

ARTICLE

REGIONAL PROTECTION OF THE RIGHT TO A NATIONALITY

*Jonathan Bialosky**

I. INTRODUCTION	153
II. THE EMERGENCE OF THE RIGHT TO A NATIONALITY UNDER INTERNATIONAL LAW	155
III. RIGHT TO A NATIONALITY WITHIN REGIONAL HUMAN RIGHTS SYSTEMS	159
A. The Inter-American System	159
B. The European System	161
C. The African System	162
D. ASEAN	164
E. Arab League	164
IV. JURISPRUDENCE FROM REGIONAL HUMAN RIGHTS SYSTEMS	165
A. Inter-American	166
1. The Inter-American Commission on Human Rights (Inter-American Commission)	166
2. The Inter-American Court of Human Rights (Inter- American Court)	168
B. European	176
C. African	182
V. CONCLUSION	189

I. INTRODUCTION

International tribunals have long analyzed issues of nationality.¹

*Attorney at Law, The George Washington University Law School Immigration Clinic. The author is grateful for the encouragement of Professor Dinah Shelton, as well as and the advice and friendship of Professor Alberto Benítez. The author also wishes to thank Maria Emilia Ramirez for her unconditional support.

¹ “[T]here is no universally agreed-upon definition of nationality.” Special Rapporteur on the Rights of Refugees, Asylum Seekers, Migrants and Internally Displaced Persons, *The Right to Nationality in Africa*, AFRICAN COMMISSION ON HUMAN AND PEOPLE’S RIGHTS 13 (May 2014), <http://www.achpr.org/files/special-mechanisms/refugees-and-internally-displaced->

Questions of nationality are critical to determining the relationship between an individual and a state, but because nationality² was historically seen as an area in which states had broad discretion,³ courts traditionally considered questions of nationality only in the context of interstate disputes.⁴ However, the global community began to view issues of nationality from a different perspective beginning in the latter half of the twentieth century. As states and international organizations sought to address the problem of statelessness caused by World War II, they increasingly used international law – and, in particular, international human rights law – as a means to limit traditional state discretion in matters of nationality. As a result, over the last several decades, sovereign discretion in nationality matters has been limited, with nationality increasingly viewed as a fundamental human right that states are bound to protect.⁵ Regional human rights bodies have taken a leading role in the protection of the right to a nationality. This right

persons/the_right_to_nationality_in_africa.pdf [hereinafter *The Right to Nationality in Africa*]. As such, this paper considers nationality as it has been defined by the International Court of Justice in what seems to be a widely accepted view. Therefore, “nationality” in this paper should be understood to mean the

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. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connection with the State which has made him its national. *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, 23 (Apr. 6).

² In this paper, the terms “nationality” and “citizenship” have the same meaning and are used interchangeably. See Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L. 694, n. 6 (2011) (“Today, the distinction [between ‘nationality’ and ‘citizenship’] . . . is vanishingly small. Many commentators use the terms interchangeably.”).

³ See *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7) (“The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.”).

⁴ See, e.g., *Nottebohm Case* 1955 I.C.J. 4, at 23 (establishing the principle of effective nationality, whereby an individual must have an effective link to a state to claim nationality for purposes of diplomatic protection).

⁵ See Alice Sironi, *Nationality of Individuals in Public International Law: A functional approach*, in *THE CHANGING ROLE OF NATIONALITY IN INTERNATIONAL LAW* 66 (Alessandra Annoni & Serena Forlati eds., 2013) (“Notwithstanding states’ competence to determine who their nationals are, the rules relating to nationality are interpreted at the international level with a view to serving the specific function of the protection of individuals’ rights or of the broad objectives underlying a particular legal regime”).

has been codified in various regional human rights instruments, and regional human rights tribunals have developed a strong jurisprudence to protect an individual's right to a nationality.

This paper will provide a comparative analysis on the right to a nationality within regional human rights systems, with a focus on the Inter-American, European, and African regional bodies. While a comprehensive discussion of nationality is impossible, given the countless aspects of nationality that could be explored,⁶ this paper aims to demonstrate the contribution that regional human rights bodies have made to the now widely accepted notion that nationality is a fundamental right, rather than a sovereign prerogative immune to international interference. Section II will provide a brief overview of the emergence of a rights-based approach to nationality under international law. Section III will describe the recognition and/or codification of the right to a nationality by regional bodies. Section IV will provide an overview of right to nationality jurisprudence from the Inter-American, European, and African systems. Section V offers concluding remarks, arguing that regional bodies will continue to play an important role in the development of the right to a nationality.

II. THE EMERGENCE OF THE RIGHT TO A NATIONALITY UNDER INTERNATIONAL LAW

International law traditionally afforded states wide latitude to regulate nationality issues,⁷ and early attempts to create an international legal regime to settle issues related to nationality acknowledged state discretion in nationality policy. Nevertheless, it was understood to be in the general interest that everyone has access to a nationality.⁸ It is thus no surprise that state discretion in nationality issues has diminished over time.⁹ Indeed, as international

⁶ For example: the conferral of nationality; birth registration as a requirement/impediment to access to nationality; the rights on foundlings; naturalization policies and procedures; immigration enforcement and deportation; statelessness; nationality issues in cases of state succession.

⁷ Mirna Adjami & Julia Harrington, *The Scope and Content of Article 15 of the Universal Declaration of Human Rights*, 27 REFUGEE SURV. Q., 93, 94-5 no. 3 (2008) ("International law has traditionally afforded states a broad discretion to define the content of, and delimit access to, nationality. . .").

⁸ Convention on Certain Questions Relating to the Conflict of Nationality Law, Apr. 12, 1930, 179 L.N.T.S. 80, No. 4138 (" . . . it is in the general interest of the international community to secure that all its members should recognise [*sic*] that every person should have a nationality . . .").

⁹ Adjami & Harrington, *supra* note 7, at 95 ("[B]ut just as state discretion has been

law has placed a greater emphasis on human rights in the twentieth century, there has been broad recognition that “the legal relationship between an individual and a state remains an essential prerequisite to the effective enjoyment and protection of the full range on human rights.”¹⁰ Against the backdrop of “the atrocities of the Second World War, among them mass denationalizations and huge population movements, the largest in European history,”¹¹ the international community therefore began to emphasize a rights-based approach to nationality issues.

The 1948 Universal Declaration of Human Rights (UDHR) includes a protection of the right to a nationality.¹² Article 15 of the UDHR states that everyone has a right to a nationality and that no one shall be arbitrarily deprived of a nationality or the right to change nationality.¹³ The right to a nationality in Article 15(1), along with the UDHR’s guarantee of the right to asylum,¹⁴ was conceptualized as a way to address the statelessness¹⁵ that affected millions in the aftermath of World War II.¹⁶ Similarly, Article 15(2)’s curtailment of a state’s ability to deprive an individual of nationality was a response to the mass denationalization of Jews in Nazi Germany.¹⁷

circumscribed by human rights norms in other areas, laws and practices on citizenship must be consistent with the principles of international law.”).

¹⁰ *Id.* at 94.

¹¹ *Id.* at 96.

¹² A discussion on the substance of the right to a nationality, i.e., what benefits an individual derives from holding a nationality, is outside the scope of this paper. However, generally speaking, a nationality allows an individual the right to reside within the territory of a state, as well as the right to participate in the governance of a state by, for example, voting, standing in elections, and working in the public service. See LAURA VAN WAAS, NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW 219 (2008) (explaining the rights and duties accompanying nationality).

¹³ Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) at art. 15(1) (Dec. 10, 1948). (“Article 15 (1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”).

¹⁴ See *id.* at art. 14(1) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”).

¹⁵ Statelessness is an issue that has attracted much scholarly attention. While related to the right to a nationality, an extensive discussion of statelessness is generally outside the scope of this paper.

¹⁶ Adjami & Harrington, *supra* note 7, at 96 (“Hundreds of thousands of Jews who survived the Nazi-perpetrated genocide fled their home countries for other countries, while millions of ethnic Germans were expelled from Eastern European states, and millions of Poles, Ukrainians, Byelorussians [*sic*], and other minority populations of the Soviet Unions were either forcibly expelled or fled for their safety.”).

¹⁷ Jorun Brandvoll, *Deprivation of Nationality: Limitations on Rendering Persons Stateless Under International Law*, in NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW

2015] PROTECTION OF THE RIGHT TO A NATIONALITY 157

As the first major international human rights instrument to contain a right to a nationality, the UDHR set the parameters for a rights-based approach to nationality. Importantly, the UDHR bifurcated the right, an approach that has been widely accepted.¹⁸ Access to a nationality, the ability of an individual to become a citizen of a particular state, either by birth or naturalization,¹⁹ is mandated by the positive right to a nationality enshrined in UDHR Article 15(1). On the other hand, UDHR Article 15(2) constrains state action in the nationality sphere by prohibiting the arbitrary revocation of nationality already granted to an individual. The explicit prohibition of *arbitrary* deprivation makes clear that some deprivations of nationality are permissible.²⁰ This may be best understood as allowing states to deprive individuals of nationality where certain procedural safeguards exist. Article 15 is therefore representative of the UDHR as a whole. While subsection (1) contains a positive right—the need for protection of which was highlighted by the atrocities of global conflict—subsection (2) contains a prohibition that is qualified, however minimally, on state action, thereby preserving some state autonomy.

International instruments adopted after the UDHR took the same approach with regard to the right to a nationality. For example, the

194, 196 (Alice Edwards & Laura Van Waas eds., 2014)(“[T]he denationalization of Jews in Germany on the basis of discrimination before and during the Second World War . . . motivated the inclusion of a prohibition against arbitrary deprivation of nationality in the UDHR.”)(footnotes omitted).

¹⁸ See discussion of regional instruments *infra* Section III.

¹⁹ A discussion on the various approaches to citizenship is beyond the scope of this paper, but, traditionally, states have employed either a *jus soli* (nationality based on place of birth), or a *jus sanguinis* (nationality based on ancestry) approach. See Carol A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 1-2 INT’L J. OF REFUGEE L., 156, 161 (1998) (“Most States . . . indicate a preference for either birth or descent by basing national legislation and practice on either *jus soli* (nationality based upon place of birth) or *jus sanguinis* (nationality based upon decent).”).

²⁰ The European Convention on Nationality, discussed in further detail in Section III below, offers examples of circumstances in which deprivation of one’s nationality may be permissible. See European Convention on Nationality, art. 7, Nov. 6, 1997, E.T.S. No. 166. (“Article 7 – Loss of nationality *ex lege* or at the initiative of a State Party. A State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except in the following cases: a) voluntary acquisition of another nationality; b) acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant; c) voluntary service in a foreign military force; d) conduct seriously prejudicial to the vital interests of the State Party; e) lack of a genuine link between the State Party and a national habitually residing abroad; f) where it is established during the minority of a child that the preconditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the State Party are no longer fulfilled; g) adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents.”).

