CUSTOMARY INTERNATIONAL LAW REQUIRING STATES TO GRANT NATIONALITY TO STATELESS CHILDREN BORN IN THEIR TERRITORY

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In the most recent few years, state practice and opinio juris are increasingly converging to affirm that states must grant nationality to children born in their territory if they would otherwise be stateless. In prior scholarship, this author has argued that there is a customary international law norm requiring states to grant nationality in such cases. Certainly, UNHCR's #IBelong campaign is a significant part of this development, placing statelessness back on the international agenda, as well as encouraging states to adhere to the statelessness conventions, adopt birth registration and statelessness determination procedures and revise domestic law. Partly due to this campaign, states are increasingly adopting practice and domestic law that provides for nationality from birth for stateless children but are also increasingly stating their opinion that such an approach is desirable, necessary and morally compelling. In fact, it is effectively impossible to identify any state that claims it has the unfettered right to refuse to grant nationality to a stateless child born in its territory. This article will complete a brief survey of recent practice and expressions of opinion, mostly as documented by UNHCR as a part of the #IBelong Campaign to End Statelessness, to confirm that this norm continues to strengthen under customary international law.

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I INTRODUCTION

In the most recent few years, customary international law is increasingly crystalising to affirm that states must grant nationality to children born in their territory if they would otherwise be stateless. In prior scholarship, this author has argued that such a norm of customary international law was beginning to emerge, based on years of slowly accumulating practice.[1] In the years since that research was published, state practice has begun to evolve rapidly. This article will assess this quickly moving field that affirms the emergence of a rule of customary international law. Now, under customary international law, stateless children can identify the state where they were born as the state that must grant them nationality if no other state will.

To a large degree, this quickly evolving practice is due to the United Nations High Commissioner for Refugees' ('UNHCR') *#IBelong* Campaign to End Statelessness ('*#IBelong* Campaign'). This initiative has placed statelessness back

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1 See William Thomas Worster, 'The Obligation to Grant Nationality to Stateless Children under Customary International Law' (2019) 27(3) *Michigan State International Law Review* 441.

on the international agenda, through hosting events and pressuring states to resolve statelessness. UNHCR has urged states to adopt birth registration and statelessness determination procedures, revise domestic law and adhere to the 1961 *Convention on the Reduction of Statelessness* ('*1961 Convention*'), among other initiatives.[2] Due to this campaign, states are increasingly reforming their practices to provide for nationality from birth for stateless children as well as increasingly revising their opinions and expressing that such solutions are desirable, necessary and morally compelling. Today, thanks in large part to UNHCR's efforts, the international community can now confidently conclude that state practice and *opinio juris* support a norm that states have an obligation to grant nationality to children born in their territories when the child would otherwise be stateless.

The question of customary international law in such a situation would bring helpful certainty to hundreds of thousands of children. It is true that treaty law can arguably already be interpreted to provide for a rule requiring nationality in such cases. The *1961 Convention* requires states to grant nationality to stateless children born in their territory and the right to a nationality in the *International Covenant on Civil and Political Rights* ('*ICCPR*') could be interpreted to also require it, especially in light of the requirement in the *Convention on the Rights of the Child* ('*CRC*') that states apply the law in the best interests of the child. However, the *1961 Convention* still does not have universal adherence and this interpretation of the *ICCPR* and *CRC* has not yet been authoritatively confirmed. With these gaps, it is more challenging to identify the state obliged to grant nationality and, in turn, secure birth registration and the rights that follow, such as education rights. Customary international law, if it can be shown to exist, could fill these gaps and provide a single, predictable and consistent rule that covers cases of statelessness at birth, applicable to all states in the world.

This article will update the prior research with the most recent, and quickly changing, practice and expressions of *opinio juris*, partly as influenced and documented by UNHCR as a part of the *#IBelong* Campaign. In doing so, it will explore a case study that demonstrates that the influence of an international organisation can push states to revise their practice and develop new views on the law. It will conclude by confirming that this norm surely exists under customary international law.

II METHODOLOGY OF CUSTOMARY INTERNATIONAL LAW

As is well known, customary international law arises when there is sufficient state practice and *opinio juris*.[3] This source of law was identified in the *Statute of the*

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2 For example, in July 2020, UNHCR hosted a High-Level Segment where many states pledged to reform their approach to statelessness: see UNHCR, *High-Level Segment on Statelessness: Results and Highlights* (Report, May 2020) 20–43 <https://www.refworld.org/docid/5ec3e91b4.html> ('*High-Level Segment Results and Highlights*'); UNHCR, *The Campaign to End Statelessness: April–June 2020 Update* (Report, 16 July 2020) ('*#IBelong Campaign Update June 2020*').

3 See *SS 'Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 18 ('*Lotus*'); *Asylum Case (Colombia v Peru) (Judgment)* [1950] ICJ Rep 266, 276–77; *North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands) (Judgment)* [1969] ICJ Rep 3, 44 ('*Asylum Case*'); *Report of the International Law Commission, Sixty-Eighth Session, 2016: Draft Conclusions on the Identification of Customary International Law Adopted by the Commission*, UN Doc A/71/10 (2 May–10 June and 4 July–12 August 2016) 76 [62] conclusions 2, 3(2) ('*ILC Draft Conclusions*').

International Court of Justice.[4] Only certain actors, primarily states, are relevant[5] and their practice must be widespread and consistent.[6] That being said, the practice of international organisations can contribute to constituting a rule of customary international law, when the organisation is acting with a competence similar to that of states.[7] In addition, this practice must be accompanied by an opinion that the states engage in this practice under a sense of obligation.[8] In order to identify whether states have the requisite practice, we must survey a sampling of representative states, apply inductive and deductive reasoning and conclude whether such customary law has crystalised.[9] Practice constituting customary international law can include legislation or judicial decisions,[10] diplomatic or other public acts, statements on policies, claims on the law[11] and practice aligned with

4 See *Statute of the International Court of Justice*, art 38.

5 See, eg, *Asylum Case* (n 3) 276–77; *ILC Draft Conclusions* (n 3) 76 [62] conclusion 4.

6 See Hugh Thirlway, *The Sources of International Law* (Oxford University Press, 2nd edn, 2014); *North Sea Continental Shelf Cases* (n 3) 44.

7 See *ILC Draft Conclusions* (n 3) 76 [62] conclusion 4(2), 88–89 comments (4), (6)–(8); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 24–25; William Thomas Worster, 'The Contribution to Customary International Law of Territories under International Administration' in Sufyan Droubi and Jean d'Aspremont (eds), *International Organisations, Non-State Actors and the Formation of Customary International Law* (Manchester University Press 2020) 343, arguing that when the United Nations operates an international territorial administration, it acts sufficiently like a state to contribute to customary international law.

8 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgment)* [1986] ICJ Rep 14, 108–109 [207] ('*Nicaragua Case*'); *North Sea Continental Shelf Cases* (n 3) 44; *Right of Passage over Indian Territory (Portugal v India) (Judgment*) [1960] ICJ Rep 6, 42–43 ('*Right of Passage Case*'); *Asylum Case* (n 3) 276–77; *Lotus* (n 3) 28; *ILC Draft Conclusions* (n 3) [62] conclusion 9.

9 See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America) (Judgment)* [1984] ICJ Rep 246, 299 [111] ('*Gulf of Maine Case*'); *Continental Shelf* (*Libyan Arab Jamahiriya v Malta*) *(Judgment)* [1985] ICJ Rep 13, [27] ('*Continental Shelf (Libya v Malta) Case*'); *Nicaragua Case* (n 8) 98 [185]; *North Sea Continental Shelf Cases* (n 3) at 43; *ILC Draft Conclusions* (n 3) [62], conclusion 16(2); Jean-Marie Henckaerts et al, 'Introduction' in *Customary International Humanitarian Law* (Cambridge University Press 2005) vol 1, xliv, li; International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law* (Final Report of the Committee on Formation of Customary (General) International Law, 2000) 23–26, principle 14, commentary (d)–(e) ('*ILA Statement of Principles*').

10 See *ILC Draft Conclusions* (n 3) [62] conclusions 5, 6(2); *Jurisdictional Immunities of the State (Germany v Italy) (Judgment)* [2012] ICJ Rep 99, [55], [70]–[71] ('*Jurisdictional Immunities Case*'); *North Sea Continental Shelf Cases* (n 3) 104–106; *Nottebohm Case (Liechtenstein v Guatemala) (Judgment)* [1955] ICJ Rep 4, 22; *Anglo-Norwegian Fisheries Case (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116, 134–36 ('*Anglo-Norwegian Fisheries Case*'); *Prosecutor v Furundžjia (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [168] ('*Furundžjia Trial Judgment*'); *ILA Statement of Principles* (n 9) 18, principle 9 commentary (c).

11 See *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 257 [86]–[88] ('*Nuclear Weapons Advisory Opinion*'); *Continental Shelf (Tunisia v Libyan Arab Jamahiriya) (Judgment)* [1982] ICJ Rep 38, [24]; *Gabčikov-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ 7, 39–42 [49]–[54] ('*Gabčíkovo-Nagymaros Case*'); *Nicaragua Case* (n 8) 97–109 [183]–[207]; *North Sea Continental Shelf Cases* (n 3) 24–25 [25]–[26], 26–27 [32]–[33]; *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v Iceland; Germany v Iceland)* [1974] ICJ Rep 3, 24–26 ('*Fisheries Jurisdiction Case*'); *Gulf of Maine Case* (n 9) 270 [34]; *Lotus* (n 3) 23, 26–30; *ILC Draft Conclusions* (n 3) [62] conclusions 6(2), 10(2), 19(2); *ILA Statement of Principles* (n 9) 14–15 principle 4 commentary (a), principle 40–41 principle 19 commentary (a).

treaties or other international agreements.[12] Importantly, where a state does not comply with the proposed norm, the norm will be affirmed if the state acknowledges its behaviour as wrongful or explains that its behaviour is not a violation due to factual or other reasons.[13] However, there is no definitive classification of acts that can be identified as 'practice'[14] and no clear standards on the relative weight of various items of evidence.[15] Ultimately, whether a proposed rule exists under customary international law is a question of the persuasiveness of the evidence, though there is no clear articulation of the burden of proof.[16] The International Court of Justice ('ICJ') appears to demand less evidence when the existing examples of practice and *opinio juris* are not contradicted.[17]

However, in proving customary international law, we can apply a presumption that such a norm exists in certain situations. In the *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* ('*Gulf of Maine*'), a chamber of the ICJ noted that some customary international law was established by induction from practice and *opinio juris*, but other rules could be established without resorting to induction, when they served the purpose of 'ensuring … coexistence and vital cooperation' among states.[18] It also appears that the Court is more likely to presume the existence of certain rules when they would have a lower impact on the state(s) concerned.[19] This approach was also followed in the older *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* case ('*Corfu Channel*'), where the Court cited 'elementary considerations of humanity' when it identified certain norms of customary international law.[20] Nonetheless, the Court insists that it does not identify customary international purely on the basis of deduction from 'humanitarian considerations' or 'moral principles'.[21] Rather, the Court appears to apply an evidentiary presumption for the existence of state practice and *opinio*

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12 See *Jurisdictional Immunities Case* (n 10) 122–23 [55]; *Nicaragua Case* (n 8) 111 [212]; *Continental Shelf (Libya v Malta) Case* (n 9) 27, 34–35; *North Sea Continental Shelf Cases* (n 3) 38–39; *Asylum Case* (n 3) 277; *Lotus* (n 3) 26; *Furundžjia Trial Judgment* (n 10) 66 [168]; *ILC Draft Conclusions* (n 3) [62] conclusions 6(2), 10(2).

