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## On the Content of the Human Right to a Nationality<sup>2</sup>

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### Abstract

According to Article 15(1) of the UDHR, ‘everyone has the right to a nationality’. Although the quoted provision looks deceptively straightforward, the determination of its content is not an easy task. Past research has been mainly focused on the problem of statelessness which was the historical reason for the introduction of the right in question. In this paper, I argue that holding the status of a formal national is not enough to have the right to a nationality secured. To show this, first, I analyse the difference between the concepts of ‘nationality’ and ‘citizenship’ with special attention paid to the cultural component of national identity. Second, I investigate the understanding of a nationality as ‘the right to have rights’. On the basis of the research on the statelessness I ask what challenges are faced by people without the formal nationality of any state and I show that being a national of certain states is equivalent to being stateless with respect to certain fundamental rights of an individual. In consequence, I suggest that (1) any State Party to the UDHR should accept as nationals those whose original nationality does not guarantee the protection of their first-order rights; (2) peoples from failed states should be able to acquire new citizenship in a country of maximal cultural affinity, with regard to the economic effectiveness of the latter; (3) the obtaining of new citizenship may legitimately be conditioned by demand on compliance with the system of values of the nationality granted.

**Keywords:** nationality, citizenship, Universal Declaration of Human Rights, statelessness, migration.

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## O treści prawa człowieka do posiadania obywatelstwa<sup>3</sup>

### Streszczenie

Zgodnie z art. 15 ust. 1 Powszechnej Deklaracji Praw Człowieka (PDPCz), „każdy człowiek ma prawo do posiadania obywatelstwa”. Choć cytowany przepis wygląda prosto, w istocie ustalenie jego treści nie jest zadaniem łatwym. Większość pozycji w literaturze koncentruje się na problemie bezpieczeństwa, która była historycznym powodem włączenia prawa do obywatelstwa do PDPCz. Tymczasem podstawową tezę niniejszego artykułu jest stwierdzenie, że samo posiadanie obywatelstwa nie jest wystarczające do zagwarantowania wszystkich z nim związanych uprawnień. Aby to wykazać, po pierwsze, analizuję różnicę między pojęciami „narodowości” i „obywatelstwa”, ze szczególnym uwzględnieniem kulturowego komponentu tożsamości narodowej. Następnie przedstawiam rozumienie obywatelstwa jako „prawa do posiadania praw”. Na podstawie istniejących badań nad bezpieczeństwem pytam, jakie wyzwania stoją przed osobami nieposiadającymi formalnego obywatelstwa żadnego państwa i pokazuję, że bycie obywatelem niektórych państw jest *de facto* równoznaczne z byciem bezpaństwowcem, jeśli chodzi o zakres posiadanych praw podstawowych. W konsekwencji, sugeruję, że (1) każde państwo-strona PDPCz powinno być gotowe do przyznania obywatelstwa tym osobom, których pierwotne obywatelstwo nie gwarantuje ochrony ich podstawowych praw; (2) osoby te powinny mieć możliwość uzyskania nowego obywatelstwa w kraju o maksymalnym podobieństwie kulturowym, z uwzględnieniem wydolności gospodarczej tego kraju; (3) uzyskanie nowego obywatelstwa może być uwarunkowane akceptacją norm kulturowych państwa przyznającego obywatelstwo.

**Słowa kluczowe:** narodowość, obywatelstwo, Powszechna Deklaracja Praw Człowieka, bezpieczeństwo, migracja.

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According to Article 15(1) of the Universal Declaration of Human Rights, 'everyone has the right to a nationality'.<sup>4</sup> It is the shortest of all points making the Declaration. However, its simplicity is deceptive. The real significance and difficulty of the entitlement in question lies in the fact that despite its inconspicuous character and insufficient attention it receives, it is an indispensable fundament for all other rights. Moreover, this will be the case as long as national states will exist and enjoy their status of the most powerful political entities. For some time, a belief was common that it will not be really long<sup>5</sup>, but it seems that it has recently faded<sup>6</sup>. For this reason, discussion concerning the role of nationality in securing basic human rights is still necessary.

Two statements are usually quoted to show the ultimate importance of this most general entitlement. The first one is a claim by Hannah Arendt:

*The Rights of Man ... had been defined as "inalienable" because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.*<sup>7</sup>

The second one are Earl's Warren words:

*Citizenship is man's basic right, for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded*

<sup>4</sup> UN General Assembly, Universal Declaration of Human Rights, 217 (III) A (Paris, 1948), <http://www.un.org/en/universal-declaration-human-rights/> (access: 16.12.2019).

<sup>5</sup> See, e.g. E.H. Carr, *The Future of Nations: Independence or Interdependence?* London 1941.