1961 Convention on the Reduction of Statelessness (1961 Convention)²¹ also contains both a positive right to a nationality and the prohibition against the arbitrary deprivation of nationality. Like both the UDHR and the 1954 Convention relating to the Status of Stateless Persons,²² the 1961 Convention sought to address post-World War II displacement issues. Article 1 mandates that a state “shall grant its nationality to a person born in its territory who would otherwise be stateless,”²³ and Article 8(1) prevents a state from depriving an individual of nationality if the deprivation would make the individual stateless.²⁴ Thus, the 1961 Convention builds upon the UDHR and similarly constrains traditional state discretion on nationality issues. However, the instrument has had limited practical effect in terms of imposing binding measures on states.²⁵

Other international instruments have addressed specific aspects of the right to a nationality. Citing Article 15 of the UDHR, the Convention on the Nationality of Married Women seeks to promote respect for the right to a nationality without distinction between sexes.²⁶ The Convention on the Elimination of All Forms of Discrimination against Women seeks to provide for equal rights of transmission of nationality by men and women, and to prevent loss of nationality by women who marry.²⁷ The Convention on the Elimination of all Forms of Racial Discrimination prevents

²¹ Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

²² Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117.

²³ Convention on the Reduction of Statelessness, *supra* note 21, at art. 1.

²⁴ *Id.* at art. 8(1) (“A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.”).

²⁵ See Adjami & Harrington, *supra* note 7, at 97 (“Whereas the [1951 Convention relating to the Status of Refugees] has been widely ratified, relatively few countries have ratified the 1954 and 1961 Statelessness Conventions.”).

²⁶ Convention on the Nationality of Married Women, Preamble, 309 U.N.T.S. 65 (entered into force Jan. 29, 1957). (“Recognizing that, in article 15 of the Universal Declaration of Human Rights, the General Assembly of the United Nations has proclaimed that ‘everyone has the right to a nationality’ and that ‘no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality,’ *Desiring* to co-operate with the United Nations in promoting universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to sex . . .”).

²⁷ Convention on the Elimination of All Forms of Discrimination against Women, art. 9, Dec. 18, 1979, 1249 U.N.T.S. 13 (“Article 9 (1) States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. (2) States Parties shall grant women equal rights with men with respect to the nationality of their children”).

discrimination on the basis of race in nationality matters.²⁸ The International Covenant on Civil and Political Rights mandates that every child have the right to acquire a nationality.²⁹ Similarly, the Convention on the Rights of the Child includes not only the right of every child to acquire a nationality, but also requires that signatories implement all the rights enshrined in that instrument so as to avoid rendering children stateless.³⁰

Nevertheless, given the non-binding nature of the UDHR,³¹ and, because of either their limited ratification or their focus on specific aspects of nationality, no international instrument has been able to enshrine a universal right to a nationality protected on a global scale. As a result, many of the strongest expressions of the right to a nationality have come from regional human rights instruments.

III. RIGHT TO A NATIONALITY WITHIN REGIONAL HUMAN RIGHTS SYSTEMS

All major regional human rights systems have recognized the existence of a right to a nationality. While some, like the Inter-American system, have explicitly codified the right in their human rights instruments, others, such as the African system, have used other rights to create nationality protections.

A. The Inter-American System

The right to a nationality is codified in two different instruments

²⁸ Convention on the Elimination of All Forms of Racial Discrimination, art. 5, Dec. 21, 1965 660 U.N.T.S. 195 (“Article 5: In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour (*sic*), or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights . . . (d)(iii) The right to nationality”).

²⁹ International Covenant on Civil and Political Rights, art. 24(3), Dec. 19, 1966, 999 U.N.T.S. 171 (“Every child has the right to acquire a nationality.”).

³⁰ Convention on the Rights of the Child, art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3 (“Article 7.(1) 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”).

³¹ René de Groot, *Survey on Rules on Loss of Nationality in International Treaties and Case Law*, CENTER FOR EUROPEAN POLICY STUDIES, Aug. 2013, no. 57, at 4 (2013) available at <http://www.ceps.eu/book/survey-rules-loss-nationality-international-treaties-and-case-law> (“Furthermore, the Universal Declaration is not an international treaty and is therefore – in spite of the high moral standard – not directly binding upon the Member States of the United Nations.”).

in the Inter-American system. Article XIX of the American Declaration on the Rights and Duties of Man states that “[e]very person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.”³² While this is an important recognition of the right to a nationality, because of the legal status³³ of the American Declaration on the Rights and Duties of Man, even more important in the Inter-American system is the right to a nationality found in the American Convention on Human Rights (American Convention). It is this right that has been the subject of more attention by the Inter-American human rights bodies. Article 20 of the American Convention on Human Rights states:

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.³⁴

The Inter-American right to a nationality therefore not only includes all aspects of the right found in the UDHR, but also, in Article 20(2), includes a stated preference for a *jus soli* approach to nationality. Article 20 of the American Convention thus seeks to combat the same problem that prompted recognition of a right to a nationality – statelessness – but does even more than the UDHR to limit state discretion in nationality policy.

Because of the recognition of the right to a nationality in its primary human rights instrument, the Inter-American human rights bodies have had occasion to develop extensive right-to-nationality jurisprudence. As discussed further in Section IV(A) below, the

³² American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6, rev.1 at 17 (1992).

³³ While the American Declaration on the Rights and Duties of Man can be a source of legal obligations within the Inter-American system, the American Convention on Human Rights unquestionably is an instrument that places binding obligations upon signatories. See Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 46 (July 14, 1989) (“For the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself. It must be remembered, however, that, given the provisions of Article 29(d), these States cannot escape the obligations they have as members of the OAS under the Declaration, notwithstanding the fact that the Convention is the governing instrument for the States Parties thereto”).

³⁴ American Convention on Human Rights, *supra* note 33, at art. 20.

Inter-American system, perhaps more than any of its regional counterparts, has articulated principles that have been extremely influential in the development of a rights-based approach to nationality.

*B. The European System*³⁵

Unlike in the Inter-American system, there is no right to a nationality included in the Council of Europe's primary human rights instrument, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). This is surprising, given that the right to a nationality enshrined in the UDHR and the 1961 Convention sought to combat statelessness, a problem endemic in Europe following World War II.³⁶ Yet it was not until Protocol No. 4 to the European Convention,³⁷ adopted in 1963, that rights such as the freedom of movement,³⁸ the prohibition of expulsion of nationals,³⁹ and the prohibition of collective expulsion of nationals⁴⁰ were even recognized in the European human rights system. Decades later, in 1996, the Council of Europe adopted the European Convention on Nationality.⁴¹ Article 4 of the instrument sets forth "principles" for the "rules on nationality," stating:

- a. everyone has the right to a nationality;
- b. statelessness shall be avoided;
- c. no one shall be arbitrarily deprived of his or her nationality;
[and]
- d. neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall

³⁵ This paper, in referring to Europe and European jurisprudence, means the Council of Europe and the jurisprudence of the European Court of Human Rights. Nationality issues – indeed, migration in general – have been dealt with extensively in the European Union, including recognition of the concept of European citizenship. However, treatment of the right to a nationality by the EU and the Court of Justice of the European Union is beyond the scope of this paper.

³⁶ See *supra* Section II.

³⁷ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and the first Protocol thereto, Sept. 16, 1963, E.T.S. No. 46.

³⁸ *Id.* art. 2.

³⁹ *Id.* art. 3.

⁴⁰ *Id.* art. 4.

⁴¹ European Convention on Nationality, *supra* note 20.

automatically affect the nationality of the other spouse.⁴²

The European Convention on Nationality also prohibits discrimination in matters of nationality.⁴³ The convention thus seems to generally mirror the principles set forth in other international instruments relating to nationality and the avoidance of statelessness. In particular, though phrased as “principles,” the right to a nationality and the prohibition of the arbitrary deprivation of nationality reflect the dual aspect of the right to a nationality found in the UDHR. Unfortunately, the European Convention of Nationality has not created a strong right to a nationality within the Council of Europe.⁴⁴

Nevertheless, as discussed below, the jurisprudence of the European Court of Human Rights (European Court) has consistently found ways to analyze issues of nationality for compliance with the European Convention. Most frequently, it has done so in cases alleging violations of the right to respect for private and family life, or those seeking redress for violations of the right to liberty and security. The European Court has had more opportunities to deal with issues of access to, rather than deprivation of, nationality. As a result, the European Court has, without explicitly recognizing a right to a nationality, afforded individuals many of the same protections available in the Inter-American system.

C. The African System

As in the European Convention, there is no explicit right to a nationality recognized in the African Charter on Human and Peoples' Rights (African Charter). However, the instrument is not totally silent on the related issue of migration. Article 12 of the African Charter provides individuals with, *inter alia*, the right of freedom of movement and residence, and the right to seek asylum; it also limits state sovereignty in immigration enforcement.⁴⁵ In particular,

⁴² *Id.* art. 4.

⁴³ *See id.* art. 5.

⁴⁴ Francesco Costamagna, *Statelessness in the Context of State Succession*, in *THE CHANGING ROLE OF NATIONALITY IN INTERNATIONAL LAW* 39 (Alessandra Annoni and Serena Forlati eds., 2013) (“Unfortunately, also the [European Convention on Nationality] has been ratified by a relatively low number of states and it lacks a proper monitoring mechanism.”) (internal citations omitted).

⁴⁵ See African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217 (“Article 12 (1) Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law. (2) Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be

2015] *PROTECTION OF THE RIGHT TO A NATIONALITY* 163

Article 12(5) prohibits mass expulsions.⁴⁶ In its jurisprudence, the African Court on Human and Peoples' Rights (African Court) has most commonly dealt with issues of nationality within the context of challenges to expulsions.

Another instrument, the African Charter on the Rights and Welfare of the African Child, which has a monitoring body separate from the African Court, recognizes a right to a nationality specifically for children. Article 6 of the instrument, which seems heavily influenced by the Convention on the Rights of the Child, states:

1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.
4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.⁴⁷

This charter contains an individual petition procedure wherein the Committee on the Rights and Welfare of the Child may receive communications by persons, groups, or NGOs on matters related to the subject matter of the instrument.⁴⁸ As discussed below in Section IV(C), the Committee's first merits decision on a communication dealt with the right to a nationality and is, thus far, the strongest explicit articulation of the right to a nationality in African human rights jurisprudence.

subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality. (3) Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. (4) A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law. (5) The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.”)

⁴⁶ *Id.*

⁴⁷ African Charter on the Rights and Welfare of the African Child, art. 6, July 11, 1990, Doc. No. CAB/LEG/24.9/49.

⁴⁸ *See id.* at arts. 32-45.

D. ASEAN

The Association of South-East Asian Nations (ASEAN) has also codified the right to a nationality, yet it has only done so in its regional declaration on human rights. Paragraph 18 of the ASEAN Human Rights Declaration states that “[e]very person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.”⁴⁹ The ASEAN declaration thus seems to substantively mirror Article 15 of the UDHR. Because the ASEAN Intergovernmental Commission has not yet developed an individual complaint mechanism, jurisprudence on the rights protected in the ASEAN system has not yet been developed.⁵⁰ However, the inclusion of the right to a nationality in the ASEAN Human Rights Declaration is further evidence of the right’s widespread recognition.