13 See *ILC Draft Conclusions* (n 3) [62] conclusion 15(2).

14 See *Report of the International Law Commission Covering its Second Session, 5 June–29 July 1950*, UN Doc A/1316 (July 1950) pt II, 368 [31]:

> Evidence of the practice of States is to be sought in a variety of materials. The reference in article 24 of the Statute of the Commission to 'documents concerning State practice' (documents *établissant la pratique des Etats*) supplies no criteria for judging the nature of such 'documents'. Nor is it practicable to list all the numerous types of materials which reveal State practice on each of the many problems arising in international relations.

15 See *Nuclear Weapons Advisory Opinion* (n 11) [78] (Schwebel J), 584–85 [9]–[10] (Higgins J).

16 See *Anglo-Norwegian Fisheries Case* (n 10) 191 (Reed J); *ILA Statement of Principles* (n 9) 13 principle 3: 'What is suggested here is something analogous to (but not the same as) the well-known distinction in the law of evidence between the admissibility of evidence and its weight (convincingness)'.

17 See *Jurisdictional Immunities Case* (n 10) 131–32 [72].

18 See *Gulf of Maine Case* (n 9) 22 [111].

19 Frederic L Kirgis, 'Custom on a Sliding Scale' (1987) 81(1) *American Journal of International Law* 146, 148: 'When the stakes are not as high, international decision makers have not been as quick to find restrictive customary rules'.

20 See *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) (Judgment)* [1949] ICJ Rep 4, 22 ('*Corfu Channel Case*').

21 See *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Judgment)* [1966] ICJ Rep 6, 34 [49]–[50].

juris when the norm would be logical or sensible to ensure international coexistence and cooperation.

The Court presumes the existence of rules of customary international law when it can logically deduce those norms from other rules or principles of international law.[22] First, the Court can deduce the existence and content of customary international law from treaties.[23] In the advisory opinion of *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, the Court used the *Charter of the United Nations* to interpret the application of the rules of self-determination.[24] Also, in the *Territorial and Maritime Dispute (Nicaragua v Colombia)*, the Court held that a rule expressed in the *United Nations Convention on the Law of the Sea* applied to the situation, despite Colombia not being a party to that treaty.[25] As such, the existence of a treaty governing the situation can be good evidence that customary international law also governs.[26] This is certainly the case when the treaty is intended to codify customary international law, rather than resolve a 'lack of consensus and of clear, agreed rules'.[27] Thus, the states must have either 'unilaterally assumed' or 'accepted' the obligations 'by conduct, by public statements and proclamations, and in other ways'[28] or adopted a 'very definite, very consistent course of conduct'[29] where the practice is in alignment with the treaty.[30] But the Court has even applied treaty provisions by analogy to cases clearly not covered by the treaty, such as in the *Corfu Channel* case, where the Court applied the obligation to notify ships of minefields during times of war in the 1907 *Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines* to peacetime situations.[31] In this manner, actual state practice is not necessarily required if the norm can be presumed and is not rebutted.[32]

Second, the Court can deduce a presumption in favour of customary international law from other norms of customary international law. This approach can take the form of identifying the full scope of existing rules, such as when, in

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22 See *Jurisdictional Immunities Case* (n 10) 126–32 [67]–[72]; *Fisheries Jurisdiction Case* (n 11) 175.

23 See, eg, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 62 [161]–[162], 242 [214], 251 [244] ('*Armed Activities on the Territory of the Congo*'); *Jurisdictional Immunities Case* (n 10) [72].

24 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 31 [52] ('*Legal Consequences*').

25 *Territorial and Maritime Dispute (Nicaragua v Colombia) (Judgment)* [2012] ICJ Rep 624, 666 [114] ('*Nicaragua v Colombia Territorial and Maritime Dispute*'); *Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia) (Judgment)* [2016] ICJ Rep 208, 213 [16] (Robinson J) ('*Nicaragua v Colombia Continental Shelf Case*').

26 See, eg, *North Sea Continental Shelf Cases* (n 3) 25; *Furundžjia Trial Judgment* (n 10) 53 [138].

27 *Medvedyev v France* (European Court of Human Rights, Grand Chamber, Application No 3394/03, 29 March 2010) 30 [92].

28 See *North Sea Continental Shelf Cases* (n 3) 25 [27].

29 See ibid 25 [28].

30 See *Furundžjia Trial Judgment* (n 10) 53 [138].

31 See *Corfu Channel Case* (n 20) 22; 'Memorial Submitted by the Government of the United Kingdom of Great Britain and Northern Ireland', *Corfu Channel (United Kingdom v Albania)* [1947] ICJ Pleadings 19, 37–38 [63]–[65].

32 See, eg, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95, 132 [151]–[152] ('*Chagos Archipelago Advisory Opinion*').

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), the Court deduced the existence of immunities from arrest for a Foreign Minster by considering the functions of the office.[33] Relatedly, the Court interpreted the full scope of the customary international law norm of self-determination to include an *erga omnes* application in both the *Western Sahara* and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinions.[34] The Court could also identify rules that are necessary or logical in connection with other existing rules, such as when the Court in *Frontier Dispute (Burkina Faso v Mali)* concluded that *uti possidetis* was 'logically connected with the phenomenon of the obtaining of independence' or in the *Gabčikovo-Nagymaros Project (Hungary v Slovakia)* case, where the Court stated that the rule was 'require[d]'.[35] The test for the necessity or logicality of the rule is not demanding, as the Court has stated that some rules are 'important'[36] or 'logically connected'.[37] It could even use existing rules as an analogy for presuming the existence of sufficient state practice and *opinio juris* for other rules. For example, in the *Continental Shelf (Libyan Arab Jamahiriya v Malta)* case, the Court found that customary international law permitted a claim of 200 nautical miles for the continental shelf by reference to the law on the exclusive economic zone.[38]

Third, the Court also deduces a presumption for a rule when the rule can be deduced from general legal principles[39] or otherwise protects important values.[40] For example, in *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, the Court referenced the principles of sovereignty and sovereign equality;[41] in *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, the Court cited the principle of the integrity of legal proceedings;[42] and in *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, the Court drew on the precautionary principle to identify an obligation to conduct an environmental impact assessment.[43] At some point, the deduction of customary international law from general or generalised legal

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33 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 20–22 [51]–[54], 146 [14] (Van den Wyngaert J) ('*Arrest Warrant Case*'); Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) *European Journal of International Law* 417, 423–26.

34 *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 31–32 [55]; *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 102 [29]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 172 [88].

35 See *Gabčíkovo-Nagymaros Case* (n 11) 65 [104].

36 See *Jurisdictional Immunities Case* (n 10) 123 [57].

37 *Frontier Dispute (Burkina Faso v Mali) (Judgment)* [1986] ICJ Rep 554, 565–66 [20]–[23]; *Jurisdictional Immunities Case* (n 10) 123–24 [57].

38 See *Continental Shelf (Libya v Malta) Case* (n 9) 33–34 [34].

39 *Lotus* (n 3) 25.

40 See *Gulf of Maine Case* (n 9); *Prosecutor v Ayyash (Judgment)* (Special Tribunal for Lebanon, Trial Chamber, Case No STL-11-01/T/TC, 18 August 2020) 26 [86], 29 [101] ('*Ayyash*'); *ILA Statement of Principles* (n 9).

41 See *Jurisdictional Immunities Case* (n 10) 123–24 [57]; *Asylum Case* (n 3) 274–77.

42 *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures)* [2014] ICJ Rep 147, 153 [27].

43 See *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 13, 82–83 [204]:

> In this sense, the obligation to protect and preserve … has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment.

principles blurs into the logicality of rules for the 'coexistence and vital cooperation' mentioned previously in the *Gulf of Maine* case.[44]

Finally, the Court also presumes the existence of customary international law when there are certain forms of state practice and *opinio juris*. While, in principle, one would apply the *SS Lotus (France v Turkey)* ('*Lotus*') presumption against states binding themselves, the ICJ has suggested that UN General Assembly ('UNGA') resolutions on the relevant point can create a presumption in favour of customary international law.[45] Even if we were to disagree that such collective practice of the international community resulted in a presumption, it would, at a minimum, be considered very persuasive evidence of customary international law,[46] especially when the relevant states had actually voted for the resolutions.[47] In addition, in *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, the ICJ held that a long undisturbed practice without objection by the other interested states was strong evidence of customary international law, apparently sufficient to overcome any *Lotus* presumption.[48] Other tribunals, for example, the Special Tribunal for Lebanon, have further held that there is a presumption of customary international law when states act in the same or a similar manner, including in adopting domestic legislation.[49]

On this basis, one could presume the existence of state practice and *opinio juris*, and, thus, a rule of customary international law, in certain situations. It could be that we are merely clarifying the scope of an existing rule or applying an existing rule to a new situation by analogy. It could be that a rule would logically serve the collective goals of coexistence or be logically deduced from other existing rules. In all of these cases, rules that have a less significant impact on states are also more likely to be unobjectionable. Also, we can presume the existence of such a rule when the topic is the subject of repeated UNGA resolutions, consistent state practice on the matter or long-established practice and failure to object. In these cases, we presume that states have adopted state practice and *opinio juris*, without needing a strong showing of either, unless there is state practice and *opinio juris* to rebut the presumption.

III GRANTING NATIONALITY TO OTHERWISE STATELESS CHILDREN

Using this methodology, we can already presume the existence of a customary international law rule that requires states to grant nationality to children as described and that there is insufficient evidence to rebut that presumption. In fact,

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44 See *Gulf of Maine Case* (n 9) 299 [111].

45 See *Nuclear Weapons Advisory Opinion* (n 11) 254–55 [70]–[71]; *Nicaragua Case* (n 8) 101–103 [191]–[193], 133 [264]; *ILA Statement of Principles* (n 9) 4 [6] n 6, 57–59; *Armed Activities on the Territory of the Congo* (n 23) 227 [163]: 'These provisions [of the *Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*] are declaratory of customary international law'.

46 See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 437 [80]; *Armed Activities on the Territory of the Congo* (n 23) 331 [16] (Elaraby J), 322 [63] (Kooijmans J).

47 See *ILC Draft Conclusions* (n 3) 107 conclusion 12(3); *Chagos Archipelago Advisory Opinion* (n 32) 132 [151]–[152], 134 [160] (especially when none of the states participating in the vote contested the existence of the right); *Nuclear Weapons Advisory Opinion* (n 11) 255 [71].

48 See *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213, 265–66 [140]–[141].

49 See *Ayyash* (n 40) 29 [101].

there is considerable evidence of state practice and *opinio juris* supporting the existence of the rule in the forms of domestic laws, treaty adherence and expressions of opinion in regard to those relevant practices.

Starting with a presumption, several factors point to such a rule. Certainly, preventing statelessness is an important human rights value[50] — it is the 'right to have rights'[51] — and elementary considerations of humanity argue against excluding individuals from any nationality. But such a rule also prevents infringements of state sovereignty and promotes international cooperation.[52] When states refuse to grant nationality, they create burdens on other states to host stateless persons. Without an international rule identifying a minimum default nationality in cases of statelessness, hosting states must accommodate the domestic policies of other states. In addition, resolving statelessness is also the subject of multiple UNGA resolutions[53] and there is widely consistent relevant state practice.[54] Furthermore, there are already strong norms under both treaty law and customary international law for a right to a nationality and against creating situations of statelessness, so identifying which state must ultimately grant nationality, if no other state will, is merely a clarification of these existing obligations. In the most recent decade, especially due to the significant influence of UNHCR's *#IBelong* Campaign, state practice and *opinio juris* have coalesced to support this norm. Increasingly, divergent practice is rare and, where it does persist, is widely characterised as wrongful. As the *#IBelong* Campaign reaches its conclusion, we can safely presume that a norm exists obliging states to grant their nationality to children born in their territory if they would otherwise be stateless. Having established a presumption in favour of such a rule, we can turn

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50 See *Andrejeva v Latvia* (European Court of Human Rights, Grand Chamber, Application No 55707/00, 18 February 2009) 15 [24]: 'nationality is a basis for a clear entitlement to a number of important rights'; *Case of Expelled Dominicans and Haitians v Dominican Republic (Judgment)* (Inter-American Court of Human Rights, Series C No 282, 28 August 2014) 83 [253] ('*Expelled Dominicans and Haitians Case*'); *Case of the Yean and Bosico Children v Dominican Republic (Judgment)* (Inter-American Court of Human Rights, Series C No 130, 8 September 2005) 57–58 [137] ('*Yean and Bosico Children Case*'); *Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica (Advisory Opinion)* (Inter-American Court of Human Rights, Series A No 4, 19 January 1984) 9 [32]–[33] ('*Proposed Amendments Advisory Opinion*'); African Committee of Experts on the Rights and Welfare of the Child ('ACERWC'), *Institute for Human Rights and Development in Africa and Open Society on behalf of Children of Nubian Descent in Kenya v Government of Kenya (Merits)* (Communication No Com/002/2009, 22 March 2011) 10 [46], 12–13 [57] ('*Nubian Children Case*'); ACERWC, *General Comment 2 on Art 6 of the African Charter on the Rights and Welfare of the Child*, AU Doc ACERWC/GC/02 (2014) ('African Committee on Children, *General Comment 2*').