<sup>6</sup> J.D.B. Miller, *The Sovereign State and its Future*, "International Journal: Canada's Journal of Global Policy Analysis" 1984, 39(2), pp. 284–301; T. Nagel, *The Problem of Global Justice*, "Philosophy and Public Affairs" 2005, 33(2), pp. 113–147; A. Shachar, *The Birthright Lottery: Citizenship and Global Inequality*, Cambridge, Mass. 2009.

<sup>7</sup> H. Arendt, *The Origins of Totalitarianism*. New York 1973, p. 292.

*in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf*<sup>8</sup>;

which were recently placed on the cover of UNHCR's handbook for parliamentarians.<sup>9</sup> What is interesting in this fact is that Warren's opinion (just like Arendt's one) implicitly expresses the scepticism towards human rights. This is the type of scepticism which Amartya Sen called *coherence critique*.<sup>10</sup> It is based on the observation that no matter how generously we grant people rights, they mean nothing if no duties are coupled with them. A *lawful claim to protection* assumes the existence of such a duty on the side of a state. Without citizenship which imposes this duty, an individual is nothing but a *naked body*.<sup>11</sup> I believe that this honest, sceptical approach is adequate for investigating the real magnitude of the meta-right to nationality.<sup>12</sup>

If we wished the layout of the Declaration to reflect the actual structure of human rights protection worldwide, Article 15 should be the first one. The citizenship remains to be the main indicator of what rights a human being can actually enjoy and the only truly effective way of guaranteeing every individual that their rights will be respected is to secure their recognition by a national state itself. Most serious *international* mechanisms are set in motion when the level of violation of human rights transcends our imagination of what inhumanity may mean. This, in turn, comes much too late.

What is more, if we assume that the right to a nationality could be interpreted as the right to whatever nationality one wishes to have – this could be, for the day, the only right necessary for an individual to have a decent life. A citizenship of any of Western European or North American countries is enough to be sure that one's fundamental needs will be met. Let Sweden or Germany or the United States claim *universal naturalization, ceteris paribus*. This would be hailed by the majority of humanity as the circumstance much more celebratory than the proud proclamation of the UDHR, with the latter willingly traded for the former.

Yet, at the same time, the right to a nationality is the only right the absence of which could be easily conceived once the political circumstances were different.

<sup>8</sup> 356 U.S. 44. *Perez v. Brownell* (No. 44). Argued: 1 May 1957. Decided: 31 March 1958. 235 F.2d 364, affirmed.

<sup>9</sup> UN High Commissioner for Refugees (UNHCR), *Nationality and Statelessness: A Handbook for Parliamentarians*, October 2005, <https://www.refworld.org/docid/436608b24.html> (access: 16.12.2019).

<sup>10</sup> A. Sen, *Development as Freedom*, New York 1999, chapter X: 'Culture and Human Rights', *Three Critiques*.

<sup>11</sup> H. Arendt, *The Origins...*, p. 241.

<sup>12</sup> For further discussion, see: S. Hall, *The European Convention on Nationality and the Right to Have Rights*, "European Law Review" 1999, 24, pp. 584–602.

It is not difficult to imagine life worthy of a human being both before the appearance of nation-states and after their eclipse. The indispensability of the status of a national seems to be a historical incident rather than a necessity stemming from fundamental human needs. This specific status of the right in question which, on one hand, guarantees more than all other rights taken together, and, on the other hand, seems prospectively unnecessary, makes a really challenging object of legal scholarship.

## Nationality and Citizenship – Remarks on Terminology

The first distinctive difficulty with the right to a nationality is its mere wording. As it is clear from the introductory considerations above, what is meant by the term *nationality*, as it is used in the Declaration, embraces the content of concepts of both *nationality* and *citizenship*. UNHCR declares to use both terms interchangeably, claiming that they are usually used so in international law.<sup>13</sup> The sense of the identity of the concepts is strengthened by properties of both English and French vocabulary (original languages of the UDHR) where the words are rough synonyms.<sup>14</sup> However, not all languages of the Declaration hold this property. In German, formal citizenship is described with the word *Staatsangehörigkeit*, while one's ethno-cultural bond with a nation is described with the word *Nationalität*.<sup>15</sup> The same difference can be found in the Polish language, where citizenship and nationality can be translated to distinct words: *obywatelstwo* and *narodowość*.<sup>16</sup>

The identification of both terms was also far from the original intention of state representatives. The right to a nationality was viewed as distinct to that of enfranchised citizenship and the suggestion that the latter should be included in Article 15 was rejected by the majority of decision-makers.<sup>17</sup> Finally, the exercise of political rights was embraced by Article 21 in the form of the right to take part in the govern-

<sup>13</sup> UNHCR, *Nationality and Statelessness...*, p. 3.