E. Arab League

The Arab League has codified a right to a nationality in the Arab Charter on Human Rights, which was revised in 2004 and entered into force on March 15, 2008. Article 29 states:

1. Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality.
2. States parties shall take such measures as they deem appropriate, in accordance with their domestic laws on nationality, to allow a child to acquire the mother’s nationality, having due regard, in all cases, to the best interests of the child.
3. Non [sic] one shall be denied the right to acquire another nationality, having due regard for the domestic legal procedures in his country.⁵¹

⁴⁹ Ass’n of S.E. Asian Nations [ASEAN], ASEAN Human Rights Declaration, Nov. 18, 2012, available at <http://www.asean.org/news/asean-statement-communications/item/asean-human-rights-declaration>.

⁵⁰ See generally Yuval Ginbar, *Human Rights in ASEAN – Setting Sail or Treading Water?*, 10 HUM. RTS. L. REV. 504 (2010), reprinted in DINAH L. SHELTON & PAOLO G. CAROZZA, REGIONAL PROTECTION OF HUMAN RIGHTS, 191, 193 (2013) (arguing that there is nothing in the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights to prevent the investigation of individual human rights complaints).

⁵¹ Arab Charter on Human Rights, art. 29, May 22, 2004, reprinted in 12 INT’L HUM. RTS. REP. 893 (2005).

The provision in the Arab Charter on Human Rights thus combines both the positive right to a nationality and the prohibition against the arbitrary deprivation of nationality, bifurcated in the UDHR, into one provision of Article 29(1). Yet Article 29(2) seems to allow states wide latitude to regulate the issue of conferral of nationality from mother to child, in stark contrast to the mandate in Article 9 of Convention on the Elimination of all Forms of Discrimination against Women, which requires states to grant men and women equal rights with respect to the nationality of their children.⁵² Article 29(3) of the Arab Charter provides for the right to acquire a new nationality, but seems to allow for domestic legislation allowing states to deprive citizenship to nationals who acquire a new nationality.

The Arab Charter is therefore both a reflection of other codifications of the right to a nationality and a unique articulation of the right. Unfortunately, given that there is not yet any individual complaint mechanism in the Arab League system, this right has not been developed by regional jurisprudence under the Arab system. However, that the right to a nationality is codified in a human rights instrument adopted by a newer regional body is further evidence of the right to a nationality becoming a widely accepted human right.

IV. JURISPRUDENCE FROM REGIONAL HUMAN RIGHTS SYSTEMS

Right to nationality jurisprudence developed by regional human rights tribunals is a function of the human rights crises specific to each region. As a result of the varying context in which nationality issues have arisen, these tribunals have articulated the right in different ways.⁵³ Thus, in the Inter-American system, right-to-nationality jurisprudence has evolved most extensively in the context of deprivations of nationality. By contrast, Europe has paid much more attention to access to a nationality, while Africa has dealt more commonly with nationality in the context of expulsion.

⁵² See Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 28.

⁵³ It should be noted that specific aspects of nationality litigation are the subject of much scholarly attention and beyond the scope of this paper. The clearest example is the burden of proof. See generally, de Groot, *supra* note 31, at 22 (stating that “the burden of proof in nationality matters is a complicated issue.”). As explained in Section I above, this paper aims to demonstrate the contribution that regional human rights bodies have made to the now widely accepted notion that nationality is a fundamental right, rather to undertake a thorough analysis of, for example, the finer points of nationality litigation.

A. Inter-American

Both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have offered strong pronouncements on the right to a nationality as enshrined in Article 20 of the American Convention. These bodies have found violations of the right to a nationality in a variety of circumstances. As a result, the Inter-American system has perhaps done more than any other regional organization to articulate and protect the right to a nationality.

1. The Inter-American Commission on Human Rights (Inter-American Commission)

The Inter-American Commission has advocated for strong protection of the right to a nationality since before the entry into force of the American Convention and the establishment of the Inter-American Court of Human Rights.⁵⁴ In addition to harshly criticizing states that have deprived their citizens of a nationality, the Inter-American Commission has called the right to a nationality a “basic right that is closely allied to other fundamental liberties,” and has urged those American states that have not yet done so to ratify international instruments aimed at the reduction of statelessness.⁵⁵ The Inter-American Commission has also harshly condemned Cuba for depriving its nationals of citizenship simply because, in exercising their rights of freedom of movement and residence protected by the American Convention, they left the island.⁵⁶

While many petitions submitted to the Inter-American Commission have ended up in the Inter-American Court on Human Rights for judgment, the Inter-American Commission has also rendered its own final decisions on several petitions alleging violations of Article 20 of the American Convention. The Inter-American Commission has found a violation of Article 20 of the American Convention where a state prevented an individual who

⁵⁴ See Third Report on The Situation of Human Rights in Chile, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.40, doc. 10, ch. 9 ¶ 11 (1977) (stating that deprivation of nationality as a punishment for political crimes is “anachronistic, outlandish and legally unjustifiable in any part of the world—is a thousand times more odious and reprehensible when applied in our own Americas, and should forever be banned from being applied by governments everywhere.”).

⁵⁵ 1998 Annual Report, INTER-AM. COMM'N H.R., OEA/Ser.L/V/II.102, doc. 6 rev., ch. 7 ¶ 10 (1999).

⁵⁶ See The Situation on Human Rights in Cuba, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.61, doc. 29 rev. 1, ch. 7 ¶¶ 3-5 (Oct. 4, 1983).

allegedly renounced his citizenship from recovering it, notwithstanding the existence of a constitutional provision that allowed for such recovery.⁵⁷ In another case, the Inter-American Commission accepted a petition alleging violation of the right to a nationality where a state denied an individual the opportunity to prove nationality before being deported.⁵⁸ It later found, in the same petitioner's case, that the summary deportation of the petitioner from his country of birth violated the right to a nationality, even though the petitioner had naturalized and become a citizen of another country.⁵⁹

The Inter-American Commission's jurisprudence has mostly dealt with deprivation of nationality under Article 20(3), but its jurisprudence makes clear that not all deprivation of nationality is arbitrary. It has declared inadmissible a petition alleging violation of Article 20 where an individual's nationality was lost upon acquiring citizenship in another country.⁶⁰ In addition, laws that mandate that only nationals of a state may hold certain professions within that state have not been found to implicate Article 20.⁶¹ Furthermore, the Inter-American Commission has seemingly accepted that, where an individual committed fraud in the naturalization process, a state may legitimately de-naturalize the individual. However, due process must be satisfied to effect a lawful deprivation of nationality on the basis of fraud.⁶²

Outside of the petition review process, the Inter-American Commission continues to strongly urge American states to protect the right to a nationality. A recent report⁶³ expressed concern over

⁵⁷ See Resolution No. 20/88, Case 9855 – Mr. Nicolas Estiverne, Haiti, Inter-Am. Comm'n H.R., 1987-8 Annual Report, OEA/Ser.L/V/II.74, doc. 10 rev.1 ¶ 14 (1987-1988).

⁵⁸ See Nelson Ivan Serrano Saenz v. Ecuador, Case 191/03, Inter-Am. Comm'n H.R., Report No. 52/05, OEA/Ser.L/V/II.124, doc. 5 (2005).

⁵⁹ See Nelson Ivan Serrano Saenz v. Ecuador, Case 12.525, Inter-Am. Comm'n H.R., Report No. 84/09, OEA/Ser.L/V/II., doc. 51 ¶ 68 (2009).

⁶⁰ See Alvaro José Robelo González v. Nicaragua, Case 12.144, Inter-Am. Comm'n H.R., Report No. 25/01, OEA/Ser.L/V/II.111, doc. 20 ¶ 69 (2000) (“This case does not involve the arbitrary or illegal denial of nationality, but rather the petitioner's acquisition of a new nationality and, consequently, pursuant to the laws at the time in force, the loss of his original nationality. In other words, Mr. Robelo lost his Nicaraguan nationality by acquiring Italian nationality.”).

⁶¹ See Steven Edward Hendrix v. Guatemala, Petition 1184-04, Inter-Am. Comm'n H.R., Report No. 101/09, OEA/Ser.L/V/II., doc. 511 ¶ 57 (2009) (declaring inadmissible petitioner's Art. 20 claims “because he [had] not been forced to change his citizenship and because this citizenship has not been affected by any public or government act.”).

⁶² See Raghda Habal and Son v. Argentina, Case 11-691, Inter-Am. Comm'n H.R., Report No. 64/08, OEA/Ser.L/V/II.130, doc. 22, rev. 1 (2008) (accepting petition to determine if “alleged irregularities in the process of the expulsion of Mrs. Habbal” violated Art. 20).

⁶³ See Human Rights of Migrants and Other Persons in the Context of Human Mobility in

violations of Article 20, and, citing its own jurisprudence and decisions from the Inter-American Court of Human Rights, the Inter-American Commission stated that immigration status of an individual's parents could never be the lawful basis for deprivation of a child's nationality if the child was born within a state's territory.⁶⁴

2. *The Inter-American Court of Human Rights (Inter-American Court)*

From its first analysis of Article 20 under the American Convention, the Inter-American Court of Human Rights has taken an expansive view of the right to a nationality. In its 1984 advisory opinion on *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*,⁶⁵ the Court made clear its rights-based approach to nationality, citing a movement away from traditional respect-for-sovereignty concepts that had traditionally characterized the treatment of nationality under international law.⁶⁶ The Court also expanded upon the two aspects of the right to a nationality protected in the Americas, stating that Article 20 of the American Convention provides:

[A] minimal measure of legal protection in international relations through the link [one's] nationality establishes between him and the state in question; and, second the protection therein accorded the individual against the arbitrary deprivation of his nationality, without which he would be deprived for all practical purposes of all of his political rights as well as of those civil rights that are tied to the nationality of the individual.⁶⁷

This explanation would provide the framework for the Court's future nationality jurisprudence.

In its first contentious case involving the right to a nationality, the Court found unanimously that Peru violated both the right to a nationality under Article 20(1) and the prohibition against the arbitrary deprivation of nationality under 20(3) of the American

Mexico, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 48/13(2013).

⁶⁴ See *id.* ¶ 596.

⁶⁵ See Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4 (Jan. 19, 1984).

⁶⁶ *Id.* ¶ 32 (“[C]ontemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by states in [regulation of nationality] . . . those powers of the state are also circumscribed by their obligations to ensure full protection of human rights.”).

⁶⁷ *Id.* ¶ 34.

Convention in *Ivcher-Bronstein v. Peru*.⁶⁸ In that case, Peru stripped Baruch Ivcher-Bronstein, an Israeli-born, naturalized Peruvian citizen, of his Peruvian nationality as retaliation for his political activity.⁶⁹ Ivcher-Bronstein was the majority shareholder, director, and president of a Peruvian television network⁷⁰ that broadcast a program alleging that an advisor to the Peruvian intelligence service committed torture and violated tax laws.⁷¹ Peruvian authorities denounced the broadcast as defamatory,⁷² and issued a decree annulling Ivcher-Bronstein's Peruvian nationality.⁷³ Peruvian law in place at the time required that an individual be a citizen of Peru to own television channels in Peru.⁷⁴

The Court stated that the American Convention protects nationality "without making a distinction about the way in which it [is] acquired."⁷⁵ Curiously, while the Court did not mention the possibility that the annulment of Bronstein's Peruvian citizenship might have rendered him stateless, it emphasized that Ivcher-Bronstein had renounced his Israeli citizenship and took affirmative steps to link "his family to the political society, the culture, the way of life and the values of Peru."⁷⁶ In regards to the deprivation of Ivcher-Bronstein's nationality, the Court found that Peru effected an annulment that failed to comply with its internal law,⁷⁷ and did so through authorities not competent to make such decisions.⁷⁸ As such, the annulment was deemed arbitrary and therefore a violation of Article 20(3) of the American Convention. While the Court did not explicitly forbid deprivation of nationality as retaliation for political activities, the decision highlights the principle that, at a minimum, deprivations of nationality must comply with domestic

⁶⁸ See *Ivcher-Bronstein v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74 (Feb. 6, 2001).

