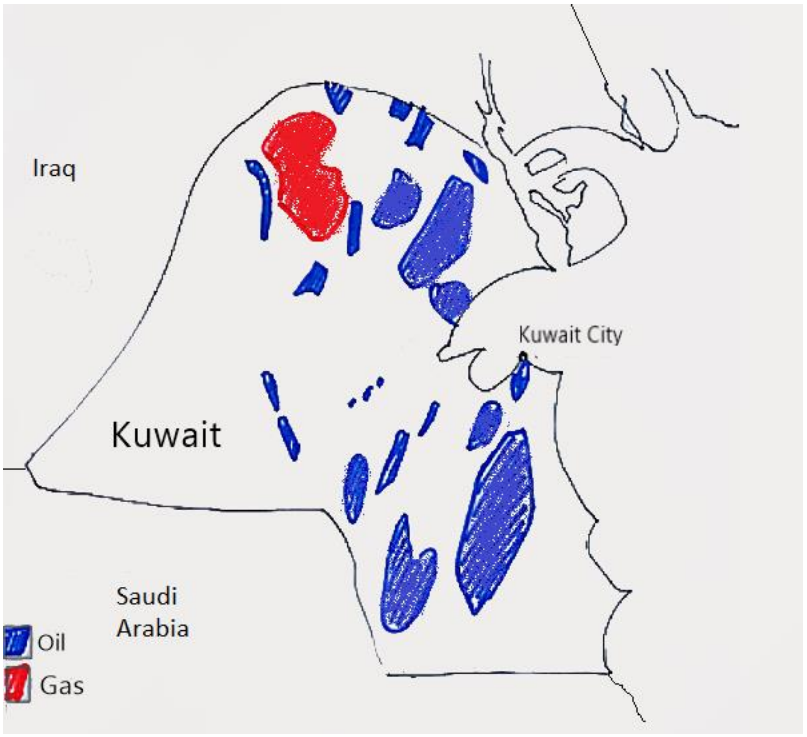
Possible Location of Bedouin Tribes During the Colonial Period