<sup>14</sup> As Brubaker points: "Citizenship" has participatory connotations that "nationality" lacks and "nationality" has a richer cultural resonance than "citizenship," but [in English and French] the words are used interchangeably to designate the legal quality of state-membership [emphasis mine]. R. Brubaker, *Citizenship and Nationhood in France and Germany*, Cambridge, Mass. 1999, p. 50.

<sup>15</sup> Idem.

<sup>16</sup> According to *Słownik języka polskiego*, nationality (*narodowość*) means belonging to a nation or a sense of this belonging. No legal bond between a state and a national is presupposed. "Narodowość", *Słownik języka polskiego PWN*, Wydawnictwo Naukowe PWN, (online), <https://sjp.pl/narodowo%C5%9B%C4%87> (access: 16.12.2019).

<sup>17</sup> K.Y. Ebright, *Nationality and Defining the 'Right to Have Rights'*, "Columbia Journal of Transnational Law" 2017, 56, p. 882.

ment of one's country. K.Y. Ebright pays attention to the fact that resolutions of the United Nations have never called non-citizens *stateless*. Similarly, the terms *nationality* and *citizenship* were not used interchangeably by them. The disjunctiveness of both concepts is also suggested by such UN documents as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

However, even if we assume the identity of the terms in international discourse, it needs to be pointed out that the human right to a nationality depends heavily on the regulations on the domestic level and it is traditionally part of its *domaine réservé*.<sup>18</sup> This is evident in the reluctance of the UDHR framers to couple the right to a nationality with the duty of any particular state.<sup>19</sup> Other international treaties also evince the belief in the priority of internal regulation in the domain of inclusion and exclusion from a nation. In the preamble to the European Convention on Nationality we can read that 'in matters concerning nationality, account should be taken both of the legitimate interests of States and those of individuals'.<sup>20</sup> Moreover, the right to nationality for everyone is granted in Article 4, only after asserting that '[e]ach State shall determine under its own law who are its nationals' (Article 3). This is a language in which discussion on any other human right is almost unthinkable, as this is the core of the concept of human rights that they are absolute independent from both legitimate and illegitimate interests of any state.

Bearing in mind the particular legitimacy of states to determine the group of its nationals/citizens, there is a need to analyse how the terms are understood in internal legal systems. Scholars note that there are not many countries in which the special category of nationals exists, as opposed to that of citizens, and that in the majority of domestic regulations these two groups are identical.<sup>21</sup> The seminal counterexamples are, among others, the United States and the United Kingdom, but these are said to be exceptions and not much more. This, however, is a very simplified picture. Even if in the generality of states the concept of nationality does not introduce so sharply a distinct category of membership in civil community, the term has both legal and political significance that is different from that of citizenship.

<sup>18</sup> Theoretically, in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of "emigration, naturalization, nationality, and expulsion" – H. Arendt, *The Origins...*, p. 278.

<sup>19</sup> M. Ganczer, *The Right to a Nationality as a Human Right?*, "Hungarian Yearbook of International Law and European Law" 2015, pp. 15–33; J. Połatyńska, *Prawo do obywatelstwa jako prawo człowieka*, "Folia Iuridica. Zeszyty Naukowe Uniwersytetu Łódzkiego" 2010 p. 2.

<sup>20</sup> Council of Europe, European Convention on Nationality, 6 November 1997, ETS 166, <https://www.refworld.org/docid/3ae6b36618.html> (access: 17.12.2019), p. 2.

<sup>21</sup> K.Y. Ebright, *Nationality...*, p. 858.

In the Polish legal system, rarely analysed from this perspective, the appeal to nationality exists in the Repatriation Act which states that a person can acquire Polish *citizenship* if they declare Polish *nationality* and have antecedents of Polish *nationality* or *citizenship*. Subsequently, the nationality of antecedents is quasi-defined as belonging to the Polish nation determined on the basis of cultivating Polish traditions and customs. Here, the nationality understood as an emotional and cultural (and not necessarily legal) bond turns out to be a necessary and sufficient condition for acquiring full political rights linked with the status of a citizen. It is an interesting breach in the otherwise much formalised premises of naturalisation. The Repatriation Act can be seen as a realisation of an international law principle known as a right to return. Similar regulations can be found in other states. In Italy, for instance, post-war repatriation legislation triggered a discussion about the meaning of *Italianess*. In the reaction to choosing a daily use of Italian language as the main indicator of being an Italian with the right to naturalisation, Joseph Kunz wrote:

*Whereas option was traditionally a means to enable the persons involved in a territorial cession to show their fidelity to the losing state, regardless of blood and language, the option is here what this writer has called an "ethnic option". ... This "ethnic option" is, of course, an expression of the principle of nationality, of an era in which nationalism precedes state allegiance.*<sup>22</sup>