⁶⁹ The Inter-American Court agreed to issue a merits decision on the case despite Peru's attempts to evade the Court's jurisdiction. The Court found that Peru's attempt to withdraw its declaration recognizing the Court's contentious jurisdiction after this case was filed with the Court was ineffective. See *Case of Ivcher-Bronstein v. Peru*, Competence, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 54 (Sept. 4, 1999). Nevertheless, Peru did not appear before the Court in the case.

⁷⁰ *Ivcher-Bronstein*, Inter-Am. Ct. H.R. (ser. C) No. 74 at ¶3.

⁷¹ *Id.* ¶ 76(i).

⁷² *Id.* ¶ 76(k).

⁷³ *Id.* ¶ 76(q).

⁷⁴ *Id.* ¶ 76(e).

⁷⁵ *Id.* ¶ 90.

⁷⁶ *Id.* ¶ 93.

⁷⁷ *Id.* ¶ 95.

⁷⁸ *Id.* ¶ 96.

legislation.

The Inter-American Court has most often dealt with the issue of arbitrary deprivation of nationality in cases originating in the Dominican Republic. As early as 1997, the Inter-American Commission expressed concern about denial of nationality in the Dominican Republic,⁷⁹ finding that the Dominican Republic violated Article 20 of the ACHR in its treatment of individuals of Haitian descent.⁸⁰ After proceedings in the Inter-American Commission,⁸¹ the Inter-American Court received the case of Dilcia Oliven Yean and Violeta Bosico Cofi.⁸² The girls, both born in the Dominican Republic and of Haitian descent, had experienced problems obtaining birth certificates, which affected, *inter alia*, their ability to enroll in and attend school.⁸³ The girls' problems resulted from the Dominican policy that created burdensome birth registration requirements and made registration of children of Haitian migrants nearly impossible. The policy was based on the idea that Haitians were deemed to be migrants "in transit," such that children born to them in the Dominican Republic fell under an exception to the country's *jus soli* nationality rules⁸⁴ and the children therefore did not acquire Dominican nationality automatically.

The Court found that the Dominican Republic arbitrarily denied the girls Dominican nationality in violation of Article 20 of the American Convention.⁸⁵ In so doing, the Court offered an extensive description of the importance of the right to a nationality. Describing the changing conception of nationality, the Court explained that "the classic doctrinal position, which viewed nationality as an attribute

⁷⁹ See Report on the Situation of Human Rights in the Dominican Republic, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.104, doc. 49 rev. 1, ch. 9 (Oct. 7, 1999).

⁸⁰ See, e.g., Dilcia Yean and Violeta Bosico v. Dominican Republic, Case 12.189, Inter-Am. Comm'n H.R., Report No. 28/01, OEA/Ser.L/V/II.102, doc. 6 rev. (2001).

⁸¹ See *id.*

⁸² See Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005).

⁸³ See *id.* ¶ 109(11) ("In the Dominican Republic there have been cases in which public authorities have placed obstacles in the way of Dominican children of Haitian origin obtaining birth certificates. Consequently, these children have had difficulty in obtaining an identity card or a Dominican passport, attending public schools, and having access to healthcare and social assistance services.").

⁸⁴ See *id.* ¶ 109(12) ("The Constitution of the Dominican Republic stipulates that all those born on its territory are Dominicans. The State adopted the principle of *ius soli* to grant Dominican nationality, except for the children of foreign diplomats resident in the country or the children of those in transit.").

⁸⁵ *Id.* ¶ 174 ("The Court finds that for discriminatory reasons, and contrary to the pertinent domestic norms, the State failed to grant nationality to the children, which constituted an arbitrary deprivation of their nationality . . .").

granted by the States to its subjects, has gradually evolved to a conception of nationality which, in addition to being the competence of the State, is a human right.”⁸⁶ The Court expanded upon this concept of nationality as a non-derogable fundamental right⁸⁷ by underscoring other rights-related paradigms that inform nationality jurisprudence. Citing “international principles concerning protection for migrants”⁸⁸ and highlighting principles of equal protection and non-discrimination,⁸⁹ the Court laid down principles regarding the granting of nationality, stating:

- (a) The migratory status of a person cannot be a condition for the State to grant nationality, because migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights;
- (b) The migratory status of a person is not transmitted to the children, and
- (c) The fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born.⁹⁰

The Court further emphasized the special importance of the right to a nationality for children, stating, “the [applicants’] vulnerability arising from statelessness affected the free development of their personalities, since it impeded access to their rights and to the special protection to which they are entitled.”⁹¹ The Court ordered the Dominican Republic to pay \$8000 in compensation to each girl,⁹² in order to make efforts to publicly acknowledge wrongdoing and apologize to the girls,⁹³ and to make efforts – including legislative efforts, if necessary – to ensure that nationality

⁸⁶ *Id.* ¶ 138 (citing Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (Ser. A) No. 4 (Jan. 19, 1984)).

⁸⁷ *Id.* ¶ 136 (“Nationality is a fundamental human right enshrined in the American Convention, and other international instruments, and is non-derogable in accordance with Article 27 of the Convention.”).

⁸⁸ *Id.* ¶ 156.

⁸⁹ *See id.* ¶ 141 (“The Court considers that the peremptory principle of the equal and effective protection of the law and non-discrimination determines that, when regulating mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights.”).

⁹⁰ *Id.* ¶ 156.

⁹¹ *Id.* ¶ 167.

⁹² *See id.* ¶ 226.

⁹³ *See id.* ¶ 234.

practices and registration of birth complied with the American Convention.⁹⁴

Unfortunately, the Dominican Republic continued to employ a discriminatory nationality policy by creating administrative hurdles for certain individuals seeking to register their births in the Dominican Republic. During an on-site visit in December 2013,⁹⁵ the Inter-American Commission received information on the impact of a constitutional court decision in the Dominican Republic that provided judicial legitimacy to the country's discriminatory practices.⁹⁶ The ruling gave new interpretation to the country's nationality rules, reiterating that the "in transit" provision at issue in the *Yean and Bosico* case meant that those children born to parents without legal immigration status in the Dominican Republic were not entitled to automatic Dominican citizenship, notwithstanding that state's *jus soli* approach to nationality.⁹⁷ After the decision, Dominican civil authorities continued to deny documentation to those seeking to register birth in the country.⁹⁸ After its visit, the Inter-American Commission found that the Constitutional Court's ruling was a violation of Article 20,⁹⁹ highlighted the resulting

⁹⁴ See *id.* ¶¶ 236-242. The Court later dismissed the Dominican Republic's request for interpretation of its judgment. See Case of the Girls Yean and Bosico v. Dominican Republic, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 156 (Nov. 23, 2006)

⁹⁵ See PRELIMINARY OBSERVATIONS FROM THE IACHR'S VISIT TO THE DOMINICAN REPUBLIC, INTER-AM. COMM'N H.R. (Dec. 2-6, 2012), available at <http://www.oas.org/es/cidh/actividades/visitas/2013RD/Preliminary-Observations-DR-2013.pdf>.

⁹⁶ *Id.* at 6 ("On September 23, 2013, the Constitutional Court of the Dominican Republic handed down Judgment 168/13, whereby it gave new interpretation as regards the acquisition of nationality by individuals born in the country to foreign parents in transit. Based on this interpretation, individuals who previously had been recognized as having Dominican nationality were denationalized.")

⁹⁷ *Id.* at 6-7 ("[T]he Constitutional Court determined that even though the petitioner was born in Dominican territory and had been registered as such by the appropriate authorities at a time in which the Constitution recognized *jus soli* as a means to recognize nationality, the new interpretation of 'foreigners in transit' – which pairs this concept with that of a foreigner with irregular status – stripped [the petitioner] of her right to Dominican nationality. Through this ruling, the Constitutional Court retroactively changed . . . the right to nationality by *jus soli*.")

⁹⁸ *Id.* at 10 ("The Central Electoral Board's denial of documents creates obstacles for individuals in the exercise of their right to move about freely in the country, since they end up without proof of their Dominican nationality.")

⁹⁹ *Id.* at 9 ("The Commission considers that the Constitutional Court's ruling implies an arbitrary deprivation of nationality. The ruling has a discriminatory effect, given that it primarily impacts Dominicans of Haitian descent, who are Afro-descendant persons; strips nationality retroactively; and leads to statelessness when it comes to those individuals who are not considered by any State to be their own nationals, under their laws.")

human rights problems created by the ruling,¹⁰⁰ and recommended that the Dominican Republic “take urgent steps to guarantee the full enjoyment of the human rights of individuals who have been deprived of nationality.”¹⁰¹

Having received the case – albeit under a different name – from the Inter-American Commission in 2012,¹⁰² the Inter-American Court recently issued a decision in the *Case of Expelled Dominicans and Haitians v. Dominican Republic*.¹⁰³ Citing the *Yean and Bosico* case¹⁰⁴ and referring to other international instruments,¹⁰⁵ the Court again highlighted the importance of the right to a nationality for the exercise of all rights.¹⁰⁶ The Court concluded that Judgment 168/13 of the Dominican Constitutional Court, denounced by the Inter-American Commission after its on-site visit, created a situation in which the victims were unable to enjoy the exercise of these rights.¹⁰⁷ The Court therefore agreed with the Commission and determined that the judgment was a violation of the American Convention.¹⁰⁸ The Court unanimously found the discriminatory treatment of children with regards to their nationality violated Article 20.¹⁰⁹ By highlighting the effect that lack of access to nationality had on a number of other protected rights, the Court offered its most expansive interpretation of the right to a nationality to date. The Court found that Dominican nationality policy implicated numerous other rights, including: the right to juridical personality,¹¹⁰ the right to a name,¹¹¹ the right to personal liberty,¹¹² the right to freedom of

¹⁰⁰ *Id.* at 11 (the ruling “creates a situation of extreme vulnerability that leads to violations of other human rights, in a vicious circle that can be broken only through recognition of their nationality.”).

¹⁰¹ *Id.* at 20.

¹⁰² See Letter of Submission of Case 12.271 to Inter-Am. Comm’n H.R. (July 12, 2012), available at <http://www.oas.org/en/iachr/decisions/court/12.271NdeREng.doc>.

¹⁰³ See *Expelled Dominicans and Haitians v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282 (Aug. 28, 2014).

¹⁰⁴ *Id.* ¶ 253.