51 See Hannah Arendt, *The Origins of Totalitarianism* (World Publishing Company 1958) 296.

52 See *A Study of Statelessness*, UN Doc E/1112 (August 1949) 8: 'Statelessness is a source of difficulties for the reception country, the country of origin and the stateless person himself'.

53 See, eg, *Assistance to Refugees, Returnees and Displaced Persons in Africa*, GA Res 62/125, UN Doc A/RES/62/125 (18 December 2007); *Assistance to Refugees, Returnees and Displaced Persons in Africa*, GA Res 63/149, UN Doc A/RES/63/149 (18 December 2008); *Assistance to Refugees, Returnees and Displaced Persons in Africa*, GA Res 64/129, UN Doc A/RES/64/129 (18 December 2009); *Assistance to Refugees, Returnees and Displaced Persons in Africa*, GA Res 65/193, UN Doc A/RES/65/193 (21 December 2010); *Assistance to Refugees, Returnees and Displaced Persons in Africa*, GA Res 66/135, UN Doc A/RES/66/135 (19 December 2011); *Office of the United Nations High Commissioner for Refugees*, GA Res 67/149, UN Doc A/RES/67/149 (20 December 2012).

54 See UN Doc A/RES/62/125 (n 53) 3 [15]; UN Doc A/RES/63/149 (n 53) 3–4 [15]; UN Doc A/RES/64/129 (n 53) 4 [16]; UN Doc A/RES/65/193 (n 53) 4 [16]; UN Doc A/RES/66/135 (n 53) 5 [16]; UN Doc A/RES/67/149 (n 53) 6 [4]–[8], 4 [25], 5 [32].

to a survey of recent state practice and expressions of *opinio juris* to demonstrate that the presumptive rule is not rebutted; in fact, it is affirmed repeatedly.

A *International Treaties*

As one form of state practice, we will first consider the role of existing treaties on statelessness in forming customary international law specifically pertaining to children.

The *1961 Convention* obliges states to grant nationality to otherwise stateless children born in their territory.[55] This treaty does not have universal adherence, though the number of states adhering to it has improved year upon year. In the most recent few years, Angola, Iceland, North Macedonia and Togo have acceded to the *1961 Convention*.[56] States are taking this treaty obligation seriously; for example, Iceland is currently developing a domestic implementation statute that would grant nationality to otherwise stateless children born in the territory.[57] Participation in this treaty is very diverse, representing all regions of the world.

Looking at *opinio juris* in regard to treaty obligations, where states have not adhered to the *1961 Convention*, many have pledged to do so in the near future. This number is increasing,[58] most recently at the High-Level Segment on Statelessness international conference,[59] and continues to be geographically diverse, showing movement towards wider participation in all regions. In addition, Uruguay specifically pledged to urge other states to adhere to the *1961 Convention*.[60] The member states of the European Union that have not yet adhered have pledged to consider ratification of the *1961 Convention*.[61] Putting their pledges into practice, the Republic of the Congo has legislated in order to permit

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55 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) ('*1961 Convention*'); Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, UN Doc A/HRC/19/43 (19 December 2011) 3–4 [4]; Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, UN Doc A/HRC/25/28 (19 December 2013) 12–13 [28].

56 Regarding Angola, see UNHCR, *The Campaign to End Statelessness: Update October–December 2019* (Report, 20 January 2020) 10 ('*#IBelong Campaign Update December 2019*'); regarding North Macedonia, see UNHCR, *The Campaign to End Statelessness: Update January–March 2020* (Report, 22 April 2020) 6; 'UNHCR Welcomes Iceland's Decision to Join Global Efforts to End Statelessness' (Press Release, UNHCR, 29 January 2021); regarding Iceland, see UNHCR, *The Campaign to End Statelessness: Update January–March 2021* (Report, 15 April 2021) 7 ('*#IBelong Campaign Update March 2021*'); 'UNHCR Welcomes Togo's Decision to Intensify its Fight Against Statelessness' (Press Release, UNHCR, 22 July 2021); UNHCR, *The Campaign to End Statelessness, Update July–September 2021* (Report, 20 October 2021) ('*#IBelong Campaign Update September 2021*') 1.

57 See UNHCR, *The Campaign to End Statelessness: October–December 2021 Update* (Report, 1 February 2022) 5 ('*#IBelong Campaign Update December 2021*').

58 Regarding Botswana, see UNHCR, *The Campaign to End Statelessness Update April–June 2021* (Report, 9 July 2021) 6–8 ('*#IBelong Campaign Update June 2021*').

59 Regarding Albania, Belarus, Botswana, Cape Verde, Cameroon, Central African Republic, Comoros, the Democratic Republic of the Congo, Ghana, Kenya, Malawi, Mauritania, Namibia, North Macedonia, the Philippines, South Sudan, Uganda and Zambia, see *High-Level Segment Results and Highlights* (n 2) 45; *#IBelong Campaign Update June 2020* (n 2) 1; 'UNHCR Applauds Kenya's Decision to Resolve the Statelessness of the Shona and Other Communities' (Press Release, UNHCR, 14 December 2020).

60 See *High-Level Segment Results and Highlights* (n 2) 73.

61 See, eg, Note Verbale from the Delegation of the European Union to the United Nations to the Secretary-General of the United Nations, 19 September 2012, [4] <https://www.un.org/ruleoflaw/files/Pledges%20by%20the%20European%20Union.pdf>.

accession[62] and South Sudan adopted national plans to accede.[63] Vietnam is currently holding domestic hearings and consultations on acceding to the *1961 Convention*.[64] Despite not attending the High-Level Segment and not submitting a pledge, Mexico is already studying adhering to the *1961 Convention*.[65] The Philippines indicated an intention to adhere, and, on 15 December 2021, the Senate of the Philippines concurred.[66] However, the Senate has requested a reservation that would limit the acquisition of Philippine nationality to only those situations described in the *Constitution of the Philippines*.[67] While the *Constitution* does recognise nationality for foundlings, who are presumed to have been born in the Philippines, it does not provide a general right to nationality *jus soli*.[68] It remains to be seen whether the Executive Branch of the Philippines will enter that reservation in its possible future accession and whether other states will object. If it were to become effective, it would be the only reservation of any state to the *jus soli* provisions in the *1961 Convention*. In fact, several states have objected to reservations regarding nationality revocation by articulating the reduction of statelessness as the object and purpose of the *Convention* and condemning any efforts that permit statelessness to continue.[69] Critically, Finland and Norway also argue in their objections that a state that adheres to the *1961 Convention* cannot benefit from a reservation that contradicts the object and purpose of the *Convention*.[70] Certainly, these states are not required to make these pledges. Furthermore, states are sometimes looking to the *1961 Convention* for guidance, even when states are not bound by the *Convention*. For example, in a judgment on 18 March 2022, the High Court of Uganda referred to the *1961 Convention* for the obligation to prevent and reduce statelessness,[71] even though Uganda is not a party

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62 Regarding the Republic of the Congo, see UNHCR, *The Campaign to End Statelessness: Update October–December 2020* (Report, 11 January 2021) 9 ('*#IBelong Campaign Update December 2020*'); see also *#IBelong Campaign July 2020* (n 2).

63 See UNHCR, *The Campaign to End Statelessness: Update July–September 2020* (Report, 14 October 2020) 2 ('*#IBelong Campaign Update September 2020*').

64 See *#IBelong Campaign Update December 2021* (n 57) 4.

65 See *#IBelong Campaign Update September 2021* (n 56) 8.

66 See Resolution Concurring in the Accession to the 1961 Convention on the Reduction of Statelessness, Res 964, 18th Congress (2021) (the Philippines) ('Resolution No 964'); *#IBelong Campaign Update December 2021* (n 57) 9.

67 See Resolution No 964 (n 66) 3.

68 See *Constitution of the Philippines*, art IV s 1.

69 See *Convention on the Reduction of Statelessness: Objection by Germany to the Declaration by Tunisia upon Accession*, 2150 UNTS (registered 15 May 2001) 35; *Convention on the Reduction of Statelessness: Objection by Sweden to the Declaration by Tunisia upon Accession*, 2150 UNTS (registered 23 May 2001) 38; *Convention on the Reduction of Statelessness: Objection by Spain to the Declaration by Tunisia upon Accession*, 3269 UNTS (registered 25 September 2018); *Convention on the Reduction of Statelessness: Objection by Germany to the Declaration by Togo upon Accession* (registered 4 January 2022). All objections are available at <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280035afb&clang=_en>.

70 See *Convention on the Reduction of Statelessness: Objection by Norway to the Declaration by Tunisia upon Accession*, 2150 UNTS (registered 23 May 2001) 37; *Convention on the Reduction of Statelessness: Objection by Finland to Declaration by Tunisia upon Accession*, 2533 UNTS (registered 7 August 2008), claiming that the *1961 Convention* (n 55) will enter into force between the two states without Tunisia benefiting from its reservation.

71 See *Hussein and Others v Attorney General* (High Court of Uganda at Kampala (Civil Division), Ssekaana Musa J, 18 March 2022) 17 arguing, inter alia, that nationality is the 'right to have rights'. See also 'Court Okays Petitioners of Somali Origin to Get Citizenship', *The Independent* (online, 20 March 2022) <https://www.independent.co.ug/court-okays-petitions-of-somali-origin-to-get- citizenship>.

to the *Convention*.[72] These new commitments and views, however embryonic, are evidence that states expect to comply with these obligations, which shows emerging *opinio juris*.

In addition, where states have refused to accede, or refuse to pledge to accede, to the *1961 Convention*, the reasons they give do not demonstrate a belief that they are perfectly free to refuse to grant nationality in such situations. Poland has argued that it has not acceded due to the risk of discrimination in favour of stateless persons and against other foreign nationals.[73] Estonia refuses, in principle, due to the application of automatic *jus soli*.[74] Instead, Estonia permits stateless children born in the state's territory to be naturalised,[75] leading to similar outcomes as *jus soli*. Slovenia has also cited reasons other than the *1961 Convention*'s terms on granting nationality to children for not signing.[76] None of these states have expressed an opinion opposing a norm of granting nationality to stateless children, and, in fact, they support it, despite refusing to adhere to the *1961 Convention*. Interestingly, states that are not party to the *1961 Convention* are routinely criticised for this lack of participation by the Human Rights Committee[77] and Committee on the Rights of the Child[78] because this failure impacts the enjoyment of other human rights that those states are bound to protect.

In addition to the *1961 Convention*, increasingly, the right to a nationality is being interpreted as creating an obligation to grant nationality in a stateless at birth situation. This obligation emerges from the general human right to a nationality.[79] Most major human rights treaties include the right to a nationality.[80] Additionally, some human rights treaties even provide that the right to a nationality is specially

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72 See 'No. 4, Convention on the Reduction of Statelessness', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=_en>.