Some even more interesting light on the problem is shed by the case of the legal institution called the Pole's Card. Pursuant to the Act on the Pole's Card<sup>23</sup>, a person who belongs to the Polish nation, but lost their citizenship because of historical turmoil or has never enjoyed the citizenship, but nevertheless has *a sense of national identity* can acquire a Pole's Card. According to a commentary provided by the International Agency for Migration, a related organisation of the UN, the *Pole's Card is a document confirming its holder belongs to the Polish nation. It does not mean though that the alien holding it is granted Polish citizenship, obtains a temporary residence permit or permit to settle in Poland or has the right to cross the Polish border without a visa* [emphasis in the original].<sup>24</sup> Nevertheless, a holder of a Pole's

<sup>22</sup> J. Kunz, *Nationality and Option Clauses in the Italian Peace Treaty of 1947*, "The American Journal of International Law" 1947, 41(3), p. 627, as cited in: P. Ballinger, *Borders of the Nation, Borders of Citizenship: Italian Repatriation and the Redefinition of National Identity after World War II*, "Comparative Studies in Society and History" 2007, 49(03), p. 728, <https://doi.org/10.1017/s0010417507000680>.

<sup>23</sup> Act of 7 September 2007 on the Pole's Card (Journal of Laws of 2007, No. 180, item 1280, as amended).

<sup>24</sup> Commentary available at [http://www.migrant.info.pl/The\\_Poles\\_Card.html](http://www.migrant.info.pl/The_Poles_Card.html) (access: 16.12.2019).

Card can enjoy certain rights enumerated in the Act. These include, among others, the right to education in Poland, to health care in emergency, and to consular aid in the face of a threat to life and safety (Article 6).

The terminological landscape is then as follows. There is the term *nationality*, an original term from the Declaration, which can be roughly interpreted either as (a) a legal bond with a state (which is called *formal nationality*) or (b) an emotional, ethnocultural bond with a nation (I will call it a *cultural nationality*<sup>25</sup>).

There is also the term (2) *citizenship*, understood in every case as a legal bond with the state and which additionally presupposes that its holder enjoys the totality of political rights. This clear division is disrupted by cases when formal nationality is not equal to citizenship (American Samoa) and when ethnocultural nationality establishes a legal relation with a state and imposes on it certain duties (the Pole's Card).

The ambition of UNHCR is to ensure that every human being holds at least one formal nationality coupled with political rights stemming from the status of a citizen. This approach does not take into account the right to a nationality understood as a membership in the community based on a cultural affinity, this is common values and ideals. This opposes Arendt's approach, on which UNHCR interpretation of Article 15 declares to be based.<sup>26</sup> According to Arendt, mere citizenship in a nation-state will never be satisfying for a member of an ethnocultural nation different from that of a state in question.<sup>27</sup> A legal bond is clearly not sufficient to protect the interests (cultural, political, but also economical) of a foreign ethnocultural national and the existence of multiple minority treaties is the best proof of it. While political rights are mostly protected by Article 21 of the UDHR, the right to live within the community based on the same nationality understood as a set of common values is absent from the current considerations of UNHCR. This is the first serious lacuna in our understanding of the right to a nationality. Thus, international law recognises the right of every human to live with formal nationality, but

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<sup>25</sup> I will mainly use the term *cultural nationality*, as I believe that nowadays this is a cultural (more than an ethnic) component which is of primary importance in the *informal* concept of nationality. The most seminal of recent nationalist arguments against accepting immigrants is their cultural foreignness, including a different religion, social structure, etc. Thus in Poland, Muslim immigration is claimed undesirable, as opposed to Ukrainian one, on the basis of its *unfitness* to the Polish nation. As a Polish official states: *We do not need Muslim immigrants because they do not fit in Poland*. At the same time, Ukrainians are said to *fit well, they quickly assimilate, and, what is more, they come from Christian, though Orthodox, cultural circle*. B. Collen, *NZZ: Polska staje się krajem imigracji zarobkowej*, 10 November 2017, <https://www.dw.com/pl/nzz-polska-staje-si%C4%99-krajem-imigracji-zarobkowej/a-41334412> (access: 16.12.2019).

<sup>26</sup> UN High Commissioner for Refugees (UNHCR), *The State of the World's Refugees: In Search of Solidarity*, 2012.

<sup>27</sup> H. Arendt, *The Origins...*, p. 291.



ignores the right to live within a cultural environment where nationality finally gets its full meaning.