¹⁰⁵ *Id.* (“In this regard, it is pertinent to mention that nationality is a fundamental right of the human person that is established in other international instruments.”).

¹⁰⁶ *Id.* (“[N]ationality is a prerequisite for the exercise of [human rights]”).

¹⁰⁷ *Id.* ¶ 314 (“The Court concludes, therefore, that judgment TC/0168/13 includes a general measure that would affect the presumed victims’ enjoyment of their rights.”).

¹⁰⁸ *Id.* ¶ 468 (“The Court has established that judgment TC/0168/13 and [relevant portions of Dominican law on nationality] violate the American Convention. Consequently, the Dominican Republic must, within a reasonable time, take the necessary measures to avoid these laws continuing to produce legal effects.”).

¹⁰⁹ *Id.* ¶ 512(3).

¹¹⁰ *Id.*

¹¹¹ *Id.*

movement and residence,¹¹³ the right to a fair trial,¹¹⁴ the right to judicial protection,¹¹⁵ the rights of the child,¹¹⁶ the rights of the family,¹¹⁷ the right to privacy,¹¹⁸ and the right to equal protection.¹¹⁹ The Court therefore ordered that the state provide the necessary documentation to the victims to allow them to establish their nationality¹²⁰ so that the victims could enjoy all these rights. The Court further ordered that the Dominican Republic adopt within a reasonable time the necessary measures to avoid the effect of the denial of rights resulting from Judgment 168/13.¹²¹ The Court went so far as to order the Dominican Republic to adopt legislative measures – including, if necessary, changes to its constitution¹²² – so that all those born within its territory could immediately register their births, regardless of the immigration statutes of their parents.¹²³

With the *Yean and Bosico* and *Case of Expelled Dominicans and Haitians* cases, the Inter-American Court has therefore provided powerful explanations of the right to a nationality, highlighting its fundamental importance and relationship to other rights. In addition, the Court further strengthened protection of the right to a nationality in Inter-American jurisprudence by articulating a right to identity, defined to encompass nationality. In *Gelman v. Uruguay* – a forced disappearance case more famous for its impact on laws regarding impunity of prosecution of crimes against humanity in countries formerly under dictatorial rule – the Court stated that:

In this manner, the referred situation affected what has been named the right to identity, although it is right [*sic*] that is not

¹¹² *Id.* ¶ 512(5).

¹¹³ *Id.* ¶ 512 (6).

¹¹⁴ *Id.* ¶ 512(7).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* ¶ 512(8).

¹¹⁸ *Id.* ¶ 512(9).

¹¹⁹ *Id.* ¶ 512(10).

¹²⁰ *Id.* ¶ 512 (13).

¹²¹ *Id.* ¶ 512 (18).

¹²² *Id.* ¶ 512 (20) (“The State should adopt, within a reasonable time, the necessary measures of an administrative, legislative – even constitutional if required – or any other nature to regulate a simple and accessible birth registration procedure, in order to ensure that all those born in its territory may be registered immediately after birth, regardless of their descent or origin and the migratory situation of their parents . . .”).

¹²³ The Dominican Republic imposed a deadline of June 17, 2015 for undocumented migrants to register for residency permits. See Joshua Partlow, *A Haitian Border Town Struggles With New Rules in the Dominican Republic*, WASH. POST June 24, 2015, available at https://www.washingtonpost.com/world/dominican-immigration-rules-throw-haitian-lives-into-limbo/2015/06/23/7a2fbace-192c-11e5-93b7-5eddc056ad8a_story.html.

found expressly established in the [American] Convention, it is possible to determine it on the basis of that provided in Article 8 of the Convention on the Rights of the Child, which established that said right encompasses the right to nationality, to a name, and to family relationships. Likewise, it can be conceptualized as the collection of attributes and characteristics that allow for the individualization of the person in a society, and, in that sense, encompasses a number of other rights according to the subject it treats and the circumstances of the case.¹²⁴

The case involved the abduction of a pregnant Argentine citizen. Detained in Buenos Aires, María Claudia García Iruretagoyena Casinelli was inexplicably transferred to Uruguay, where she gave birth to a baby girl. The baby girl, María Macarena Gelman García, was separated from her mother and placed on the doorstep of the home of a Uruguayan police officer in Montevideo. Her mother was disappeared and her remains were never recovered. María Macarena Gelman García lived twenty-three years of her life in Uruguay without knowing the true identity of her biological parents.¹²⁵

The Court found unanimously that Uruguay was responsible for the “suppression and substitution of the identity of María Macarena Gelman García, which took place since her birth, until her true identity was determined.”¹²⁶ With regards to the right to a nationality specifically, the Court held Uruguay responsible for the “illegal transfer of María Macarena Gelman’s her [*sic*] mother to another State in her state of pregnancy with the mentioned purpose, prevented the birth of the girl in the mothers [*sic*] country of origin where she normally would have been born and acquired Uruguayan nationality [instead].”¹²⁷ Concluding that this transfer was an “arbitrary situation,”¹²⁸ the Court found that María Macarena Gelman García, while not stateless because of her Uruguayan nationality, had been deprived of Argentine citizenship unlawfully under the American Convention. The case thus reaffirmed the recognition of the right to a nationality, as a fundamental right, necessary for expression of identity, even independently of any considerations for statelessness, the problem that spurred the

¹²⁴ See *Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 122 (Feb. 24 2011)*(internal citations omitted).

¹²⁵ *Id.* ¶¶ 79-109.

¹²⁶ *Id.* ¶ 312(3).

¹²⁷ *Id.* ¶ 128.

¹²⁸ *Id.*

recognition of the right to a nationality in the first place.¹²⁹

Through the jurisprudence of both the Inter-American Commission and the Inter-American Court, the right to a nationality has therefore been strongly articulated and protected in the Americas. Codified in the region's principle human rights instrument and progressively developed by human rights tribunals, the right to a nationality has been declared "an inherent right of all human beings."¹³⁰

B. European

As mentioned above, while there is no right to a nationality found in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), the European Court of Human Rights (European Court) has created strong protections of nationality such that a right to a nationality has almost been implied within the European system. While the Inter-American and African systems have had more opportunities to deal with states stripping individuals of citizenship and therefore developed an extensive deprivation-of-nationality jurisprudence, the European Court has more often dealt with issues of access to nationality.

The first step in the development of the European Court's nationality jurisprudence was its finding that a state's immigration policies must comply with human rights obligations. In *Amuur v. France*,¹³¹ a case involving the detention of Somali migrants in the transit-zone of a Paris airport, the Court found that holding migrants seeking entry to France violated Article 5 of the European Convention, which protects the right of liberty and security. Recognizing that Article 5(1)(f)¹³² allows for detention to prevent unauthorized entry into a country, the Court stated:

Such holding should not be prolonged excessively, otherwise there would be a risk of turning a mere restriction on liberty – inevitable with a view to organizing the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose

¹²⁹ See *supra* Section II.

¹³⁰ See Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, *supra* note 65, ¶32.

¹³¹ *Amuur v. France*, 1996-III Eur. Ct. H.R. 25.

¹³² The extensive Art. 5(1)(f) jurisprudence of the European Court of Human Rights is beyond the scope of this paper.

is considered – into a deprivation of liberty.¹³³

Citing the “need to reconcile the protection of fundamental rights with the requirements of States’ immigration policies,”¹³⁴ the Court found in *Amuur* that, under these particular circumstances, France violated Article 5 by not providing appropriate legal procedures for the migrants.¹³⁵ In a later case, reaffirming that states should admit non-nationals into their territory, the European Court clarified the circumstances under which a non-national’s detention would be compatible with Article 5(1)(f) of the European Convention. In *Saadi v. the United Kingdom*,¹³⁶ the Court found no Article 5 violation, but laid down strict requirements for lawful detentions of non-nationals.¹³⁷

Building on the proposition that states should allow asylum-seekers into their territories and that detention of asylum-seekers must comply with strict requirements, the Court found in *Amie and Others v. Bulgaria*¹³⁸ that Bulgaria violated Article 5 of the European Convention by holding one applicant in detention for a total period of nearly one year and nine months. In the case, Bulgarian officials sought to deport a Lebanese national who had been granted refugee status in Bulgaria, because he allegedly represented a threat to national security.¹³⁹ The Court found that his prolonged detention while authorities sought to obtain proper travel documentation from Lebanon was unlawful, stating that Bulgarian authorities had not shown that “they pursued the matter vigorously.”¹⁴⁰ While recognizing the difficulties of expelling refugees, the Court declared that in some instances – seemingly even those involving national security concerns – states must “consider

¹³³ *Amuur*, 1996-III Eur. Ct. H.R. 25 ¶ 43.

¹³⁴ *Id.* ¶ 50.

¹³⁵ *See id.* ¶¶ 53-59.

¹³⁶ *Saadi v. The United Kingdom*, 2008 Eur. Ct. H.R. 80 (stating that the detention of asylum seekers “must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion.”).

¹³⁷ *See id.* ¶ 74 (“To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised (*sic*) entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued.”) (internal citations omitted).

¹³⁸ *Amie and Others v. Bulgaria*, App. 58149/08, Eur. Ct. H.R. (2013).

¹³⁹ *Id.* at ¶ 11.

¹⁴⁰ *Id.* ¶ 77.

whether removal is a realistic prospect, and accordingly whether detention with a view to removal is from the outset, or continues to be, justified.”¹⁴¹ Taken together with *Ammur* and *Saadi, Amie and Others* demonstrates that the European Court has found that, in some cases, migrants have both a right to enter the territory of and a right to remain in the territory of European states, notwithstanding states’ concerns for national security. These Article 5 cases represent a clear inclination of the European Court to scrutinize state immigration policies for compatibility with human rights norms.

While the European Court has comfortably dealt with issues involving detention and expulsion, it has actually gone much further in implying a right to a nationality in cases where states have refused to allow access to citizenship to non-nationals within their territory. These cases have most commonly arisen in the context of claims brought under Article 8 of the European Convention, which protects the right to respect for private and family life. Indeed, the Court has long recognized that decisions related to nationality can implicate Article 8.¹⁴² In a string of cases originating in Latvia – all involving individuals living in Latvia at the time of the Soviet Union’s collapse – the Court has dealt with nationality issues facing those without easy access to a nationality.¹⁴³

In *Sisojeva and Others v. Latvia*,¹⁴⁴ the Court found that Latvia violated Article 8 by failing to normalize the applicants’ permanent immigration status. Emphasizing that “[c]ontracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens,”¹⁴⁵ the Court nonetheless stated that:

the decisions taken by States in the immigration sphere can in some cases amount to interference with the right to respect for private and family life secured by Article 8 § 1 of the [European] Convention, in particular where the persons concerned possess strong personal or family ties in the host

¹⁴¹ *Id.*

¹⁴² *See, e.g.,* *Karashev v. Finland*, App. 31414/96, Eur. Ct. H.R. (1999) (finding application inadmissible, but stating “[a]lthough right to a citizenship is not as such guaranteed by the Convention or its Protocols, the Court does not exclude that an arbitrary denial of a citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual.”).

¹⁴³ Most individuals involved in the proceedings did not, and/or could not have, become citizens of the newly created Russian Federation, so were effectively stateless.