73 See European Migration Network (EMN), *Statelessness in the EU* (Report, 11 November 2016) ('*Statelessness in the EU*') <https://emn.ie/files/p_201702100930222016_emn_inform_on_statelessness.pdf>.

74 See ibid 4.

75 See ibid 13.

76 See ibid 4.

77 See UN Commission on Human Rights, *Human Rights and Arbitrary Deprivation of Nationality*, UN Doc E/CN.4/RES/2005/45 (19 April 2005) 2 [1], 2 [5].

78 See, eg, Committee on the Rights of the Child ('CommRC'), *Concluding Observations on the Combined Third and Fourth Periodic Reports of Saudi Arabia*, UN Doc CRC/C/SAU/CO/3-4 (25 October 2016) 6 [23]; CommRC, *Concluding Observations on the Second Periodic Report of South Africa*, UN Doc CRC/C/ZAF/CO/2 (27 October 2016) 7–8 [32]; CommRC, *Concluding Observations on the Combined Third and Fourth Periodic Report of Suriname*, UN Doc CRC/C/SUR/CO/3-4 (30 September 2016) 5 [17].

79 See *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (10 December 1948) art 15(1) ('*UDHR*'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 24(3) ('*ICCPR*'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7 ('*CRC*'); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(d)(iii) ('*ICERD*').

80 See *UDHR* (n 79) art 15; *1961 Convention* (n 55); 'CSCE Helsinki Document 1992' (Conference Paper, Conference for Security and Co-operation in Europe Summit, 9–10 July 1992); Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, UN Doc A/HRC/19/43 (19 December 2012) 3–4 [4].

protected for children.[81] For those few human rights treaties that are not so clear about protecting nationality, nationality is often ensured as an aspect of the rights to dignity, identity and legal personality;[82] for example, in the *CRC*.[83]

One obvious weakness of the right to a nationality in those texts is that it does not expressly identify which state must grant nationality to a child born stateless.[84] The question is not whether there is a rule obliging states to grant nationality to children who have a right to it, but, instead, which states must grant nationality to which children. In interpreting the treaty context and subsequent practice, we can clarify which state must grant nationality if no other state will.

The developing jurisprudence on human rights treaties demonstrates that they are applicable to persons within the state's jurisdiction.[85] Jurisdiction, in this sense, refers to de facto effective control over the person or place.[86] When a child is born in a place where the state exercises effective control, there can be only one state with jurisdiction and only one state that must protect the right to a nationality. The Human Rights Committee has held that states must adopt measures and cooperate internationally to ensure that every child has a nationality at birth.[87] Thus, the right to a nationality does not mean that states must grant nationality to

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81 See *ICCPR* (n 79) art 24(3); *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) art 29 ('*Migrant Workers Convention*'); *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 20 December 2008, 2716 UNTS 3 (entered into force 23 December 2010) art 25(4).

82 See Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 2918/2016*, UN Doc CCPR/C/130/D/2918/2016 (20 January 2021) annex II 12 [4] ('*Zhao v the Netherlands*') arguing that leaving a child stateless is a violation of *ICCPR* art 16, regarding legal personality. See also *Penessis v Tanzania (Judgment)* (African Court on Human and Peoples' Rights, App No 013/2015, 28 November 2019) 23 [87] finding that leaving a child stateless violates the 'dignity of the human person'. *Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Their Families and No 22 (2017) of the Committee on the Rights of the Child on the General Principles regarding the Human Rights of Children in the Context on International Migration*, UN Doc CMW/C/GC/3-CRC/C/GC/22 (16 November 2017); *Nubian Children Case* (n 50). See also *Yean and Bosico Children Case* (n 50) 57 [134].

83 See *CRC* (n 79) art 8; *Human Rights and Arbitrary Deprivation of Nationality: Resolution Adopted by the Human Rights Council on 30 June 2016*, UN Doc A/HRC/RES/32/5 (30 July 2016) 4 [11]; *Status of the Convention of the Rights of the Child: Report of the Secretary-General*, UN Doc A/68/257 (2 August 2013) 15–16 [57] et seq; Human Rights Council, *Arbitrary Deprivation of Nationality: Report of the Secretary-General*, UN Doc A/HRC/10/34 (26 January 2009) 16 [59]; *Yean and Bosico Children Case* (n 50) 58 [137].

84 See Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *International Journal of Refugee Law* 156, 168–69; Jaap Doek, 'The CRC and the Right to Acquire and to Preserve a Nationality' (2006) 25 *Refugee Survey Quarterly* 26; Gerard-René de Groot, 'Children, Their Right to a Nationality and Child Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* 144, 146–47 (Cambridge University Press 2014).

85 See *ICCPR* (n 79) art 2(1); *CRC* (n 79) art 2(1).

86 See UN Human Rights Committee, *CCPR General Comment No 17: Article 24 (Rights of the Child)*, UN Doc INT/CCPR/GEC/6623/E (7 April 1989) 3 [8] ('*HRC General Comment No 17*').

87 See ibid; *ICCPR* (n 79) art 24; *Expelled Dominicans and Haitians Case* (n 50) 84 [258]; *Nubian Children Case* (n 50) 9 [42]: 'a purposive reading and interpretation of the relevant provision strongly suggests that, as much as possible, children should have a nationality beginning from birth'. African Committee on Children, *General Comment 2* (n 50); Human Rights Committee, *Concluding Observations: Colombia*, UN Doc A/52/40 (21 September 1997) 306.

all children born in their territory.[88] Instead, the state must cooperate with other states to ensure the child's nationality,[89] with the state that is exercising effective control taking ultimate responsibility. The African Committee of Experts on the Rights and Welfare of the Child, in applying the right to nationality in its instrument, concluded that the state of birth bears the primary responsibility in such a case.[90] The obligation on the territorial state to secure nationality sets a high bar to take all steps possible to ensure that the nationality is real and effective, not speculative and hypothetical.[91] By applying our understanding of the scope of the application of these treaties, we can identify the state that must ensure the right to a nationality. It is the state where the child is born — the state that is exercising effective control over the territory — that must secure nationality.

The result is that the territorial state must grant its nationality if it cannot secure another one. It might be that another state grants nationality to this child *jus sanguinis*, in which case, the territorial state that is exercising effective control will need to ensure that the other state does indeed apply its law effectively. But the *jus sanguinis* state does not bear the obligation to ensure nationality; only the territorial state that is exercising effective control bears this obligation. If the state of the child's parent's nationality, or any other state, refuses to grant nationality, then that act must be regarded as definitive.[92] As such, the state that is exercising effective control cannot discharge its positive obligation to ensure nationality by simply pointing to the laws of the *jus sanguinis* state and excusing itself from responsibility. In such a situation, the state that is exercising effective control has not ensured nationality.[93] If the territorial state cannot ensure nationality by appealing to the cooperation of a *jus sanguinis* state, then the responsible state must grant its own nationality.[94] The reason for this result is that the responsible

88 See *HRC General Comment No 17* (n 86) 3 [8]; *Zhao v the Netherlands* (n 82) 7 [8.2].

89 See *ICCPR* (n 79) art 24; *Expelled Dominicans and Haitians Case* (n 50) 84 [258]; *Nubian Children Case* (n 50) 9 [42]; African Committee on Children, *General Comment 2* (n 50); UN Doc A/52/40 (n 87) 306.

90 See *Nubian Children Case* (n 50) 9 [42] (interpreting the right to nationality to mean right to a nationality from birth), 11 [50]–[51].

91 See ibid; *Zhao v the Netherlands* (n 82) 7–8 [8.3], 8 [8.5].

92 See ibid 7–8 [8.3] citing UNHCR, *Guidelines on Statelessness No 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness* (Report, 2012) 5 [19] ('*Guidelines on Statelessness No 4*').

93 *Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Their Families and No 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit and Return*, UN Doc CMW/C/GC/4-CRC/C/GC/23 (16 November 2017) 7 [24] arguing that *jus soli* application would discharge the obligation, but so would international cooperation.

94 See UN Doc CMW/C/GC/3-CRC/C/GC/22 (n 82) [66]; *Guidelines on Statelessness No 4* (n 92); UN Doc A/HRC/25/28 (n 55); UN Doc A/HRC/10/34 (n 83); *Yean and Bosico Children Case* (n 50) 58 [140]; CommRC, *Joint General Comment No 21 of the Committee on the Human Rights of Children in the Context of International Migration*, UN Doc INT/CRC/INF/81/E (24 April 2017) [66]; UN Doc CRC/C/ZAF/CO/2 (n 78) 7 [32(b)]; UN Doc CRC/C/SUR/CO/3-4 (n 78) 5 [17]; CommRC, *Concluding Observations on the Fifth Periodic Report of Pakistan*, UN Doc CRC/C/PAK/CO/5 (11 July 2016) 16–17 [65]–[66]; CommRC, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Chile*, UN Doc CRC/C/CHL/CO/4-5 (30 October 2015) 7–8 [30]–[33]; CommRC, *Concluding Observations on the Report Submitted by Israel under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, UN Doc CRC/C/OPSC/ISR/CO/1 (13 July 2015) 5 [24]–[25].

state cannot permit the child to become stateless, because they must receive 'a' nationality. Any other result would constitute an arbitrary refusal of nationality.[95]

There are even more human rights treaties that may be implicated when children are born stateless in a state territory. For example, the reason for withholding nationality at birth might be based on discriminatory measures,[96] though consideration of this topic is beyond the scope of this article. One treaty in particular, though, is highly relevant for the situation of children: the *CRC*. This treaty, the most ratified instrument in the world, states that all decisions concerning children must be made in the child's best interest.[97] While the *CRC* has slightly different provisions on its scope, it certainly covers the territory of the state party.[98] Multiple authorities have concluded that a lack of nationality is never in the best interest of a child.[99] Therefore, these previously discussed obligations must be interpreted through the lens of the best interests of the child, which is to effectively provide for a nationality.

In addition to these international treaties, there are also a variety of regional treaties with similar provisions.[100] Some states in Europe have adopted the *European Convention on Nationality*,[101] which guarantees the right to a nationality

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95 *See* UN Doc A/HRC/10/34 (n 83) 17 [61]; UN Doc A/HRC/19/43 (n 55) 3–4 [4]; UN Doc A/HRC/25/28 (n 55) 12–13 [28]; *Yean and Bosico Children Case* (n 50) 58 [140].

96 See *ICERD* (n 79) art 5(d)(iii); *Migrant Workers Convention* (n 81) art 29; 'Turkmenistan: Statelessness More of a Problem than Numbers Suggest' (United States Department of State Cable No 09ASHGABAT1607_a, 14 December 2009) [3] <https://wikileaks.org/plusd/cables/09ASHGABAT1607_a.html> ('State Department Cable No 09ASHGABAT1607_a'):

> None of the Central Asian countries [Turkmenistan, Tajikistan, Kazakhstan and Kyrgyzstan] are signatories to either of the UN Conventions on statelessness, but they are bound to protect stateless people under other UN treaty obligations [such as the] *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention on the Rights of the Child*, and the [*International*] *Covenant on Civil and Political Rights*.

Serena Forlati, 'Nationality as a Human Right', in Serena Forlati and Alessandra Annoni (eds), *The Changing Role of Nationality in International Law* (Taylor & Francis 2013) 18, 22.

97 See *CRC* (n 79) art 3; UN Doc A/68/257 (n 83) 15–16 [57] et seq; *Zhao v the Netherlands* (n 82) 7 [8.2].

98 See CommRC, *General Comment No 5 (2003), General Measures of Implementation of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/5 (27 November 2003) 1 [1], 10 [40]–[41]; CommRC, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations: Canada*, UN Doc CRC/C/15/Add.215 (27 October 2003) 3 [9]; CommRC, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland-Isle of Man*, UN Doc CRC/C/15/Add.134 (16 October 2000) 2 [4], [5].