The reasons for it are numerous. The most obvious one is the practical impossibility of providing every ethnocultural nation with its own formal nation-state. However, practical impossibilities are not an argument strong enough to annihilate the fundamental desire of peoples to function within a political structure dominated by their own ethnocultural nationals. The immortality of this desire is one of the basic causes of deadly conflicts worldwide. However, even if it does not lead to a fight to death, it can be a source of serious political turmoil. The recent example of the problem is Catalonia's fight for independence from Spain. The otherwise recognised right to the self-determination of nations<sup>28</sup> has become questioned in the case of Catalonia when it endangered the political stability and sovereignty of greater national organism that is Spain. Such conflicts are common and they cannot be easily resolved. Although it seems that the best resolution would be to honestly acknowledge the impossibility of a just solution instead of looking for a legal justification for a political decision.

Another reason for reluctance to consider nationality in its ethnocultural dimension is some sort of embarrassment which the concept provokes. Any discussion about the importance of an ethnic affinity between citizens inevitably sounds racist. And racism (both ethnic and cultural<sup>29</sup>) is one of the most deadly sins in contemporary political discourse. Thus, we have a paradoxical situation in which debate about human rights protection is frequently (and reasonably) held in terms of the political and cultural rights of ethnic minorities and indigenous peoples, while any direct expression of preference for one's own ethnocultural nationals is treated as an extremist right-wing whine. The longing for society shaped and functioning in accordance with a homogenous set of values and traditions is seen as backward, obsolete, unworthy of an educated citizen of the world.

We divided the world in accordance with the ethnocultural nation-state-sovereignty principle and now we wish to transform these organisms into a purely formal structure without really changing the fundament of this division that is the almost exclusive right of every state to determine who can be its citizen. Obviously, it is difficult to advocate for the human right to membership in a community based

<sup>28</sup> Article 1 of Charter of the United Nations (United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI). See also the issues of Dakota Access Pipeline project, indigenous people in Canada, the people of Hong Kong seeking more autonomy from Beijing, Kashmir and the Kurds in Iraq. A bibliography concerning the above-mentioned cases is available in: L. Che Ako, *The Right to Self-Determination and Secession: Analysing The Catalanian Case*, "Independent Student Journal: Law" 2018, 1, p. 10.

<sup>29</sup> On the transition from biological to cultural racism in contemporary discourse, see: E. Balibar, *Is There a Neo-Racism?* [in:] É. Balibar and I. Wallerstein (eds.), *Race, Nation, Class: Ambiguous Identities*, London 1991.

on common ethnocultural nationality if we actually wish this type of nationality to vanish. Maybe the net of human memberships could be shaped differently for the benefit of all. Maybe a post-national individual can be seen as a higher step in the moral and political development of humanity. This is far from clear, but nevertheless possible. What is important is that we have not achieved this step yet. And until there is no non-national (in both discussed senses) political entity in the world where one could shelter, by the human right to a nationality we must understand not only particular entitlements connected with a legal status but also membership in a community of a shared cultural framework.

## The Problem of Statelessness

The most important reason, however, why international organisations are not willing to embrace nationality in its cultural dimension in the reading of Article 15 is that the frontal rationale behind including the discussed provision in the UDHR was to fight the phenomenon of statelessness.<sup>30</sup> It was not until 1995 that UNHCR was given the mandate on the issue. Such a belated reaction was not the fault of UNHCR itself, which had sought to protect stateless persons much earlier. However, these efforts initially faced severe reluctance on the part of states. It was not until the emergence of huge groups of Eastern Europeans denaturalised after the fall of the Soviet Union that Western governments realised that today's stateless people would be tomorrow's refugees, with all troubles which this brings about.

It may be argued that the true content of the human right to a nationality can be interpreted only with regard to this aim. However, the Declaration is claimed not to be a regular act of positive law which *grants rights*, but it declares the recognition of rights existing prior to its adoption. Thus, an investigation can be conducted into what is the content of a certain human right independently from the formulation or interpretation of this right in any declarative document and its historical or actual purpose.<sup>31</sup> The statelessness-oriented approach is, however, useful or even indispensable for determining what is really protected under the right to a nationality. The already mentioned reason for it is the serious vagueness of the concept of nationality. As Paul Weis, one of the most prominent scholars studying the topic, stated:

<sup>30</sup> G.S. Goodwin-Gill, *The Rights of Refugees and Stateless Persons*, [in:] K.P. Saksena (ed.), *Human Rights Perspective and Challenges (in 1990 and Beyond)*, New York 1994, pp. 378–389.

<sup>31</sup> T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, Cambridge 2008, p. 53.

*There is ... not one definition of nationality as a conception of municipal law, but as many definitions as there are States, unless one wishes to choose a general definition such as "nationality denotes a specific relationship between individual and State conferring mutual rights and duties as distinct from the relationship of the alien to the State of sojourn".*<sup>32</sup>

More than half a century of research later, scholars are equally confused by the content of the concept.<sup>33</sup> This is unfortunate, as the exact determination of *rights and duties* stemming from the status of a national would allow us to understand what is at stake when we promote the human right to hold this status.