¹⁴⁴ *Sisojeva and Others v. Latvia*, App. No. 60654/00, 2005 Eur. Ct. H.R. 923.

¹⁴⁵ *Id.* ¶ 99.

country which are liable to be seriously affected by an expulsion order.¹⁴⁶

Furthermore, the Court held that Article 8 not only contained a prohibition against arbitrary state interference in an individual's life, but also a positive obligation and that states "must also, by means of positive measures if necessary, afford him or her the opportunity to exercise the rights in question without interference."¹⁴⁷ In a case decided around the same time, the Court again found that Latvia violated Article 8 in similar circumstances despite the state's declaration that a previously issued deportation order against the applicant was no longer enforceable.¹⁴⁸ Both the Sisojeva and Kaftailova cases were referred to the Grand Chamber, which found that Latvia's offer to permanently normalize the applicants' immigration status was a sufficient remedy of the Article 8 violations.¹⁴⁹

In *Andrejeva v. Latvia*,¹⁵⁰ another Grand Chamber case originating in Latvia, the applicant did not complain of a lack of access to permanent immigration status, but rather her inability to access a state pension as a Latvian citizen would. The applicant alleged that Latvia violated Article 14 (the prohibition against discrimination) vis-à-vis Article 1 of Protocol No. 1 of the Convention (protection of property)¹⁵¹ because the state refused to grant her a pension for her work in the former USSR on the grounds that she was not a Latvian citizen. Finding that, "nationality [was] . . . the sole criterion for the distinction complained of,"¹⁵² the Court did not accept Latvia's argument that the applicant could avoid potential discrimination simply by naturalizing.¹⁵³ Effectively, the Court found that, under these circumstances, status as a permanently resident non-citizen of Latvia entitled the applicant to the same treatment as a Latvian citizen. The decision thereby represents a significant incursion into states' ability to define nationality,

¹⁴⁶ *Id.* ¶ 101.

¹⁴⁷ *Id.* ¶ 1044.

¹⁴⁸ *Kaftailova v. Latvia*, App. No. 59643/00, 2007 Eur. Ct. H.R., 1071.

¹⁴⁹ *See Sisojeva and Others v. Latvia*, 2007-I, Eur. Ct. H.R. 77; *Kaftailova* 2007 Eur. Ct. H.R., 1071.

¹⁵⁰ *Andrejeva v. Latvia*, App. No. 55707/00, 2009-II Eur. Ct. H.R. 71..

¹⁵¹ As the Court stated, "Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by other substantive provisions of the Convention and its Protocols." *Id.* ¶ 74. For this reason, the applicant could not rely on Article 14 alone.

¹⁵² *Id.* ¶ 87.

¹⁵³ *See id.* ¶ 91.

mandating that states treat – at least with respect to matters of pension disbursement – certain non-nationals as equal to citizens unless states can demonstrate “very weighty reasons”¹⁵⁴ for not doing so.

The Court further limited state discretion over citizenship laws in another Article 8 case, *Genovese v. Malta*.¹⁵⁵ The applicant, born out of wedlock to a Scottish mother and a Maltese father, sought and was denied Maltese citizenship. The Court found that the basis of the denial, a Maltese law that allowed for conferral of citizenship for children born out of wedlock only if the mother was Maltese, was discriminatory. Even though the applicant was estranged from his father and thus had no family life interest, the Court found that the case still implicated Article 8.¹⁵⁶ Despite recognizing that the applicant had rights, as a citizen of the EU, to live and work in Malta, the Court used the concept of “social identity”¹⁵⁷ to find a rights violation. In so doing, the Court further entrenched nationality issues into its Article 8 jurisprudence.

In *Kuric and Others v. Slovenia*,¹⁵⁸ the Court decided a case involving applicants that formerly held permanent resident status in Slovenia. The applicants failed to take advantage of Slovenian legislation that would have facilitated their acquisition of Slovenian citizenship in the period immediately following the dissolution of Yugoslavia and Slovenia’s establishment as an independent state. When the deadline set forth in the legislation passed, Slovenia “erased” the applicants’ permanent residency, leaving them with the option to apply for naturalization under a different, more demanding provision of Slovenian law.¹⁵⁹ The Court agreed with the applicants that the Slovenian “erasure” and the applicants’ inability to more easily acquire Slovenian citizenship was a violation of Article 8.¹⁶⁰ The Court deemed the applicants “settled migrants” in Slovenia, finding that decisions relating to their immigration status constituted an interference with their rights to respect of their private life.¹⁶¹ While recognizing that “the dissolution of [Yugoslavia] and the fact

¹⁵⁴ *Id.* ¶ 87.

¹⁵⁵ *Genovese v. Malta*, App. No. 53124/09, 2011 Eur. Ct. H.R. 1590.

¹⁵⁶ *Id.* ¶ 33 (“[E]ven in the absence of family life, the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person’s social identity.”).

¹⁵⁷ *Id.*

¹⁵⁸ *Kuric and Others v. Slovenia*, App. No. 26828/06, 2010 Eur. Ct. H.R. 1129.

¹⁵⁹ *Id.* ¶ 316.

¹⁶⁰ *See id.* ¶ 361.

¹⁶¹ *Id.* ¶ 352.

that the registers of citizens in [Yugoslavia] were not always accurate created a special and complicated situation,”¹⁶² the Court found that Slovenia’s treatment of non-nationals violated Article 8 because “the legal situation of the majority of the applicants, who had their habitual residence in Slovenia at the material time remain[ed] unsettled.”¹⁶³ Such a lack of foreseeability did not satisfy Article 8’s requirement that any interference with private life must be “necessary in a democratic society.”¹⁶⁴ After the Court’s decision, the Grand Chamber later awarded relatively high monetary damages to the applicants as compensation for, amongst other losses, lost income in respect of housing and social allowances.¹⁶⁵

Despite evolution of relatively strong nationality protections, in a recent decision, the Court at once highlighted its ability to scrutinize state nationality decisions under Article 8 and identified the limits of its oversight. In *Petropavlovskis v. Latvia*,¹⁶⁶ the applicant claimed the denial of his naturalization application was punitive, because he had been outspoken against education reform in Latvia. The applicant therefore alleged violations of freedom of expression and of assembly and association. The Court found no such violations because the applicant had not shown evidence on any impediment to the expression of his views.¹⁶⁷ The Court also took the opportunity to summarize its approach to nationality issues under Article 8, even though the applicant raised no Article 8 claim. Rejecting Latvia’s argument that, under international law, questions of nationality fall within the exclusive competence of states,¹⁶⁸ the Court cited *Karassev* and *Genovese* as instances where nationality decisions can implicate the human rights norms protected by the European Convention.¹⁶⁹ While acknowledging the lack of a right to a nationality in the European Convention, the Court nevertheless referenced the UDHR,¹⁷⁰ the European Convention on Nationality,¹⁷¹ and the jurisprudence of the Inter-American system,¹⁷² underscoring the evolution of a right-based approach to nationality. However, the

¹⁶² *Id.* ¶ 376.

¹⁶³ *Id.* ¶ 375.

¹⁶⁴ *Id.* ¶ 361.

¹⁶⁵ *See* Case of Kuric and Others v. Slovenia, 2014-II Eur. Ct. H.R. 262.

¹⁶⁶ *Petropavlovskis v. Latvia*, App. 44230/06, App. No. 44230/06, 2015 Eur. Ct. H.R. 4.

¹⁶⁷ *Id.* ¶ 77.

¹⁶⁸ *See id.* ¶ 73.

¹⁶⁹ *See id.* ¶ 49.

¹⁷⁰ *Id.* ¶ 73.

¹⁷¹ *Id.* ¶ 80.

¹⁷² *Id.* ¶ 43.

Court cut back on this progression, refusing to rely on the UDHR and Inter-American jurisprudence to find an Article 8 violation.¹⁷³ The Court acknowledged the primacy of domestic law on issues of nationality¹⁷⁴ and explicitly stated that “neither the Convention nor international law in general provides for the right to acquire a specific nationality.”¹⁷⁵ The Court also explained that states still maintain some discretion in matters of acquisition of citizenship of the state,¹⁷⁶ and that naturalization schemes requiring a demonstration of loyalty to the state are permissible.¹⁷⁷ Therefore, despite the Court’s ability to scrutinize some aspects of state nationality policy, naturalization schemes continue to allow states a fair measure of discretion.

The European Court, despite the absence of an explicit reference to nationality in the region’s principle human rights text, has made strong statements allowing individuals positive access to nationality in several cases. Yet, while the European Court has acknowledged the shift toward a rights-based approach to nationality, it has signaled that states do maintain some discretion on nationality issues.

C. African

Notwithstanding – or perhaps because of – mass expulsions¹⁷⁸ and large numbers of stateless persons on the continent,¹⁷⁹ the African Commission on Human and Peoples’ Rights (African Commission) has acknowledged that the right to a nationality “is not really protected in Africa.”¹⁸⁰ Nevertheless, the African Commission has dealt with issues related to nationality in several cases.¹⁸¹ Most

¹⁷³ See *id.* ¶ 81.

¹⁷⁴ See *id.* ¶ 84 (“[T]he issue whether or not the applicant has an arguable right to acquire citizenship of a State must in principle be resolved by reference to the domestic law of that State.”).

¹⁷⁵ *Id.* ¶ 83.

¹⁷⁶ See *id.* ¶ 85 (“[T]he criteria set for naturalization and its procedure, which are both determined by domestic law.”).

¹⁷⁷ See *id.* (“The Court considers that a democratic State is entitled to require persons who wish to acquire its citizenship to be loyal to the State and, in particular, to the constitutional principles on which it is founded”).

¹⁷⁸ *The Right to Nationality in Africa supra* note 1, at 1 (“[M]assive expulsion of aliens in Africa . . . has already been noted to be a problem of concern”).

¹⁷⁹ *Id.* at 3 (“The existence of large numbers of stateless persons on the continent . . . requires action to clarify and reinforce the right to nationality with the regional human rights system.”).

¹⁸⁰ *Id.*

¹⁸¹ There are, as yet, very few final judgments in contentious cases by the African Court on Human and Peoples’ Rights, and none relating to nationality issues. Therefore, the jurisprudence of that body is not considered in this paper.

often, the African Commission has dealt with cases challenging the lack of procedural safeguards afforded to individuals who has been deported.¹⁸² While deportation and the right to a nationality are distinct concepts, the resulting jurisprudence shows that the African Commission, like the European Court, has almost found an implied right to a nationality in Africa that brings with it the protections similar to those recognized by other regional human rights tribunals.¹⁸³

The African Commission, from its early jurisprudence, has held that immigration decisions can implicate human rights.¹⁸⁴ The African Commission has found that mass deportations directed toward national, racial, ethnic or religious minority groups are discriminatory,¹⁸⁵ and that the mass expulsions prohibited by Article 12(5) of the African Charter can, depending upon the circumstances, implicate, *inter alia*, the right to property, the right to work, the right to education, and the right to family, all of which are specifically protected by the African Charter.¹⁸⁶

The African Commission has dealt with several cases of mass expulsion. In a decision echoing the prohibition of arbitrary deprivation of nationality codified in various international instruments and recognized by other regional human rights systems, the African Commission, in *Malawi African Association and Others v. Mauritania*,¹⁸⁷ found Mauritania to have violated several provisions of the African Charter. By expelling nearly 50,000 black Mauritians to Senegal and Mali and later destroying their Mauritanian identity cards, Mauritania “depriv[ed] them of their

¹⁸² In addition to the cases discussed in further detail below, *see, e.g.*, *Organisation Mondiale Contre La Torture v. Rwanda*, Commc’n Nos. 27/89, 46/91, 49/91, 99/93, Afr. Comm’n H.P.R. (1996); *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea v. Republic of Guinea*, Commc’n No. 249/2002, Afr. Comm’n H.P.R., 20th Activity Rep. (2004); *Institute for Human Rights and Development in Africa v. Angola*, Commc’n No. 292/2004, Afr. Comm’n H.P.R., 24th Activity Report (2008); *Amnesty International v. Zambia*, Commc’n No. 212/98, Afr. Comm’n H.P.R., 12th Annual Activity Rep. (1999).