99 See CommRC, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013); *HRC General Comment No 17* (n 86) 3 [8]; CommRC, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations: Czech Republic*, UN Doc CRC/C/CZE/CO/3-4 (4 August 2011); *Guidelines on Statelessness No 4* (n 92) 3 [11]; UN Doc A/HRC/25/28 (n 55); African Committee on Children, *General Comment 2* (n 50) 38 [86] quoting *Nubian Children Case* (n 50) 10 [46]: 'being stateless as a child is generally an antithesis to the best interests of children'.

100 See, eg, *Arab Charter on Human Rights*, opened for signature 22 May 2004 (entered into force 15 March 2008) art 29; *Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms*, opened for signature 26 May 1995 (entered into force 11 August 1998) art 24(2); *Covenant on the Rights of the Child in Islam* (adopted June 28–30 2005) art 7(2)2; *Charter for European Security of the Organization for Security and Co-operation in Europe* (adopted November 1999) art 19.

101 See *European Convention on Nationality*, opened for signature 6 November 1997, ETS No 166 (entered into force 1 March 2000) art 4.

for everyone[102] and specifically commands that an otherwise stateless child must receive nationality from the state of birth.[103] Europe also has the *Convention on the Avoidance of Statelessness in relation to State Succession*.[104] This *Convention* provides for a right to a nationality,[105] requiring successor states to grant nationality to persons born in the territory of the new state if their parents had the nationality of the predecessor state,[106] which affirms the importance of place of birth. While the *European Convention on Human Rights* ('*ECHR*') does not address statelessness in children specifically,[107] other rights in the *ECHR* can be implicated when a child lacks a nationality,[108] so that a right to a nationality is perhaps implicit in the *ECHR*.[109] In his dissenting opinion in *Ramadan v Malta*, Judge Paulo Pinto de Albuquerque argued that states parties to the *ECHR* must grant nationality to children born in their territories who would otherwise be stateless.[110] Although the other judges did not join this view, they acknowledged that there is a customary international obligation to avoid creating situations of statelessness.[111]

In Africa, there is more than one instrument that provides for a child's right to a nationality.[112] The *African Charter on the Rights and Welfare of the Child* prohibits the arbitrary denial of nationality,[113] which has been interpreted to mean

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102 See ibid art 3.

103 See ibid art 6; UN Doc A/HRC/19/43 (n 80).

104 See *Convention on the Avoidance of Statelessness in relation to State Succession*, opened for signature 19 May 2006, CETS No 200 (entered into force 1 May 2009) ('*Convention on the Avoidance of Statelessness*'); European Commission for Democracy through Law, *Declaration on the Consequences of State Succession for the Nationality of Natural Persons adopted at its 28th plenary meeting, Venice, 13–14 September 1996*, CDL-NAT(1996)007rev-e (13–14 September 1996).

105 See *Explanatory Report to the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession*, CETS No 200 (19 May 2006) 3 [12].

106 See *Convention on the Avoidance of Statelessness* (n 104) art 10.

107 See *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR*').

108 See, eg, *K2 v United Kingdom (Decision as to Admissibility)* (European Court of Human Rights, First Section, Application No 42387/13, 9 March 2017) holding that deprivation of nationality was not a violation of art 8 of the *ECHR*, the right to family and private life, because the individual was not left stateless; *Mennesson v France (Judgment)*, (European Court of Human Rights, Fifth Section, Application No 65192/11, 26 June 2014); *Genovese v Malta (Judgement)* (European Court of Human Rights, Fourth Section, Application No 53124/09, 11 October 2011) 7–8 [30]–[33]; *Kuric and Others v Slovenia (Judgment)* (European Court of Human Rights, Grand Chamber, Application No 26828/06, 13 July 2010) 75 [361]; *Makuc v Slovenia (Partial Decision as to Admissibility)* (European Court of Human Rights, Third Section, Application No. 26828/06, 31 May 2007) 36 [160]; *Karassev & Family v Finland (Judgment)* (European Court of Human Rights, Fourth Section, Application No 31414/96, 12 January 1999); *K & W v Netherlands*, (European Commission on Human Rights, Application No 11278/84, 1 July 1985) 220: 'the right to acquire a particular nationality is neither covered by, nor sufficiently related to, [art 8 in conjunction with art 14] or any other provision of the convention'.

109 But see *Explanatory Report to the European Convention on Nationality*, CETS No 166 (6 November 1997) 3 [16].

110 See *1961 Convention* (n 55) arts 1–2; *American Convention on Human Rights*: *'Pact of San Jose, Costa Rica'*, opened for signature 22 November 1969, 1144 UNTS 143 (entered into force 18 July 1978) art 20, ('*AmCHR*'); *African Charter on the Rights and Welfare of the Child*, adopted 1 July 1990, OAU Doc CAB/LEG/24.9/49 (entered into force 29 November 1999) art 6 ('*African Charter*'); *CRC* (n 79) art 7; *European Convention on Nationality*, opened for signature 6 November 1997, ETS No 166 (entered into force 1 March 2000) arts 6(1)(b)–(2); *Covenant on the Rights of the Child in Islam* (n 100) art 7(3).

111 *See Kuric v Slovenia* (n 108).

112 See *African Charter* (n 110) art 6.

113 See *Nubian Children Case* (n 50) 10 [46]; *African Charter* (n 110) art 6.

that the state of birth has a duty to secure a nationality for an otherwise stateless child, including extending its nationality if other steps are unsuccessful.[114] The *African Charter on Human and Peoples' Rights* does not expressly provide for a right to a nationality,[115] though the collective impact of the other rights in the *Charter*, such as the right to dignity and equality,[116] is understood to effectively provide a right against arbitrary refusal of nationality.[117]

The Americas also have human rights treaties that guarantee a right to a nationality.[118] The *American Convention on Human Rights* explicitly demands that states must grant nationality to children born in their territory who would otherwise be stateless,[119] and this provision has been repeatedly affirmed in the jurisprudence of the Inter-American Court of Human Rights.[120] In particular, the Court has held that the obligation to grant nationality in such cases is part of the broader obligation to avoid and reduce statelessness.[121] The same obligation appears in the *American Declaration of the Rights and Duties of Man*.[122]

Following on from the previous discussion, multiple similar and consistent treaty obligations covering most states in the world and representing diverse geographical practice is strong evidence that the rule exists under customary international law. As we know from the jurisprudence of the ICJ, we can clarify the meaning of customary international law from treaties,[123] even when states are not a party.[124] This conclusion is especially compelling when states act in accordance with treaty obligations to which they are not a party,[125] as will be discussed in more detail later in this article. Many states are already bound by international and regional treaty obligations to grant nationality to stateless children born in their territory. This obligation might be explicit, as it is in the *1961 Convention*, or implicit, as it is in the *ICCPR*. In any event, all states are bound by the *CRC* and must always make decisions in the best interests of the

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114 See *Nubian Children Case* (n 50) 9 [42] interpreting the right to a nationality to mean a right to a nationality from birth, 11 [50]–[51] holding that the refusal of nationality at birth due to the existence of another nationality requires the territorial state to 'ensure' that the other state provides nationality.

115 See *African Charter* (n 110); *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, adopted 1 July 2003 (entered into force 25 November 2005) art 6(g)–(h).

116 See ibid.

117 See *Malawi African Association and Others v Mauritania* (African Commission on Human and Peoples' Rights, App Nos 54/91, 61/91, 98/93, 164-196/97 and 210/98, 11 May 2000) 22 [126]; *Modise v Botswana* (African Commission on Human and Peoples' Rights, App No 97/93, 6 November 2000) [88].

118 See *AmCHR* (n 110) art 20.

119 See ibid art 20(2).

120 See *Proposed Amendments Advisory Opinion* (n 50) 9–10 [32]–[35]; *Yean and Bosico Children Case* (n 50) 58–59 [140]–[142], 61–62 [154]–[158]; *Castillo Petruzzi et al v Peru (Judgment)* (Inter-American Court of Human Rights, Series C No 59, 30 May 1999) 36 [101]; *Ivcher-Bronstein v Peru (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 74, 6 February 2001) 43 [88].

121 See *Expelled Dominicans and Haitians Case* (n 50) 83 [253]–[264]; *Yean and Bosico Children Case* (n 50) 58 [140] on the obligation to avoid and reduce statelessness.

122 See *American Declaration of the Rights and Duties of Man*, UN Doc E/CN.4/122/Rev.1 (8 October 1948) art XIX: 'Every 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'.

123 See *Legal Consequences* (n 24) 31 [52].

124 See *Nicaragua v Colombia Territorial and Maritime Dispute* (n 25) 666 [114]; *Nicaragua v Colombia Continental Shelf Case* (n 25) 213 [16] (Robinson J).

125 See, eg, *North Sea Continental Shelf Cases* (n 3) 25; *Furundžjia Trial Judgment* (n 10) 53 [138].

child. Therefore, states are largely acting out of a sense of legal obligation in complying with their treaty obligations or expressing an intention to comply, and these treaties provide for nationality in cases of statelessness at birth.

B *Domestic Legislation*

In addition to treaty obligations evidencing customary international law, widespread and consistent domestic legislation is also strong evidence of customary norms. Many states have adopted domestic laws that provide a nationality to otherwise stateless children born in their state territory. First, a significant number of states in the world practice *jus soli*, which already grants nationality to children born in the state's territory.[126] There is, of course, no rule that would require states to practice *jus soli*;[127] however, the application of *jus soli* does effectively address statelessness at birth. In fact, the adoption of *jus soli* laws has been clearly linked to the reduction of statelessness in children. For example, Burkina Faso is currently revising its laws to ensure that the practice of *jus soli* effectively provides for the nationality of stateless children born in state territory.[128] Granted, many domestic laws adopting *jus soli* are not generous and might limit the grant of nationality somewhat by, for example, requiring lawful residence and perhaps continued residence after birth for several years.[129] Nonetheless, these measures express the view that a child has a special bond to the state of birth and that that state has the primary responsibility for the child. Some states have expressed the view that this responsibility exists independently of an explicit requirement in, for example, the *1961 Convention*, to provide for *jus soli* in these cases.[130] That being said, the core concordant practice is one of

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126 See, eg, *Decreto No 1601/2004*, (2004) 30531 Boletín Oficial 3 (Argentina); *Australian Citizenship Act 2007* (Australia); *Constitution of Barbados*; *Barbados Citizenship Act Cap 186 1966* (Barbados) which was last amended in 1982 and includes amendments made under laws *No 1971-31* (Barbados), *1975-25* (Barbados) and *Barbados Citizenship (Amendment) Act 1982-5* (1982) Official Gazette, Supplement (Barbados). See also *Constitution of Belize*, pt III including amendments made by *Belize Constitution (First Amendment) Act No 14 of 1985* (Belize) and *Belize Constitution (Second Amendment) Act No 26 of 1988* (Belize). See also *Belize Nationality Act Cap 127A* (1980–1990) Laws of Belize Revised Edition (Belize); *Code de la Nationalité Loi No 65-17*, arts 7–11, 24, 28 (Benin) ('*Benin Nationality Law*'), on reaching majority; *Constitución Política de Bolivia de 1967 con reformas de 1994*, title III, which was promulgated on 2 February 1967 and amended by *Law of Reform of the Political Constitution of the State Law No 1585 of 1994* (Bolivia); *Law No 818 of 1949*, title II (Brazil) amended by *Decree Law No 961 of 1969* (Brazil) and *Constitutional Amendment No 3 of 1994* (Brazil); *Code des Personnes et de la Famille 1989*, arts 141–44 and 155–61 (Burkina Faso) on reaching majority; *Citizenship Act 1985* (1985) Revised Statutes of Canada c C-29 (Canada); *An Act to amend the Citizenship Act 2008 Bill C-37 of 2008* (Canada); *Strengthening Canadian Citizenship Act 2014 Bill C-24 of 2014* (Canada); *Immigration and Refugee Protection Act 2001* (2001) Revised Statutes of Canada c 27 (Canada) ('*IRPA*') on legal residents; *Constitution de la République Centrafricaine*, adopted on 7 January 1995; *Code de la Nationalité Centrafricaine Loi No 1961.212*, arts 24, 35, 68, and ch III (Central African Republic) which includes amendments made by *Loi No 1964/54* (Central African Republic) and *Ordonnance No 1966/64 modifiant la Loi 1961/212 portant Code de la Nationalité* (1966) Journal Officiel de la République Centrafricaine (Central African Republic).