The analysis of statelessness and risks which it entails is a good point of departure to reconstruct the bundle of entitlements and obligations connected with one's relation to a state. When we discover what one is deprived of being stateless, we should be able to say what one should have under one's right to be a national. Let us then look into the problem of living beyond a nation. Since UNHCR was given the mandate on statelessness in 1995, it focused much effort on investigating both the causes and consequences of the phenomenon. The numerous documents issued from this moment points the following perils faced by stateless individuals and peoples. UNHCR reports, handbooks and manuals contain long lists of issues faced by an *apátrida*: difficulties to register births and obtain birth certificates; lack of identity documentation and, as a result, difficulties to be recognised as a person before the law; difficulties to legally marry; limited or no access to education and health care; lack of access to the labour market; limits on property ownership; difficulties to enter into contracts, obtain business licenses or open bank accounts; non-recognition of the right to reside in one's own country, resulting in a risk of detention and/or expulsion; limitations on freedom of movement, restricting the ability to leave and return to the country of residency, and also sometimes restricting the ability to move freely within the country; repeated and prolonged detention, particularly in a migratory context and where the country of origin refuses to allow return; heightened risk of exploitation, trafficking, and sexual and gender-based violence.<sup>34</sup>

<sup>32</sup> P. Weis, *Nationality and Statelessness in International Law*, Leiden 1979, p. 29.

<sup>33</sup> M.J. Vela, *How Far Has the Protection of the Right to Nationality under International Human Rights Law Progressed from 1923 until the Present Day?* Tilbur University [no date], p. 11, <http://arno.uvt.nl/show.cgi?fid=136225> (access: 16.12.2019).

<sup>34</sup> Organization for Security and Co-operation in Europe, *Handbook on Statelessness in the OSCE Area*, February 2017, p. 73.

However, the consequences of the lack of state recognition and protection are not only formal: stateless people are confronted with actual home detention<sup>35</sup> and permanent fear<sup>36</sup> resulting from the lack of necessary documents in countries when having an ID is demanded from every person treading on public space. Stateless adults frequently renounce their desire to have children, feeling responsibility for bringing into the world new generation of humans without rights. For many, this is a heart-breaking decision.<sup>37</sup> Their fears are confirmed by testimonies of stateless children who feel humiliated by their status. They are devoid of all development opportunities, their potential is wasted, their innate curiosity dampened. The nationality turns out to guarantee the right to childhood.<sup>38</sup> Finally, stateless people, unable to obtain legal housing, face dramatic day-to-day challenges when doomed to existence in internment camps or provisional shelters, which include: lack of water, forced co-habitation with animals, poor sanitation systems resulting in skin diseases, upper respiratory infections and gastro-intestinal disorders which more often than not accompany such living conditions.<sup>39</sup>

So let us now reverse the problem. If these are deficits experienced by people because of the violation of their right to a nationality, the content of the right in question should be exactly the access to the aforementioned political, economic and social goods. To have a nationality would mean to enjoy access to education and health care, to labour market, to property ownership, to mostly unlimited freedom of movement, freedom of dangers concerning exploitation and trafficking, freedom from life-threatening poverty, from moral commandment to resign from parenthood and from daily struggle in living settings opposing human dignity with no hope and possibility to escape them. The right to a nationality indeed brings about all these privileges, but only if it is a right to a *right* nationality.

In Somalia, only 30% of children enjoy the privilege of primary education<sup>40</sup>. In Canada the number is 100%.<sup>41</sup> In Somalia, the problem of statelessness hardly

<sup>35</sup> UN High Commissioner for Refugees (UNHCR), *Ending Statelessness Within 10 Years*, November 2014, p. 14.

<sup>36</sup> UN High Commissioner for Refugees (UNHCR), *"This Is Our Home": Stateless Minorities and Their Search for Citizenship*, November 2017, p. 3.

<sup>37</sup> UN High Commissioner for Refugees (UNHCR), *Ending Statelessness...*, p. 12.

<sup>38</sup> UN High Commissioner for Refugees (UNHCR), *I Am Here, I Belong: The Urgent Need to End Childhood Statelessness*, November 2015.

<sup>39</sup> UNHCR, *Handbook on Statelessness in the OSCE Area*, p. 15.

<sup>40</sup> Somalia Education Cluster, *Annual Report 2016*, January 2017, [https://reliefweb.int/sites/reliefweb.int/files/resources/somalia\\_education\\_cluster\\_annual\\_report\\_2016.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/somalia_education_cluster_annual_report_2016.pdf) (access: 16.12.2019).