¹⁸³ Yet, the African Commission has declared inadmissible for vagueness, a communication explicitly alleging deprivation of nationality. *See Ayele v. Togo*, Commc’n 35/89, Afr. Comm’n H.P.R., 7th Annual Activity Rep. (1993-1994).

¹⁸⁴ *See Recontre Africaine pour la Défense des Droits de l’Homme v. Zambia*, Commc’n 71/92 ¶ 20, Afr. Comm’n H.P.R. 10th Annual Activity Rep. (1996) (“Clearly, the drafters of the Charter believed that mass expulsion presented a special threat to human rights.”).

¹⁸⁵ *See Union Inter africaine des Droits de l’Homme and Others v. Angola*, Commc’n 159/96 ¶ 17, Afr. Comm’n H.P.R., 11th Annual Activity Rep. (1997).

¹⁸⁶ *Id.* ¶ 17.

¹⁸⁷ *Malawi African Association and Others v. Mauritania*, Commc’n Nos. 54/91, 61/91, 98/93, 164-196/97, 210/98, Afr. Comm’n H.P.R., 13th Annual Activity Rep. (2000).

Mauritanian citizenship.”¹⁸⁸ According to the African Commission, this constituted a violation of the right to freedom of movement and residence within the borders of state, protected by Article 12(1) of the African Charter.¹⁸⁹ Furthermore, the African Commission found that Mauritania violated Article 2’s prohibition on discrimination and the right to property protected in Article 14 by targeting black Mauritians and looting, destroying, and expropriating their property before forcing them out of the country.¹⁹⁰ The African Commission therefore recommended that Mauritania allow the expelled to return to the country and that the state replace the destroyed identity cards.¹⁹¹ In so doing, the African Commission was able to effectively protect the applicants’ right of Mauritanian nationality, notwithstanding that no such right exists in the African Charter.

In another mass expulsion case, the African Commission again emphasized the inherent link between states’ immigration decisions and the enjoyment of human rights, declaring that states may only deport individuals if certain due process requirements are met; the Commission explicitly mentioned that human rights norms can limit state immigration actions, stating

The African Commission wishes to emphasi[ze] that there is nothing in the African Charter that requires Member States of the African Union to guarantee for non-nationals an absolute right to enter and/or reside in their territories. This, however, does not in any way mean that the African Charter gives Member States the free hand to unnecessarily and without due process deal with non-nationals to such an extent that they are denied the basic guarantees enshrined under the African Charter for the benefit of everyone. Member States may deny entry to or withdraw residence permits from non-nationals for various reasons including national security, public policy or public health. Even in such extreme circumstances as expulsion, however, the affected individuals should be allowed to challenge the order/decision to expel them before competent authorities, or have their cases reviewed, and have access to legal counsel, among others. Such procedural safeguards aim at making sure that non-nationals enjoy the equal protection of the law in their country of residence,

¹⁸⁸ *Id.* ¶ 126.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* ¶¶ 127-129.

¹⁹¹ *Id.* ¶ 145.

2015] *PROTECTION OF THE RIGHT TO A NATIONALITY* 185

ensure that their daily lives are not arbitrarily interfered with, and that they are not sent back/deported/expelled to countries or places they are likely to suffer from torture, inhuman or degrading treatment, or death, among others.¹⁹²

In the case, the African Commission therefore found that by confiscating identity documents, detaining, rapidly deporting, and confiscating property from Gambians lawfully authorized to work in Angola, Angola violated several provisions of the African Charter.¹⁹³ The decision underscores a recognition of the prohibition against arbitrariness in nationality decisions, codified in the right to a nationality recognized in both the UDHR and the American Charter.

The African Commission has also had occasion to pronounce on nationality issues in cases regarding presidential eligibility requirements. In two cases, the African Commission found that provisions limiting candidacy for president to only those individuals whose parents were citizens of the state were discriminatory and violated the right to participate freely in government, protected by Article 13 of the African Charter.¹⁹⁴ The African Commission therefore not only underscored the strong link between nationality and political participation, but also seemingly expressed a distaste for *jus sanguinis* approaches to nationality, thus aligning its views with the UN statelessness conventions, international instruments relating to children's rights, and the American Convention.

The African Commission's most important statements on nationality issues came in *Modise v. Botswana*,¹⁹⁵ a case involving both expulsion and issues of state succession. Finding that Botswana incorrectly interpreted its constitutional provisions regarding conferral of citizenship and then incorrectly refused to recognize John Modise as a citizen, the Commission again highlighted the intersection between nationality and other rights protected by the African Charter. Focusing on the "incessant deportation[s]"¹⁹⁶ suffered by Mr. Modise, the Commission found that Botswana violated his right to dignity protected in Article 5 of the African

¹⁹² Institute for Human Rights and Development in Africa v. Angola, Commc'n 292/04 ¶ 84, Afr. Comm'n H.P.R., 24th Annual Activity Rep. (2008).

¹⁹³ *Id.*

¹⁹⁴ See Legal Resources Foundation v. Zambia, Commc'n 211/98, Afr. Comm'n H.P.R., 14th Annual Activity Rep. (2001); Mouvement Ivoirien des Droits Humains (MIDH) v. Côte d'Ivoire, Commc'n 246/02, Afr. Comm'n H.P.R., 25th Annual Activity Rep. (2008).

¹⁹⁵ *Modise v. Botswana*, Commc'n 97/93, Afr. Comm'n H.P.R., 14th Annual Activity Rep. (2000).

¹⁹⁶ *Id.* ¶ 91.

Charter.¹⁹⁷ Furthermore, the Court held that Botswana's actions prevented Mr. Modise from enjoying his rights to freedom of movement and of residence, along with his right to family.¹⁹⁸ By confiscating his belongings, Botswana also violated Mr. Modise's right to property.¹⁹⁹

Modise v. Botswana is thus representative of the far-reaching consequences of a state's nationality policy. The case is also the closest the African Commission has come to finding an implied positive right to a nationality, like that which exists in Article 15(1) of the UDHR and Article 20(1) of the Inter-American Charter. Two factors made this possible. First, because Mr. Modise spent several years being deported from both South Africa and Botswana, spending seven years living in a "no man's land,"²⁰⁰ the African Commission was able to highlight the difficulties individuals face without having access to nationality. Second, because of Mr. Modise's political ambitions in Botswana and because of a Botswana law that limited candidates for presidency to citizens by birth, the Commission was able to underscore how the failure to grant nationality can impact other protected rights.²⁰¹ Not only that, but, in Mr. Modise's case, because the right to freely participate in the government of a country is one of the "most cherished fundamental rights,"²⁰² his situation was especially dire. The Commission was therefore able to almost "read in" ²⁰³ a positive right to a nationality in the African Charter. While the Commission was only able to "[urge] the government of Botswana to take appropriate measures to recognize Mr John Modise as its citizen by descent," ²⁰⁴ the case was still a strong incursion on state discretion in nationality issues.

The African Commission further evinced its comfort with the notion that human rights norms can restrict state immigration

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* ¶¶ 92-93

¹⁹⁹ *Id.* ¶ 94.

²⁰⁰ *Id.* ¶ 91.

²⁰¹ *Id.* ¶ 90.

²⁰² *Id.* ¶ 96.

²⁰³ The African Commission has "read in" rights in other contexts to find protections not explicitly found in the African Charter. *See, e.g., Purohit and Another v. The Gambia*, Comm'n 241/01 at ¶ 84, Afr. Comm. H.P.R., 16th Annual Activity Rep. (2003) (stating "... The African Commission would like to read into article 16 the obligation on part of states party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realized in all its aspects without discrimination of any kind.").

²⁰⁴ *Modise*, Comm'n 97/93 ¶ 98.

2015] PROTECTION OF THE RIGHT TO A NATIONALITY 187

decisions in another case originating from Botswana. In *Good v. Botswana*,²⁰⁵ the African Commission held that Botswana unlawfully deported Dr. Kenneth Good as reprisal for his publication of an article criticizing Botswana's presidential succession policies. The African Commission explicitly found that it "has jurisdiction over immigration matters,"²⁰⁶ and that states do not have unfettered discretion to limit judicial review of deportation decisions on grounds of national security and/or the public interest.²⁰⁷ Furthermore, the African Commission found that the mere existence of a Botswanan law allowing the president to effectively deport by decree was insufficient to comply with Article 12(4) of the African Charter, which requires that individuals may only be expelled from a state by virtue of a decision taken in accordance with the law.²⁰⁸ *Good v. Botswana* therefore signals that international human rights norms can place limits on traditionally sovereign prerogatives like immigration matters – a conclusion particularly important because Botswana is a dualist state.²⁰⁹

For all the strong work of the African Commission, the strongest protection of the right to a nationality has come from the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). In the body's first substantive decision,²¹⁰ it found a violation of the right to a nationality enshrined in Article 6 of the African Charter on the Rights and Welfare of the African Child. In a case whose facts are eerily similar to those of the *Yean and Bosico Children*—decided by the Inter-American Court on Human Rights—

²⁰⁵ See *Good v. Botswana*, Commc'n No. 313/05, Afr. Comm'n H.P.R., 28th Annual Activity Report (2010).

²⁰⁶ *Id.* ¶ 83.

²⁰⁷ *Id.* ¶ 208 ("[T]he deportation of the victim without being provided with a chance to be heard is justifiable neither on the basis of domestic laws nor with the pretext of national security.").

²⁰⁸ *Id.* ¶ 205 ("[T]he mere existence of the law by itself is not sufficient; the law has to be in line with not only the other provisions of the Charter but also other international human rights agreements to which Botswana is a party. In other words, Botswana has the obligation to make sure that the law (in this case the Botswana Immigration Act) does not violate the rights and freedoms protected under the African Charter or any other international instrument to which Botswana is a signatory.").

²⁰⁹ *Id.* ¶¶ 237-240 ("The fact that a state is monist or dualist cannot be used as an excuse for not complying with its treaty obligations . . . both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation. . . It is also a well-established principle in international law that a state cannot invoke its domestic laws to avoid its international obligations.").