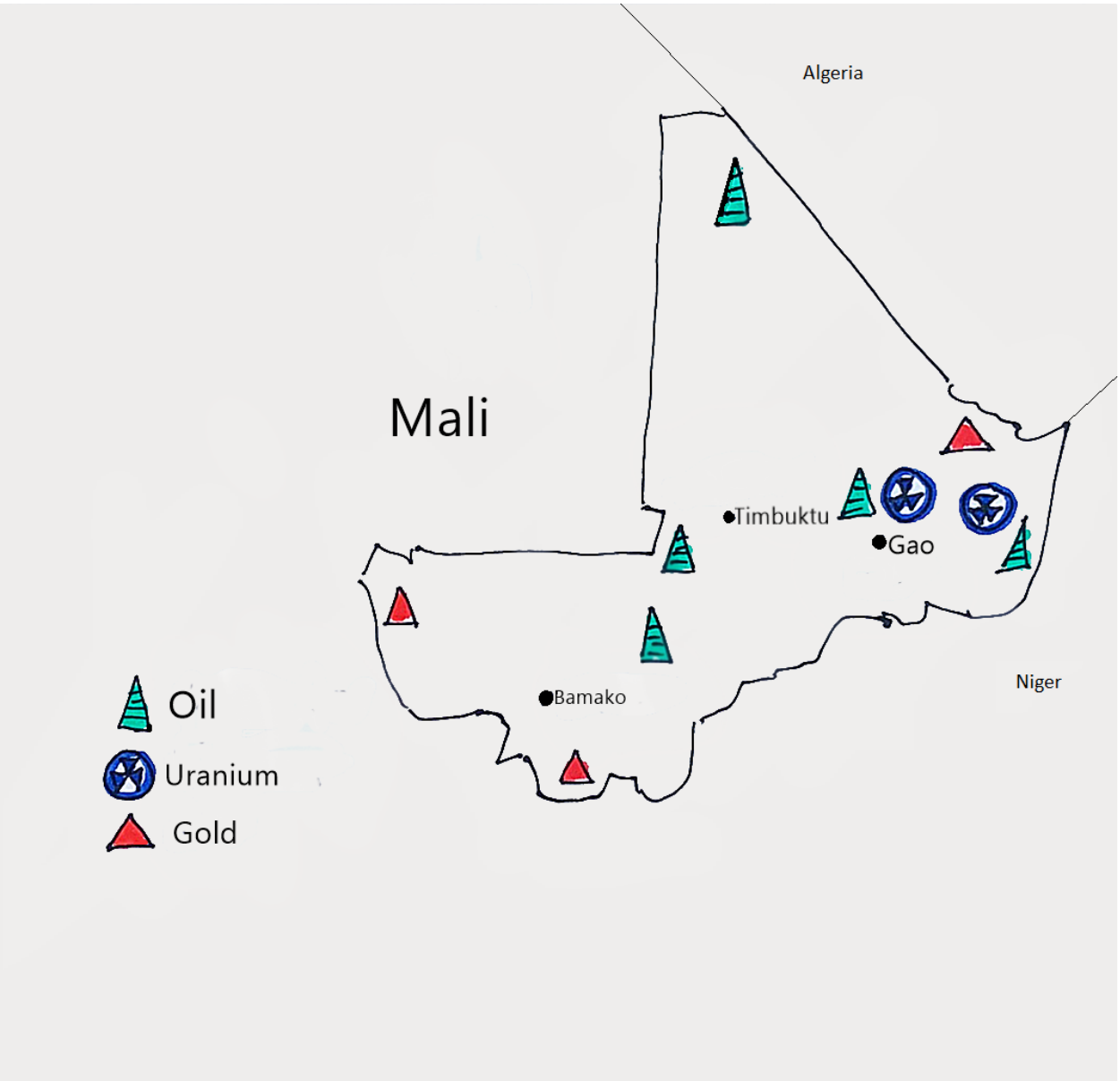
Tuareg Today



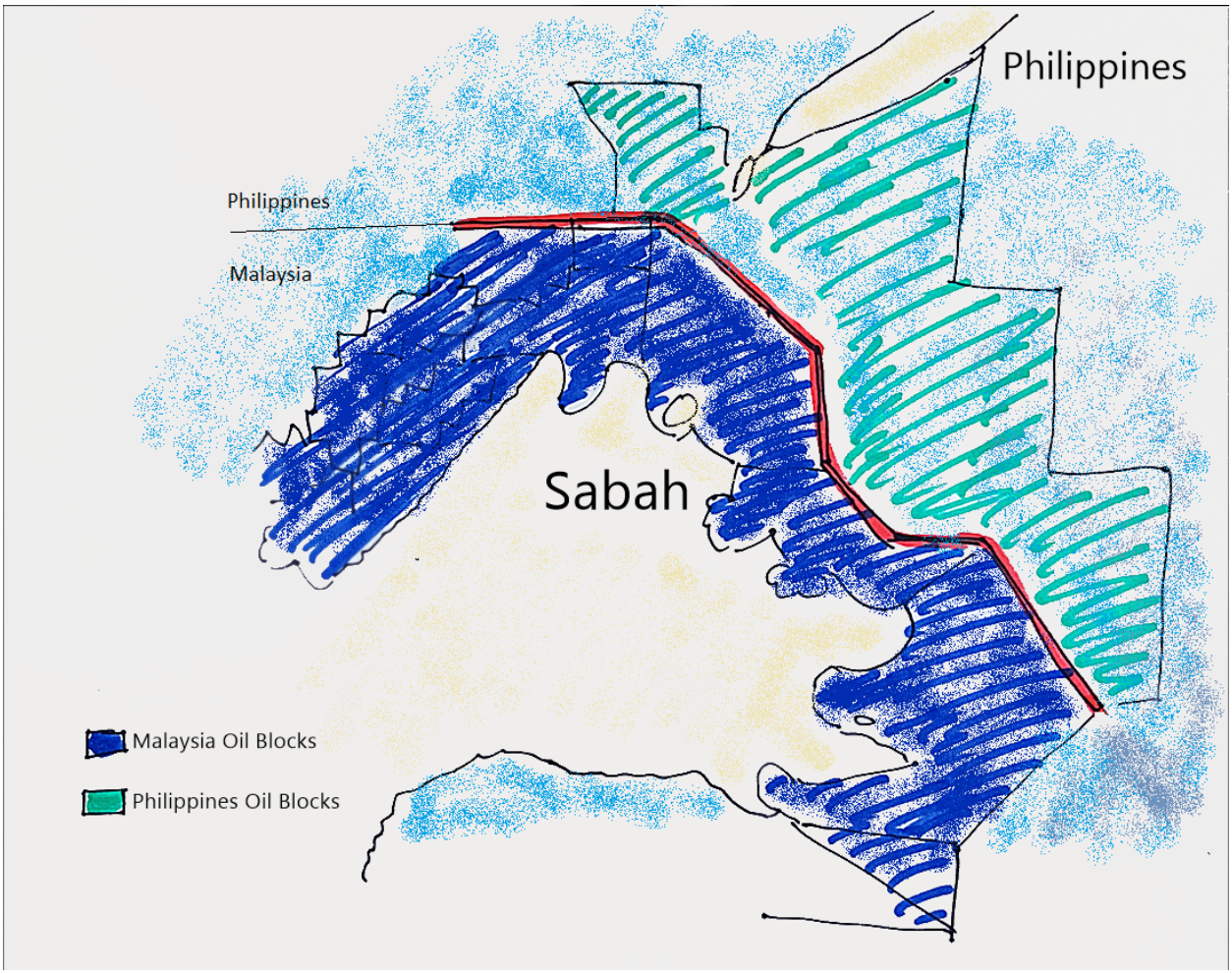
Sama Dilaut Today (in green)



Kuwait Oil Fields



Mali minerals and oil – possible/speculative locations



Oil Blocks for Sale: Malaysia and Philippines

Tun Mustapha Marine Park