<sup>41</sup> UNESCO Institute for Statistics, *Primary School Enrollment*, <https://data.worldbank.org/indicator/SE.PRM.NENR> (access: 16.12.2019).

exists.<sup>42</sup> For most nationals, being Somali is equivalent to being stateless in regard to educational opportunities. If you are being born in Angola, the chances that you will not survive the birth are almost 10%. In Luxemburg, it is about 0.1%.<sup>43</sup> In Angola, the problem of statelessness is negligible. It is just that being Angolan is equivalent to being stateless in regard to access to basic neonatal care. If you happen to be a citizen of Afghanistan, your passport allows you to visit 36 countries worldwide. If you are German, the number is 171.<sup>44</sup> There is lesser difference in the scope of freedom of movement between Afghan national and stateless person than between Afghan and German citizens. 48% of Senegal nationals of working age are excluded from the labour market.<sup>45</sup> The same rate of unemployment is distinctive for formerly deported peoples in Crimea, Ukraine, who were deprived of citizenship and lacked a residence permit.<sup>46</sup> It is true that lack of state protection put stateless persons at risk of falling prey to human traffickers. However, if you happen to be Eritrean, the chances are good that you will decide to rely on the same criminals for a deliberate escape from your country of origins.<sup>47</sup> Although now they will be called differently – human smugglers – their *modus operandi* and risks connected with displacement will remain similar. The decision to refrain from having children because of the fear for their future may be a dramatic one. However, South Sudanese parents make the same choice because of the unbearable living conditions in their country.<sup>48</sup> What is still worse, however, is the situation in which no choice is available. One out of three Sudanese women has no access to contraception in spite of her desire not to have any (more) children.<sup>49</sup> Data concerning extreme poverty is widely known. 53.5% of the Nigerian population lives below the poverty line at

<sup>42</sup> UN High Commissioner for Refugees (UNHCR), *Universal Periodic Review: Somalia*, November 2010.

<sup>43</sup> World Health Organization, *Diphtheria-tetanus-pertussis (DTP3) Immunization Coverage*, <https://www.who.int/gho/immunization/dtp3/en/> (access: 16.12.2019).

<sup>44</sup> Passport Index, available at <https://www.passportindex.org/byRank.php> (access: 16.12.2019).

<sup>45</sup> Central Intelligence Agency, *The World Factbook: Senegal*, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sg.html> (access: 16.12.2019).

<sup>46</sup> UN High Commissioner for Refugees (UNHCR), *Evaluation of UNHCR's Programme to Prevent and Reduce Statelessness in Crimea, Ukraine*, March 2004. <https://www.unhcr.org/405ab4c74.pdf> (access: 16.12.2019).

<sup>47</sup> International Organization for Migration (IOM), *Migrant Smuggling Data and Research: A Global Review of the Emerging Evidence Base*, 2016, available at [https://publications.iom.int/system/files/smuggling\\_report.pdf](https://publications.iom.int/system/files/smuggling_report.pdf) (access: 16.12.2019).

<sup>48</sup> S. Kane, M. Kok, M. Rial, M. et al. *Social Norms and Family Planning Decisions in South Sudan*. *BMC Public Health*, 16, 1183 (2016), <https://doi.org/10.1186/s12889-016-3839-6>, <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-016-3839-6> (access: 16.12.2019).

<sup>49</sup> Family Planning FP2020, *South Sudan. Actions for Acceleration*, 2018–2019, [https://www.familyplanning2020.org/sites/default/files/South\\_Sudan\\_2018-2019\\_Actions\\_for\\_Acceleration.pdf](https://www.familyplanning2020.org/sites/default/files/South_Sudan_2018-2019_Actions_for_Acceleration.pdf) (access: 16.12.2019).

\$1.90 a day (PPP).<sup>50</sup> While there are in Nigeria 53 thousands of refugees with limited civil and economic rights stemming from citizenship, this amounts to less than 0.1% of the Nigerian population of 190.9 million.

This recitation could be much longer. We would be able to analyse housing conditions, access to drinking water, morbidity and mortality from easily curable diseases, and in every case the nationality of a person would be the single most powerful determinant and indicator of the fulfilments of their basic needs.<sup>51</sup> This, obviously, does not matter that statelessness is not a factor which, independently of the country of residence of an individual, significantly worsens their prospects for well-being and as such should be combatted with true zeal. It just shows that the right to a nationality understood as the right to have rights is empty if the nationality granted to an individual does not entail the realisation of first-order rights.

The best illustration of this fact is the phenomenon of *harraga* – ‘burners of papers’. They are emigrants, mainly from Algeria, Morocco and sub-Saharan African countries, who, when arriving illegally at the coasts of Europe, destroy their documents in order to annihilate any trace of where they come from. They prefer to renounce their nationality in order to get protection and support from the European Union. Their citizenship turns out to be a deadly obstacle to get help guaranteed in international humanitarian law. They come to the conclusion that it is better to be stateless than a citizen of a state unable to protect its citizens. The former status leaves the door slightly ajar to transits into someone else, or rather someone from somewhere else. The latter shuts it definitively.