²¹⁰ Institute for Human Rights and Development in Africa and The Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v. The Republic of Kenya, Commc'n 002/09, Afr. Comm. Of Experts on the Rights and Welfare of the Child (Mar. 22, 2011).

the ACERWC found that the obstacles created by the Kenyan government for the birth registration of those Kenyan children of Nubian descent was a violation of the right to a nationality protected by the African Charter on the Rights and Welfare of the African Child. In its decision, the ACERWC made clear that the right to a nationality had emerged as a fundamental human right.²¹¹ The Committee also emphasized the particular importance acquisition of nationality can have for children,²¹² and highlighted the grave consequences of failure to recognize a child's nationality.²¹³

Given the ACERWC's decision, along with the nationality-related human rights problems in Africa, it comes as no surprise that the African Union has recognized that the right to a nationality is a fundamental human right²¹⁴ and demonstrated significant political will toward codifying and protecting the right to a nationality in the region. Citing the UDHR, Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the UN statelessness conventions, the African Commission passed a resolution calling upon African states to ratify all international human rights instruments related to statelessness and tasking the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons to carry out in-depth research on the right to

²¹¹ *Id.* ¶ 48 (“Therefore, under general international law, States set the rules for acquisition, change and loss of nationality as part of their sovereign power. However, although states maintain the sovereign right to regulate nationality, in the African Committee’s view, state discretion must be and is indeed limited by international human rights standards, in this particular case the African Children’s Charter, as well as customary international law and general principles of law that protect individuals against arbitrary state actions. In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness.”).

²¹² *Id.* ¶ 50 (“Therefore, while the African Committee is not suggesting that States Parties to the Charter should introduce the *jus soli* approach, in line with the best interests of the child principle, it is explaining the intent of Article 6(4) of the African Children’s Charter that if a child is born on the territory of a State Party and is not granted nationality by another State, the State in whose territory the child is born, in this particular case Kenya, should allow the child to acquire its nationality.”).

²¹³ *Id.* ¶ 68 (“The implications of the multi-generational impact of the denial of right of nationality are manifest and of far wider effect than may at first blush appear in the case. Systemic under-development of an entire community has been alleged to be the result. Therefore, in addressing the consequences of the non-recognition of the nationality of children of Nubian descent, actions which address the long-term effects of the past practice must be formulated.”).

²¹⁴ *The Right to Nationality in Africa supra* note 1, at 50 (“African States should include a provision in their national legislation stating that all men, women, and children have the right to a nationality, as it is a fundamental prerequisite for the enjoyment and exercise of the human rights recognized (*sic*) by the African Charter and other African human rights treaties that they have ratified.”).

nationality in Africa.²¹⁵ The special rapporteur released a study on the right to nationality in Africa that was approved by the African Commission,²¹⁶ which thereafter assigned to the same special rapporteur the task of drafting a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa.²¹⁷

As a result of the understanding African human rights bodies have of the importance of nationality issues, and because of the political steps the region has taken to codify the right to a nationality, Africa is perhaps the region most representative of the global shift toward recognition of nationality as a fundamental human right. The attention it has given to the issue of nationality is cause for optimism that any future right to a nationality protected in Africa will be at least as strong as that which is recognized by other regional human rights bodies.

V. CONCLUSION

Nationality has increasingly been viewed as a fundamental right that states must protect. In recent decades, the development of international human rights law has eroded traditional state discretion in matters of nationality,²¹⁸ with regional human rights bodies at the forefront of this development. As a result, several important principles have emerged. For example, as seen in the *Yean and Bosico* and the *Children of Nubian Descent in Kenya* cases there is wide acceptance of the notion that children are entitled to nationality based on their birth within a state's territory, particularly if the denial of nationality will result in the child's statelessness.²¹⁹ Moreover, the prohibition against arbitrariness in state policy on an individual's ability to retain and change nationality – central to the positive decision in the *Bronstein* case – seems also to have become a norm

²¹⁵ Afr. Comm'n Hum. & Peoples' Rts. Res. 234 (Apr. 23, 2013).

²¹⁶ *The Right to Nationality in Africa* supra note 1.

²¹⁷ Afr. Comm'n Hum. & Peoples' Rts. Res. 277 (Apr. 29-May 12, 2014).

²¹⁸ See, e.g., Mike Sanderson, *Statelessness and Mass Expulsion in Sudan: A Reassessment of the International Law*, 12 NW. J. INT'L HUM. RTS. 74 (2014) ("While states continue to enjoy a wide margin of discretion in such matters, any exercise of such powers is subject to general public international restrictions with respect to the abuse of rights, good faith, arbitrariness, and the treatment of aliens.") (internal citations omitted).

²¹⁹ See also Serena Forlati, *Nationality as a human right*, in THE CHANGING ROLE OF NATIONALITY IN INTERNATIONAL LAW 18, 28 66 (Alessandra Annoni and Serena Forlati eds., 2013) ("Recent practice shows almost universal acceptance of the principle according to which children are entitled to nationality by reason of their birth, even if full implementation of this right is often hindered.").

of customary international law.²²⁰ Moreover, some have argued that states' immigration policies, specifically their ability to expel non-nationals from their territories, are now increasingly limited by procedural safeguards that human rights norms required be afforded to non-citizens.²²¹ Also, with respect to deprivation of nationality, it now seems clear that any deprivation of nationality effectuated in a discriminatory manner will be deemed arbitrary and thus prohibited.²²² Some commentators have even argued that, because nationality is what allows for the effective enjoyment of other fundamental rights, *any* deprivation of nationality should always be considered persecution, thereby affording those deprived of nationality with refugee status under international law.²²³

Regional bodies have played an important role in the development of a rights-based approach to nationality. With the codification of a right to a nationality in the principle human rights instruments of the Inter-American, ASEAN, and Arab League systems, regional bodies have followed the example of UDHR by recognizing a legal right to a nationality. In addition, while their principle human rights instruments do not enumerate a right to a nationality, human rights tribunals for both the European and African systems have found ways to create strong protections of nationality through their jurisprudence on such issues as the right to privacy, the right to dignity, and the prohibition against mass expulsions. This regional human rights law is a clear representation of the shifting concept of nationality.²²⁴ Perhaps because issues of nationality most often arise in situations involving neighboring countries,²²⁵ regional

²²⁰ *Id.* (“[T]he prohibition of arbitrariness in the field is now part of international customary law.”).

²²¹ Sanderson *supra* note 220 (“Although the expulsion of foreign nationals traditionally lies within the ‘reserved domain’ of state powers, their powers in this regard are now significantly constrained by rules of substantive and formal due process.”).

²²² See Brandvoll *supra* note 17, at 215 (“Arbitrary deprivation of nationality includes situations where deprivation takes place . . . on the basis of discrimination . . .”).

²²³ See generally U.N. High Commissioner for Refugees (UNHCR), *Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1A(2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees*, October 2014, PPLA/2014/01, available at <http://www.refworld.org/docid/543525834.html> (arguing that all deprivation of nationality should lead to a finding of persecution under international refugee law).

²²⁴ See Spiro, *supra* note 2, at 695 (“Regional institutions, especially those of Europe and the Americas, have been receptive to a rights conception of citizenship practice.”).

²²⁵ See *supra* Section IV (with discussion of cases where the nationalities at issue were those of neighboring countries, e.g., Argentina and Uruguay, Haiti and the Dominican Republic, Latvia and Russia, Botswana and South Africa).

2015] PROTECTION OF THE RIGHT TO A NATIONALITY 191

bodies, rather than global tribunals, may have more at stake in ensuring that issues of nationality are settled. Whatever the reason, given that regional bodies have cited the human rights jurisprudence of other regions,²²⁶ and that the UN has referred to regional recognition of the right to a nationality,²²⁷ it is clear that the decisions of regional bodies on the right to a nationality can have a global impact.

Moreover, there are advantages to a regional development of the right to a nationality. Specifically, different contexts allow for unique elaborations of specific aspects of the right. For example, codification of the right in the Inter-American system, coupled with the specific human rights crises occurring in the region, has allowed for extensive deprivation-of-nationality jurisprudence. By contrast, in Europe, a continent where the right to a nationality is not codified but where the concept transnational migration is widely accepted,²²⁸ there has been greater articulation of rights related to access to nationality. In Africa, a region that has struggled with mass deportations, there has been a recent push to codify a right to a nationality. Any right enshrined in a protocol to the African Charter will likely reflect the jurisprudence of the African Commission, which has recognized the need for strong procedural safeguards in deportation cases²²⁹ and has expressed a preference for a *jus soli* approach to nationality.²³⁰ Collectively, these unique regional approaches will provide for varying conceptualizations of the right to a nationality, the development of which will likely serve to strengthen the substantive content of the right in general. Such a strengthening will be a welcome development in the field of international human rights.

With the widespread agreement on the need for prohibitions

²²⁶ See Institute for Human Rights and Development in Africa and The Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v. The Republic of Kenya, Commc'n 002/09, Afr. Comm. Of Experts on the Rights and Welfare of the Child (Mar. 22, 2011) (referring to the Inter-American Court of Human Rights decision in the Yean and Bosico case).

²²⁷ See, e.g., Human Rights Council Res. 20/5, Rep. of the Human Rights Council, 20th Sess., June 18-July 2, 2012, A/HRC/RES/20/5 (July 16, 2012).

²²⁸ Freedom of movement is one of the pillars of the European Union. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) Preamble ("BEARING IN MIND that the Treaties establish an area without internal frontiers and grant every citizen of the Union the right to move and reside freely within the territory of the Member States . . .").

²²⁹ See Institute for Human Rights and Development in Africa v. Angola, Commc'n 292/04, Afr. Comm'n H.P.R., 24th Annual Activity Rep. (2008).

²³⁰ See Legal Resources Foundation v. Zambia, Commc'n 211/98, Afr. Comm'n H.P.R., 14th Annual Activity Rep. (2001).

against discrimination and arbitrariness, along with general recognition that nationality is strongly linked to the exercise of rights and freedoms in general, there is certainly a base from which the development of the right to a nationality can advance. Further, given that the right to a nationality was first articulated following widespread displacement caused by World War II,²³¹ and given that current conflicts are producing equally burdensome population shifts,²³² it is unlikely that that need to reckon with issues related to nationality will subside. Conditions are therefore ripe for further development of the right to a nationality. As they have done for decades, regional bodies are likely to remain at the forefront of protection of nationality, which has gone from an emerging to a “fundamental human right.”²³³

²³¹ See Section II *supra*..

²³² Anthony Faola, *A Global Surge in Refugees Leaves Europe Struggling to Cope*, WASH. POST, April 21, 2015, at A1, available at http://www.washingtonpost.com/world/europe/new-migration-crisis-overwhelms-european-refugee-system/2015/04/21/3ab83470-e45c-11e4-ae0f-f8c46aa8c3a4_story.html (“Globally, the world is witnessing a momentous period of instability and conflict that has produced what the United Nations now described as the largest pool of refugees, asylum-seekers and internally displaced persons since the ravages of World War II.”).

²³³ Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130 ¶ 136 (“Nationality is a fundamental human right enshrined in the American Convention, and other international instruments, and is non-derogable . . .”).