127 See *Nubian Children Case* (n 50) 11 [50].

128 See UNHCR, *#IBelong Campaign Update December 2021* (n 57) 3.

129 See UN Doc A/HRC/25/28 (n 55) 12–13 [28].

130 See UNHCR, *Pledges 2011*: *Ministerial Intergovernmental Event on Refugees and Stateless Persons (Geneva, Palais des Nations, 7–8 December 2011)* (Report, May 2012) 15; *Law on Nationality No 37/81*, art 11 (the Philippines); *Decree-Law No 237-A of 2006* (2017) 118 Diário da República 3120, art 1(1)(f) (the Philippines). See also *Hussein v Attorney General* (n 71) wherein the Court references the *1961 Convention* (n 55) as a correct statement of the rule under customary international law, because the state is not a party to the *Convention*.

acknowledging the link between birth and territory as a default basis for nationality when other links do not provide for nationality and that this practice is adopted even without an international obligation to generally apply *jus soli*.[131]

Second, an even larger number of states, many of which might not otherwise practice *jus soli* generally, grant nationality based on place of birth to foundlings, that is, children discovered in the state whose parents and place of birth are unknown.[132] These measures provide that, not only does the state presume that the child was born in the state's territory, but it also presumes that the child, by virtue of that place of birth, was born with the state's nationality. Critically, several states apply *jus soli* in this special case when they do not normally apply it otherwise.[133] Again, practice shows several deviations and limitations, but the core concept is that a child who would otherwise be stateless must receive the nationality of the place of birth. In a recent court decision in Côte d'Ivoire, the Court agreed that a foundling acquired the nationality of the state based on place of birth and struck down additional administrative steps for confirming that nationality.[134] Only in one case could this author identify a state arguing that it had no obligation to grant nationality in this situation, and it received criticism for that assertion.[135]

Third, a number of other states that do not otherwise practice *jus soli* make an exception and grant nationality where the child would otherwise be stateless.[136] These states have recently adopted legislation, regulations or decisions granting

131 See *Nubian Children Case* (n 50) 11 [50].

132 See, eg, *Citizenship Law of 1936* (1992) Official Gazette of the Ministry of Justice for the Republic of Afghanistan, art 3 (Afghanistan); *Law on Albanian Citizenship No 8389 of 1998* (Albania) as amended by *Law No 8442 of 1999*, art 8 (Albania); *Nationality Law No 1970-86*, art 7.2 (Algeria) ('*Algerian Nationality Law*'); *Nationality Law No 1/05 of 2005*, art 14(a) (Angola) ('*Angolan Law No 1/05*'); *Angolan Nationality Law No 13/91 of 1991* (Angola) ('*Angolan Law No 13/91*'); *Antigua and Barbuda Citizenship Act No 17 of 1982*, pt II art (3)(1), (5) (Antigua and Barbuda) ('*Antigua and Barbuda Law No 17 of 1982*'); *Law on Citizenship of the Republic of Armenia 1995*, art 20 (Armenia) ('*Armenian Citizenship Law*') as amended on 6 April 2010; *Federal Law concerning Austrian Nationality 1985 No 37/2006* (1985) 311 Federal Law Gazette of the Republic of Austria, art 8(1) (Austria) ('*Austrian Nationality Law*'); *Bahraini Citizenship Act of 1963*, art 5(a) (Bahrain); *Citizenship Act of 1951*, art 11(2) (Bangladesh) ('*Bangladesh Citizenship Act*'); *Law on Citizenship of the Republic of Belarus of 1991* (Belarus); *Law on Citizenship of the Republic of Belarus No 136-3 of 2002* (2002) National Registry of Legislative Acts of the Republic of Belarus No 2/885, arts 8, 9 (Belarus) ('*Belarussian Citizenship Law 2002*'); *Belgian Nationality Law No 1984-06-28/35*, art 10 (Belgium) ('*Belgian Nationality Law*').

133 See ibid.

134 See UNHCR, *#IBelong Campaign Update December 2021* (n 57) 7.

135 See *Law on Citizenship No 93 of 1994* (1994) 17 Latvijas Republikas Saeimas un Ministru Kabineta Ziņotājs, art 2(1)(5)–(6) (Latvia) ('*Latvian Citizenship Law 1994*') as amended by *Amendment Law of 9 May 2013* (Latvia) ('*Latvian Citizenship Law 2013*').

136 See, eg, *Algerian Nationality Law* (n 132) art 7.1; *Code of Algerian Nationality of 1978* (Algeria); *Angolan Law No 13/91* (n 132); *Angolan Law No 1/05* (n 132) art 14(b); *Antigua and Barbuda Law No 17 of 1982* (n 132); *Armenian Citizenship Law* (n 132); *Austrian Nationality Law* (n 132) arts 8(2), 14; *Bangladesh Citizenship Act* (n 132); *Belarussian Citizenship Law 2002* (n 132); *Belgian Nationality Law* (n 132) art 10; *Benin Nationality Law* (n 126), arts 2, 7–11, 24, 28; *Law on Citizenship of Bosnia and Herzegovina of 1999* (1999) Official Gazette BH No 13/99, art 7(2) (Bosnia and Herzegovina); *Law on Bulgarian Citizenship of 1998* (1998) 136 D'rzhaven Vestnik 1, s II art 10 (Bulgaria).

nationality to stateless children born in state territory.[137] For example, Colombia has adopted regulations extending nationality to stateless children born in its territory to Venezuelan parents[138] and South African courts have acknowledged that a stateless child born in South Africa must receive South African nationality.[139] Iceland is currently consulting with Georgia and France on adopting domestic legislation that would give effect to its accession to the *1961 Convention*[140] and Albania has already implemented the necessary domestic law.[141] Bosnia recently completed UNHCR training for registration to reduce statelessness at birth.[142] In some of these cases, the states adopted these provisions, even though not a party to the *1961 Convention*, such as Iran.[143] As with the aforementioned examples, there is some variation in practice. States disagree whether this grant of nationality is truly nationality at birth or a naturalisation application; however, even for those states that characterise the grant as naturalisation, they generally prohibit a discretionary refusal.[144] In other cases where states do not already undertake this practice, they have pledged to begin to do so. For example, at UNHCR High-Level Segment conference, many

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137 See *#IBelong Campaign Update September 2021* (n 56) 3 regarding Madagascar; *Organic Law Governing Rwandan Nationality No 002/2021* (2021) 60 Official Gazette 2, Special 28 July 2021 arts 8, 10, 19 (Rwanda); *#IBelong Campaign Update June 2021* (n 58) 7 regarding Chile; *Ley de Migración y Extranjería No 21.325 of 2021* art 173 (Chile); *#IBelong Campaign Update December 2020* (n 62) 7 regarding Colombia and the Philippines; 'UNHCR Welcomes Turkmenistan's Decision to Grant Citizenship to 2,580 Stateless People' (Press Release, UNHCR, 22 December 2020); *#IBelong Campaign Update September 2020* (n 63) 5 regarding Albania; UNHCR, *The Campaign to End Statelessness Update January–March 2020* (Report, 22 April 2020) 5 regarding Colombia, Croatia, Estonia and Iceland; *#IBelong Campaign Update December 2019* (n 56) 8 regarding Côte d'Ivoire legislating for stateless foundlings; UNHCR, *The Campaign to End Statelessness Update July–October 2019* (Report, November 2019) 9 regarding Colombia; UNHCR, *UNHCR's Comments on the Proposed Amendments to the Croatian Citizenship Act* (Report, November 2018); *Statelessness in the EU* (n 73) 2, 12 regarding Cyprus and Luxembourg; *Civil Registry Law of 2002 No 141(I)/2002* (Cyprus).

138 *#IBelong Campaign Update September 2021* (n 56) 6: 'the National Registrar's Office of Colombia issued *Resolution 8617/21*, which extends *Resolution 8470/19* and makes it possible for children born in Colombia to Venezuelan parents to obtain birth certificates which are valid to prove Colombian nationality'.

139 See South Africa, *DGLR & KMRG v The Minister of Home Affairs, The Director General of Home Affairs, The Deputy Director General of Civic Services and R Kruger N O* (unreported) cited in Scalabrini Centre of Cape Town et al, *Joint Submission to the Committee on the Rights of the Child, 88th Pre-Sessional Working Group, 8–12 February 2021, South Africa* (Submission, 1 November 2020). Note that the South African Department of Home Affairs has yet to promulgate regulations to effectuate this order.

140 See *#IBelong Campaign Update December 2021* (n 57) 5.

141 See *Law on Aliens No 79/2021* (2021) 162 Official Journal of the Republic of Albania (Albania); *#IBelong Campaign Update December 2021* (n 57) 8.

142 See *#IBelong Campaign Update December 2021* (n 57).

143 See '75,000 Children in Iran to Gain Nationality under New Law' (Press Briefing Summary, UNHCR, 1 December 2020).

144 See *Statelessness in the EU* (n 73); *Decree No 913-NS of 1954* (Kampuchea); *Law No 904-NS of 1954* (Kampuchea); *Act on Danish Nationality No 422 of 2004*, art 6 (Denmark) as amended by *Act No 311 of 2004* (Denmark); *Citizenship Act of 1995* (1995) 67–69 Pravovye Akty 2293, art 13(4), 13(6) (Estonia) ('*Estonian Law on Citizenship*'); *Nationality Law 5712-1952* (Israel) as amended by *Nationality (Amendment No 4) No 5740-1980* (1980), 984 Safer Ha-Chukkim 222 (Israel); *Latvian Citizenship Law 1994* (n 135) arts 3(1)–3(2), 3(5) as amended by *Latvian Citizenship Law 2013* (n 135); *Law on Citizenship No VIII-391 of 1991* (Lithuania); *Law on Citizenship No XI-1196 of 2010* (Lithuania); *Kingdom Act on Dutch Citizenship No 268 of 1984*, art 6(1)(b) (the Netherlands) as amended on 25 Nov 2013; *Act on Swedish Citizenship No 2001:82* (2001) Swedish Code of Statutes, arts 6–8 (Sweden) as amended by *Law No 2006:222* (2006) Swedish Code of Statutes (Sweden).

states pledged to legislate such terms in the near future[145] and the Democratic Republic of the Congo, Georgia and Nigeria have already developed plans to realise their pledges.[146] Even of those states that have refused to accede to the *1961 Convention* or legislate, most have at least pledged to consider reviewing existing legislation and accession and/or reviewing existing reservations on the topic.[147] The Economic Community of West African States' ('ECOWAS') governments are developing new draft model laws on statelessness.[148] Even Japan, long regarded as maintaining one of the most exclusive nationality regimes in the world, is currently studying means to resolve the legal status of a large group of stateless children born in its territory.[149] Furthermore, Burkina Faso also submitted its draft laws on birth registration to UNHCR for review and advice on whether it is in compliance with its pledge.[150]

Where this change in practice and views occurs as a result of the *#IBelong* Campaign, they nonetheless qualify as relevant state practice and *opinio juris*. Certainly, the results are a testament to the work of UNHCR, but states are not merely pledging political support. They are expressing their views that such practice is expected by the international community and a rule to which they wish to adhere. They are working towards changing their domestic laws to come into compliance with international expectations to accept the default that otherwise stateless children should acquire the nationality of the state of birth. These steps are, therefore, evidence of practice and expressions of *opinio juris*.[151] In sum, most states internationally have some domestic legislation in place to grant nationality to otherwise stateless children born in their territory. Of course, the scope of the various measures varies, but the widespread and consistent underlying idea is that statelessness in children must be avoided and that the state of birth will take responsibility, if necessary, by granting its nationality.