## Conclusions

There are two instant conclusions from these considerations. First, that to guarantee an individual a legal status of a national in a state-community based on values different to those which constitute their cultural identity – is to fulfil only one half of the human right to a nationality. Second, that to guarantee an individual a legal status of national in a state-community where they cannot enjoy any substantial goods which should be provided by an effectively functioning political organism

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<sup>50</sup> World Bank, *Poverty & Equity Brief: Zimbabwe*, October 2019, [http://databank.worldbank.org/data/download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global\\_POVEQ\\_ZWE.pdf](http://databank.worldbank.org/data/download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global_POVEQ_ZWE.pdf) (access: 16.12.2019).

<sup>51</sup> B. Milanović, *The Haves and the Have-Nots: A Brief and Idiosyncratic History of Global Inequality*, New York 2011, Kindle edition, Basic Books. Vignette 2.5.

is equivalent to not fulfilling the human right to a nationality at all, as long as we decide to understand this right as *the right to have rights*, as UNHCR correctly does.

How to translate this conclusion into the language of specific provisions which would enable an individual to exercise the discussed right in full? The most straightforward solution should be to grant every person who is a citizen of a *failed state*, i.e. a state which failed its duty to protect that individual, a citizenship of a state where they could exercise all of their rights, at least at some threshold level.<sup>52</sup> Obviously, the acquisition of such a citizenship should be voluntary. If a person, according to internal regulations, can hold more than one citizenship, the additional, *humanitarian* citizenship could be also conditional – it would expire as soon as the individual's state of origin is able to secure the whole set of the individual's first-order rights.

Such deployment, however, should take into consideration the right to a nationality understood as a community of values among co-citizens. It is not only technically but also logically impossible to guarantee every ethnocultural group its own political organisation on the national level, as no one can set a finite threshold above which ethnocultural diversity is deep and common enough to claim a new political body. What is more, ways of national identification can fluctuate too quickly for the net of nation-states to absorb demanded transformation without risk for the international stability and protection of rule of law. Any person, however, should be able to be granted membership in a community based on shared fundamental values (such as gender equity, social solidarity or the primacy of religious law over state legislation). Thus, the duty of all states recognising the human right to a nationality should be to accept those individuals who are not able to participate in the cultural framework of their country of formal citizenship even on the most basic level. However, the recognition of the cultural dimension of national identity also means something else. This is the right of every host nation to accept only those who are ready to share the national values. If there is a value of multiculturalism among them – a state is able to accommodate a greater variety of comers. If not – the legitimate condition for the comers to assimilate will be significant.

The great mistake of the contemporary approach to the human right to a nationality is to negate its full content as long as it is possible, i.e. as long as nationals of failed states come to the gate of well-functioning communities. Then, the situation is radically reversed and the communities become obliged to accept newcomers regardless of the substantial gap between the value systems of both groups. Any attempt to conserve the dominant (mono)culture by potential hosts is seemed as

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<sup>52</sup> For a useful tool of assessing the meeting of the threshold of the basic needs, see: M.C. Nussbaum, *Creating Capabilities: The Human Development Approach*, Cambridge Mass. 2011.

discriminatory and backward. However one can have a right and reason to hold such an opinion, the full recognition of the human right to a nationality must acknowledge the right to such a closure, as nationality is not only a formal but also a social, emotional and cultural phenomenon.<sup>53</sup>

What I suggest is that: (1) any state which recognise the right guaranteed in Article 15 of the UDHR should embrace its full content by readiness to accept as nationals those whose original nationality does not guarantee the protection of their first-order rights<sup>54</sup> or is based on values clearly contradictory to their own; (2) peoples from failed states should be able to acquire new citizenship in a country of maximal cultural affinity, with regard to the economic effectiveness of the latter; (3) the obtaining of new citizenship may legitimately be conditioned by demand on compliance with the system of the values of the received nationality.

The analysis of the content of the human right of nationality imposes on states a requirement of much greater solidarity than they used to feel obliged to. However, at the same time, it guarantees that the true significance of a nation, as a community based on shared values, will not be ignored while resolving the pressing, *technical* problem with coming *citizens* of failed state organisms. The problem which would not have occurred in this form if states had stuck to their lofty obligation set by the UDHR.

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<sup>53</sup> This is clear in ICJ definition included in the ruling in the *Nottebohm* case, where nationality is described as 'a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties': *Liechtenstein v Guatemala – Nottebohm – Judgment of 6 April 1955 – Second Phase – Judgments* [1955] ICJ 1; ICJ Reports 1955, p. 4; [1955] ICJ Rep 4 (6 April 1955).

<sup>54</sup> Which is, obviously, a violation of Article 28 of the UDHR: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.



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