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145 See *High-Level Segment Results and Highlights* (n 2) 47–75; *#IBelong Campaign Update June 2020* (n 2) regarding Angola, Argentina, Belize, Central African Republic, Comoros, Côte d'Ivoire, Eswatini, Gambia, Lesotho, Lithuania, Mali, Namibia, Nigeria, Rwanda, South Sudan and Uganda.

146 See, eg, UNHCR, *#IBelong Campaign Update September 2021* (n 56) 3–4, 7:

> the Democratic Republic of the Congo, UNHCR and the International Conference for the Great Lakes Region convened a workshop to take stock of progress on the implementation of pledges made by the Government … The workshop resulted in the adoption of a roadmap for pledge implementation and the establishment of a taskforce to follow up on the commitments … Georgia adopted a National Action Plan on Statelessness. The document covers all the pledges made by the Government … Nigeria, UNHCR, the National Population Commission and the National Commission for Refugees, Migrants and Internally Displaced Persons conducted a birth registration exercise.

147 Regarding Germany, Liberia, Kyrgyzstan, Malawi, Sweden and Zimbabwe, see *High-Level Segment Results and Highlights* (n 2) 21; *#IBelong Campaign Update June 2020* (n 2) 2, 3.

148 See *#IBelong Campaign Update December 2021* (n 57) 3.

149 See *#IBelong Campaign Update September 2021* (n 56) 7: 'the Ministry of Justice of Japan announced the findings of research carried out by the Immigration Services Agency (ISA) regarding the legal status and eligibility to Japanese nationality of a group of 300 children who were born and registered as stateless in Japan'.

150 See *#IBelong Campaign Update December 2021* (n 57) 3.

151 See *Nicaragua Case* (n 8) 108–109 [207]; *North Sea Continental Shelf Cases* (n 4) 44; *Right of Passage Case* (n 8) 42–43; *Asylum Case* (n 3) 276–77; *Lotus* (n 3) 28; *ILC Draft Conclusions* (n 3) 77 [62] conclusion 9.

C *Characterising Acts as Wrongful or Permitted*

States have also stated their views, either expressly or implicitly, that granting nationality to otherwise stateless children born in their territory is obligatory. In some situations, states have acknowledged that their refusal to grant nationality at birth to stateless children constitutes a violation of international law.[152] For example, both Estonia[153] and Côte d'Ivoire[154] have concluded that their domestic restrictions on *jus soli* for stateless children are wrongful. These, and other states, may have undertaken revisions of their domestic legislation in line with an expectation that they grant nationality to stateless children born in their territory if

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152 See *Zhao v the Netherlands* (n 82) 3 [2.7]: 'the State party has acknowledged that its law is not in line with the 1961 *Convention*'. See also *Legislative Scrutiny: Nationality and Borders Bill (Part 1) — Nationality, Seventh Report of Session, 2021–22* (HC Paper 764 and HL Paper 90, UK House of Commons and House of Lords Joint Committee on Human Rights, 3 November 2021) 3–4:

> The Committee has been undertaking legislative scrutiny of the Nationality and Borders Bill … [which] amends the British *Nationality Act 1981* (BNA) … It is also difficult to see how it complies with the obligation to grant stateless children born in the UK British nationality, in line with Article 1 of the 1961 UN *Statelessness Convention.*

Statelessness in the EU (n 73) reporting that Estonia points out that their *Law on Citizenship* (n 144) is partially in conflict with the *1961 Convention* (n 55); United States Department of State ('USDS'), *Costa Rica 2021 Human Rights Report* (Country Report, 12 April 2022) 9–10 ('*Costa Rica Country Report*'); USDS, *Cote d'Ivoire 2021 Human Rights Report* (Country Report, 12 April 2022) 18–19 ('*Cote d'Ivoire Country Report*'); USDS, *Syria 2021 Human Rights Report* (Country Report, 12 April 2022) 55 ('*Syria Country Report*'); 'UAEG Seeks to End Uncertain Status of Stateless Residents' (United States Department of State Cable No 06ABUDHAB4I54_a, 2 November 2006) [2] <https://wikileaks.org/plusd/cables/06ABUDHABI4154_a.html> ('State Department Cable No 06ABUDHAB4I54_a'): 'On October 25, the official Emirates News Agency (WAM) reported that President Sheikh Khalifa had issued directives for federal ministries to seek a comprehensive and permanent solution to the problem of the country's "bidoun," or stateless people'. *Decision on the Loss of Greek Nationality by Virtue of Former Article 19 of the Greek Nationality Code and the Procedure for its Reacquisition* (Greek National Commission for Human Rights, 30 October 2003) on restoring Greek nationality; *Law on the Acquisition and Loss of Citizenship of the Czech Republic No 194/99* (Czech Republic) and *Law on the Acquisition and Loss of Nationality of the Czech Republic No 357/2003* (Czech Republic) amending *Law Acquisition and Loss of Citizenship of the Republic No 40/1993* (Czech Republic) resolving issues pertaining to the nationality of persons of Roma origin.

153 See *Statelessness in the EU* (n 73); *Estonian Law on Citizenship* (n 144).

154 See *Loi No 2013-653 of 2013 Portant Dispositions Particulaires en Matiere d'Acquisition de la Nationalite par Declaration*, art 3 (Côte d'Ivoire).

they cannot otherwise secure nationality for the children.[155] In other cases, states have criticised the failure to grant nationality at birth in such situations.[156] For example, states have received specific advice from the Human Rights Committee

155 See 'The Problem of Statelessness in the Kyrgyz Republic' (United States Department of State Cable No 09BISHKEK1080_a, 1 October 2009) [1] <https://wikileaks.org/plusd/cables/09BISHKEK1080_a.html>: 'On September 22, UNHCR and the Kyrgyz government co-hosted a high-level steering meeting to highlight the problem of statelessness in Kyrgyzstan and adopted a concluding statement with concrete objectives'. See 'Dominicans Begin Work on Implementing Their 2004 Nationality Law' (United States Department of State Cable No 09SANTODOMINGO236_a, 24 February 2004) [1] <https://wikileaks.org/plusd/cables/09SANTODOMINGO236_a.html>: 'The Dominican government recently held a summit on migration issues that resulted in recommendations for regularizing the large undocumented population in the country'. See 'Citizenship Manual Outlines Legal Maze Facing Stateless Hill Tribes' (United States Department of State Cable No 09CHIANGMAI12_a, 6 January 2009) [2] <https://wikileaks.org/plusd/cables/09CHIANGMAI2_a.html>: 'Thai citizenship law continues to evolve in a positive direction, as the RTG [Royal Thai Government] collaborates with UN agencies and NGOs'. 'Minority Hill Tribes Still Plagued by Statelessness, Though Trends Are Encouraging' (United States Department of State Cable No 08CHIANGMAI192_a, 19 December 2008) [1] <https://wikileaks.org/plusd/cables/08CHIANGMAI192_a.html>: 'In recent years the Royal Thai Government (RTG) has made strides to improve citizenship eligibility for highlanders, including passing two significant new laws in 2008'. See 'Estonia Offers Free Citizenship Courses' (United States Department of State Cable No 06TALLINN988_a, 3 November 2006) [1] <https://wikileaks.org/plusd/cables/06TALLINN988_a.html>: 'The number of stateless people living in Estonia has declined significantly since 1992. A new program to provide citizenship training to non-citizens is being jointly funded by the GOE and the EU'. State Department Cable No 06ABUDHAB4I54_a (n 152) [1]: 'Children of qualifying bidoun, even if born after December 2, 1971, gain derivative status if they meet the other criteria'. See 'Parliament Establishes Committee to Address the Condition of Stateless Arabs' (United States Department of State Cable No 06KUWAIT2822_a, 12 July 2006) [1] <https://wikileaks.org/plusd/cables/06KUWAIT2822_a.html>: 'In its inaugural session on July 12, Kuwait's new Parliament voted unanimously to establish a committee for dealing with the over 100,000 "Bidoon"'. State Department Cable No 09ASHGABAT1607_a (n 96) [3]: 'The Turkmen Government is working with UNHCR to discover whether these people are citizens of other former Soviet countries, who got caught between bureaucracies at the fall of the Soviet Union'. See generally USDS, *Dominican Republic 2021 Human Rights Report* (Country Report, 12 April 2022) 16–18 ('*Dominican Republic Country Report*'); USDS, *Estonia 2021 Human Rights Report* (Country Report, 12 April 2022) 7–8 ('*Estonia Country Report*'); USDS, *Israel and the Occupied Territories 2021 Human Rights Report* (Country Report, 12 April 2022) 50 ('*Israel and Occupied Territories Country Report*'); USDS, *Kosovo 2021 Human Rights Report* (Country Report, 12 April 2022) 21 ('*Kosovo Country Report*'); USDS, *Turkmenistan 2021 Human Rights Report* (Country Report, 12 April 2022) 19 ('*Turkmenistan Country Report*').

156 See, eg, USDS, *Costa Rica Country Report* (n 152) 9–10; USDS, *Cote d'Ivoire Country Report* (n 152) 18–19; USDS, *Syria Country Report* (n 152) 55; USDS, *Dominican Republic Country Report* (n 155) 17; USDS, *Estonia Country Report* (n 155) 8; USDS, *Israel and Occupied Territories Country Report* (n 155) 50; USDS, *Kosovo Country Report* (n 155) 21; USDS, *Turkmenistan Country Report* (n 155) 19; USDS, *Vietnam 2021 Human Rights Report* (Country Report, 12 April 2022) 35–36.

recommending that they adhere to the *1961 Convention* to reduce statelessness[157] or been told by the Council of Europe Parliamentary Assembly that they are not sufficiently protecting children's rights to nationality.[158] States that have adhered to the *1961 Convention* but entered reservations to the obligation to grant nationality to children at birth have not expressed any views that they believe they are free to refuse to grant nationality under international law. States have criticised others for their refusal to grant nationality to stateless children born in the territory[159] and praised other states that took measures to grant nationality in these

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157 See, eg, Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: Algeria*, UN Doc A/HRC/WG.6/27/L.11 (18 May 2017) 14 [129.24]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: Brazil*, UN Doc A/HRC/WG.6/27/L.9 (17 May 2017) [5.33]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: Estonia*, UN Doc A/HRC/WG.6/24/L.4 (21 January 2016) 22–23 [123.13]–[123.19]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: Hungary*, UN Doc A.HRC/WG.6/25/L.6 (19 May 2016) 12 [128.5]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: India*, UN Doc A/HRC/WG.6/27/L.8 (8 May 2017) 6 [5.32]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: Latvia*, UN Doc A/HRC/WG.6/24/L.12 (5 February 2016) 20 [120.45]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: Morocco*, UN Doc A/HRC/WG.6/27/L.4 (4 May 2017) 17 [6.242]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: Papua New Guinea*, UN Doc A.HRC/WG.6/25/L.7 (19 May 2016); Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: The Philippines*, UN Doc A/HRC/WG.6/27/L.10 (18 May 2017) 27 [133.256]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: Poland*, UN Doc A/HRC/WG.6/27/L.12 (18 May 2017) 15 [120.21]–[120.22]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: South Africa*, UN Doc A/HRC/WG.6/27/L.14 (12 May 2017) 5 [6.21]–[6.23], 18 [6.237]–[6.238]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: Sudan*, UN Doc A.HRC/WG.6/25/L.5 (19 May 2016) [2]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: Suriname*, UN Doc A.HRC/WG.6/25/L.1 (19 May 2016) 22 [135.20]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: Swaziland*, UN Doc A.HRC/WG.6/25/L.11 (19 May 2016) 6 [31]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: Tajikistan*, UN Doc A.HRC/WG.6/25/L.8 (20 May 2016) [2]; Human Rights Committee, *Draft Report of the Working Group on the Universal Periodic Review: Tanzania*, UN Doc A.HRC/WG.6/25/L.9 (20 May 2016) [4].

158 See *The Need to Eradicate Statelessness of Children* (Council of Europe Parliamentary Resolution No 2099, 4 March 2016) 2 [8] ('CoE Resolution No 2099'): 'The relevant legislation … contain[s] insufficient or no safeguards against childhood statelessness, in breach of regional and international obligations'. See also at 2 [9]:

> Azerbaijan, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, 'the former Yugoslav Republic of Macedonia', Poland and Slovenia … do not provide full protection against children's statelessness, as they only function if the child's parents are stateless or of unknown citizenship and do not function in circumstances in which parents who have a nationality cannot pass on their nationality to their children.

See also at 2 [12.1.1]: 'calls on those States that have not yet done so to sign and ratify the Council of *Europe Convention on Nationality* [which includes obligation on territorial state to grant nationality at birth if a child is otherwise stateless]'.

159 See UN Doc A/HRC/WG.6/27/L.11 (n 157) 14 [129.23]–[129.24]; UN Doc A/HRC/WG.6/24/L.4 (n 157) 25 [123.54]; UN Doc A/HRC/WG.6/24/L.12 (n 157) 23 [120.79]; UN Doc A/HRC/WG.6/27/L.9 (n 157) [5.33]; CoE Resolution No 2099 (n 158) 2 [12.1.1]; USDS, *Bangladesh 2021 Human Rights Report* (Country Report, 12 April 2022) 36–37; *Zhao v the Netherlands* (n 82) 8 [8.4] citing CommRC, *Concluding Observations on the Fourth Periodic Report of the Netherlands*, UN Doc CRC/C/NDL/CO/4 (8 June 2015) 7 [33].

cases.[160] Even states that merely imposed rather limited additional requirements for a grant of nationality to stateless children have been viewed as violating human rights.[161] For example, Iran's requirement that one parent be a resident of or born in Iran in order for the stateless child to receive its nationality has been strongly criticised.[162] Some states are actively seeking out advice from peers. Iceland, for example, is consulting with Georgia and France on adopting domestic legation that would give effect to its accession to the *1961 Convention*.[163] These critiques have not gone unnoticed and there is evidence that states view their actions to possibly adhere to the *1961 Convention*, legislate domestic law or pledge to do the same as being motivated by the criticism.[164]

In other situations where states have refused to grant nationality to stateless children born in their territory, they have not appealed to a permissive rule under international law. Rather, they have explained their behaviour by arguing that the relevant children are not cooperating with administrative procedures,[165] are merely in transit[166] or lack evidence of their birth in state territory.[167] Some states have argued that the relevant children are not actually stateless, because, as is argued by the state, they already have another nationality.[168] However, where these arguments are merely speculative and only based on the state's (possibly incorrect) interpretation of foreign law, and the children have not had the other nationality confirmed, the states making such arguments have been strongly condemned.[169] These states could far more easily just argue against the existence of any law requiring them to grant nationality, but do not attempt to do so.

D *International Organisations Influencing Opinion*

International organisations are also actively involved in the issue of stateless children at birth and are urging states to grant them nationality when born in their

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160 See 'UNHCR Claims "Big Step Forward"; Plan of Action with GVN on Stateless Khmers' (United States Department of State Cable No 07HANOI651_a, 14 September 2007) [1] <https://wikileaks.org/plusd/cables/07HANOI1651_a.html>: 'UNHCR has asked Post to "encourage" the process, including the use of its public diplomacy resources'.

161 See *Estonian Law on Citizenship* (n 144) art 5; *Statelessness in the EU* (n 73) 12–15.

162 See *Nationality Law of 2006* (1928) Civil Code of the Islamic Republic of Iran Book 2 art 976 (Iran); USDS, *Iran 2021 Human Rights Report* (Country Report, 12 April 2022) 47–48.

163 See *#IBelong Campaign Update December 2021* (n 57) 5.

164 See, eg, *High-Level Segment Results and Highlights* (n 2) 50 regarding the commitments made by Belize: '[t]his commitment corresponds to [Human Rights Committee] recommendation[s] [of Mexico and Serbia]'.

165 See, eg, *Zhao v the Netherlands* (n 82) 2 [2.3], 3 [2.6]: 'the requirements by Dutch legislation that a person must provide conclusive proof of nationality … the district court of Midden-Nederland … emphasized that the burden of proof of lack of nationality rested on the author, with the municipality having no responsibility to investigate the matter'. 'Statelessness in Cote d'Ivoire' (United States Department of State Cable No 07ABIDJAN997_a, 25 September 2007) [1] <https://wikileaks.org/plusd/cables/07ABIDJAN997_a.html>: 'The lesson learned from this first assessment is that the problem of statelessness seems to result more from low awareness and interest in identification and naturalization procedures than from actual denial of citizenship by the government of Cote d'Ivoire'.

166 See USDS, *Burma 2021 Human Rights Report* (Country Report, 12 April 2022) 166 ('*Burma Country Report*'); USDS, *Dominican Republic Country Report* (n 155) 25.

167 See USDS, *Cambodia 2021 Human Rights Report* (Country Report, 12 April 2022) 30; USDS, *Costa Rica Country Report* (n 152) 9; USDS, *Dominican Republic Country Report* (n 155) 16–17; USDS, *Jordan 2021 Human Rights Report* (Country Report, 12 April 2022) 34; USDS, *Malaysia 2021 Human Rights Report* (Country Report, 12 April 2022) 25–26.

168 See USDS, *Burma Country Report* (n 166) 27–28.

169 See UN Doc A/HRC/19/43 (n 80).

territory. These efforts reflect and shape the practice and *opinio juris* of states. The African Union adopted the *Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa*, which provides for the acquisition of nationality by otherwise stateless children born in state territory, which is now under review by member states.[170] At the International Conference on Addressing Statelessness in Europe in April 2019, states agreed on a final document that recommends legislating for any otherwise stateless child born in the state to receive nationality.[171] The Council of Europe urges its member states to adhere to the *1961 Convention* and adopt implementing legislation[172] and strongly criticises states that refuse to grant nationality in such circumstances.[173] Both the Committee on the Rights of the Child[174] and the Human Rights Committee[175] have advised states to adhere to the statelessness conventions to fully ensure human rights. Some states have engaged with UNHCR and/or the United Nations Children's Fund ('UNICEF') for advice on developing strategies for preventing child statelessness at birth in their territory[176] or providing training for government or administrative officers in implementing international obligations to grant nationality.[177] The ECOWAS Commission and the Economic Community of Central African States Commission have cooperated with UNHCR and regional governments to produce a draft model law on the reduction of statelessness in the

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170 See Explanatory Memorandum, *Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa: Explanatory Memorandum* (adopted May 2017, revised June 2018) art 5 <https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22527_e_originalexplanatory_memorandum.pdf>.

171 See UNHCR, *International Conference on Addressing Statelessness in Europe, Madrid, 25–26 April: Final Document* (Report, April 2019).

172 See CoE Resolution No 2099 (n 158) 2 [12.1.1]–[12.2.2]:

> calls on Andorra, Armenia, Azerbaijan, Belgium, Cyprus, Estonia, Georgia, Ireland, Liechtenstein, Lithuania, Monaco, San Marino, Serbia, Slovenia, Spain, Switzerland, Turkey and the United Kingdom to sign and ratify the Council of Europe Convention on Nationality, and calls on Croatia, France, Greece, Italy, Latvia, Luxembourg, Malta, Poland and the Russian Federation to ratify it; calls on those States … to sign and ratify the Council of Europe *Convention on the Avoidance of Statelessness in relation to State Succession*; urges those States … to sign and ratify … the 1961 *Convention on the Reduction of Statelessness*; … calls on them to: … bring national law into compliance with the above-mentioned international instruments and standards and, in particular, to ensure that national legislation provides for granting nationality to every child born on their territory who would otherwise be stateless.

173 ibid 2 [8]–[9] regarding Azerbaijan, Croatia, Cyprus, the Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, 'the former Yugoslav Republic of Macedonia', Norway, Poland, Romania, Slovenia and Switzerland.

174 See UN Doc CRC/C/SAU/CO/3-4 (n 78) 6 [23]; UN Doc CRC/C/ZAF/CO/2 (n 78) 7–8 [32]; UN Doc CRC/C/SUR/CO/3-4 (n 78) 5 [17].

175 See UN Doc E/CN.4/RES/2005/45 (n 77) 2 [1], [5].

176 See *#IBelong Campaign Update September 2021* (n 56) 4–5:

> in Zambia, under the banner of the UNHCR–UNICEF Coalition on Every Child's Right to a Nationality, the two UN Agencies held a series of meetings to develop a new two-year joint strategy to end childhood statelessness in Zambia. … in Yemen, UNHCR and the Migrant and Refugee Study Centre organized a training for 35 senior field officials … in Jordan, UNCHR delivered four training sessions to employees of the Civil Status Department.

177 See *#IBelong Campaign Update December 2021* (n 57) 5, regarding the UNHCR training for the Bosnia and Herzegovina Ministry of the Interior and judges to implement new birth registration procedures and grant of nationality at birth.

region.[178] These efforts, along with the *#IBelong* Campaign, are concentrating state attention on this issue, influencing their behaviours and opinions and affirming the conclusion that customary international law has reached a point where nationality must be granted in these cases.

IV CONCLUSION

Based on quickly accelerating changes in practice and *opinio juris*, a customary international law norm requiring states to grant nationality to otherwise stateless children born in their territories is forming. As of even a few years ago, this norm appeared to be emerging, but quickly changing recent practice, especially due to the momentum of UNHCR's *#IBelong* Campaign, has clearly crystalised the rule.

First, we need to observe the contemporary understanding of customary international law. While the traditional elements of state practice and *opinio juris* continue, our application of this methodology has been refined over time. We now use representative sampling methods, inductive and deductive reasoning and a presumption of a rule; this rule is affirmed by the UNGA, reflects the concurrent practice of states and serves important purposes in the international community. Practice under a treaty can qualify as state practice and *opinio juris*. Deviations from the rule do not defeat it when those deviations are characterised as unlawful.

Second, by applying this clarified methodology to the evolving practice on child statelessness, we can identify the rule. There is a presumption that states must grant nationality to otherwise stateless children born in their territory. International treaties affirm this rule. The *1961 Convention* explicitly provides for this rule and, increasingly, states are adhering to this treaty or pledging to do so, thus supporting its value. Where states do not adhere, they do not argue that they are not bound by such a rule. Also, the *ICCPR*, though it does not identify the responsible state in the text of the right to a nationality, is applicable following a jurisdictional analysis, which can identify the sole responsible state as the state of birth. Along with the obligation to cooperate to secure nationality, these treaties support the existence of the instant rule. There is already a clear rule that states should avoid and reduce cases of statelessness, affirmed repeatedly by the UNGA, and such a rule is a logical deduction from this principle. Domestic legislation is increasingly converging on the same content, providing for nationality in such cases. States are also criticising other states that do not provide for birth nationality as out of alignment with international obligations, and the states subject to such criticism justify their actions, not by appealing to the lack of a rule, but through other arguments that affirm the rule. There is little evidence, thus, contradicting such a norm. Certainly, such a rule would foster international 'cooperation',[179] protect important social values[180] and affirm the 'elementary considerations of humanity'.[181]

Application of the customary international law methodology points us to the existence of this rule. Therefore, the current trend is clear. It is certainly valuable to continue to advocate for adherence to the *1961 Convention* and support the interpretation of the right to a nationality under treaty law, so that this obligation is secured from future evolution. However, children without nationality, and the

178 See *#IBelong Campaign Update December 2021* (n 57) 3.
179 See *Gulf of Maine Case* (n 9) 299 [111].
180 See ibid; *Ayyash* (n 40) 26 [86], 29 [101].
181 See *Corfu Channel Case* (n 20) 22.

states that host them, may now already identify the state that must grant them nationality under customary international law.