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**STATELESSNESS: THE ABSENCE OF NATIONALITY AND THE
CONSTRUCTION OF A BRAZILIAN POLICY OF HOSPITALITY**

Tese de Doutorado

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Tese apresentada à Banca Examinadora do Programa de Pós-Graduação em Direito, da Faculdade de Direito da Universidade de São Paulo, como exigência parcial para obtenção do título de Doutor em Direito, na área de concentração Direito Internacional, sob a orientação do Professor Associado Dr. Alberto do Amaral Júnior.

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Statelessness: the absence of nationality and the construction of a
Brazilian policy of hospitality

Tese apresentada à Faculdade de Direito da Universidade
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To Eva, for all the patience,
love and affection.

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The master of the house having no more urgent concern than that of letting his joy shine out over anyone who, of an evening, will come to eat at his table and rest under his roof from the fatigues of the road, anxiously awaits on the threshold of his house the stranger he will see rising into view on the horizon like a liberator. And from as far away as he sees him coming, the master will hasten to callout to him: “Enter quickly, as I am afraid of my happiness”.

Jacques Derrida

O Senhor do lugar, não tendo preocupação mais urgente que aquela de derramar sua alegria sobre não importa quem que, à noite, vier jantar à sua mesa e sob seu teto repousar das fadigas do caminho, espera com ansiedade sobre a soleira de sua casa o estrangeiro que ele verá despontar no horizonte como um libertador. E do mais longe que ele o vir chegando, o senhor se apressará em gritar-lhe: “Entre rápido, porque tenho medo de minha felicidade”.

Jacques Derrida

RESUMO

ASSUNÇÃO, Thiago. **Apatridia: A ausência de nacionalidade e a construção de uma política brasileira de hospitalidade.** 2018. 324 f. Tese (Doutorado em Direito) - Faculdade de Direito, Universidade de São Paulo, São Paulo, 2018.

A apatridia, ou ausência de nacionalidade, afeta mais de 10 milhões de pessoas no mundo hoje. O principal objetivo desta tese é lançar luzes sobre o fenômeno da apatridia, a partir do estudo do papel da nacionalidade e sua relação com o exercício da cidadania. Inicialmente, busca-se contextualizar historicamente o surgimento do estado-nação, bem como o princípio da nacionalidade, conectado à soberania estatal. Em seguida, são estudados os critérios utilizados para atribuição da nacionalidade pelos estados, bem como os progressivos limites à sua discricionariedade nesta área. O fenômeno da apatridia é então esmiuçado, partindo-se da sua história, conceito, causas e consequências. São elucidadas as respostas construídas no direito internacional para a sua redução e proteção das pessoas apátridas. Por fim, são estudados os desafios existentes para a erradicação da apatridia no mundo. Em um segundo momento, a tese problematiza as próprias noções de nacionalidade e cidadania, para analisar como as transformações em curso no cenário internacional têm afetado esses institutos. A partir do estudo da globalização, integração regional, transnacionalidade dos atores não-estatais, do surgimento dos direitos humanos e ascensão do indivíduo enquanto sujeito de direito internacional, e ainda, da intensificação da mobilidade humana internacional, procura-se avaliar o impacto desses fatores para a nacionalidade e para o exercício da cidadania. Em particular, revela-se o surgimento de novas formas de pertencimento e associação dos indivíduos, a partir do pluralismo que caracteriza as identidades na contemporaneidade. Esta tendência aponta para uma internacionalização da cidadania, especialmente considerando-se a crescente afirmação dos direitos humanos dos não-cidadãos. Ademais, a naturalização e a múltipla nacionalidade, passam a ser cada vez mais reguladas pelo direito internacional, à luz do princípio da não-discriminação e da autonomia individual. Busca-se, assim, compreender a existência de uma cidadania comunitária na Europa, a partir da supranacionalidade da União Europeia, bem como o surgimento do que a doutrina chama de cidadania global, transnacional ou pós-nacional, a partir do descolamento da ideia de nacionalidade e cidadania. Por fim, o trabalho aponta para a construção de um direito (humano) à cidadania. No último capítulo, a tese apresenta o Brasil como estudo de caso, a partir da chave de leitura da hospitalidade em relação ao Outro. São analisadas as recentes iniciativas de recepção de migrantes e refugiados no país, na busca de se construir uma política migratória e de asilo condizente com os compromissos internacionais assumidos, bem como com a tradição brasileira de país de migrações. Finalmente, apresenta-se o enquadramento jurídico da apatridia no Brasil, com uma breve análise da nova lei de migrações, especialmente no que diz respeito à inédita legislação da apatridia no país, o que, conclui-se, vai ao encontro da construção de uma política brasileira de hospitalidade.

Palavras-chave: Apátridas. Apatridia. Nacionalidade. Cidadania global, transnacional, pós-nacional. Direito humano à cidadania. Política de hospitalidade no Brasil.

ABSTRACT

ASSUNÇÃO, Thiago. **Statelessness: the absence of nationality and the construction of a Brazilian policy of hospitality**. 2018. 324 p. Thesis (PhD in Law) – Faculty of Law, University of São Paulo, São Paulo, 2018.

Statelessness, or lack of nationality, affects more than 10 million people in the world today. The main objective of this thesis is to shed light on the phenomenon of statelessness, departing from the study of the role of nationality, and its relationship with the exercise of citizenship. Initially, it is contextualized historically the emergence of the nation-state, as well as the principle of nationality, connected to state sovereignty. Subsequently, it is studied the criteria used for the attribution of nationality by the states, as well as the progressive limits to their discretion in this area. The phenomenon of statelessness is then explored, starting from its history, concept, causes and consequences. It is elucidated the answers built in international law for its reduction and protection of stateless persons. Finally, the challenges for eradicating statelessness in the world are studied. In a second moment, the thesis problematizes the very notions of nationality and citizenship, to analyze how the transformations in progress in the international scenario have affected these institutes. Based on the study of globalization, regional integration, transnationality of non-state actors, the emergence of human rights and the rise of the individual as subject of international law, as well as the intensification of international human mobility, the work seeks to analyze the impact of these factors on nationality and the exercise of citizenship. In particular, it is revealed the emergence of new forms of belonging and association of the individuals, related to the pluralism that characterizes the identities in contemporaneity. This trend points to an internationalization of citizenship, especially considering the growing affirmation of the human rights of non-citizens. In addition, naturalization and multiple nationality are increasingly regulated by international law, in the light of the principle of non-discrimination and individual autonomy. The study seeks to understand the existence of a communitarian citizenship in Europe, from the supranationality of the European Union, as well as the emergence of what the doctrine calls global, transnational or post-national citizenship, from the detachment of the nationality from the citizenship. Finally, the work points to the construction of a (human) right to citizenship. In the last chapter, the thesis presents Brazil as a case study, based on the category of hospitality in relation to the Other. The recent initiatives of reception of migrants and refugees in the country are analyzed, in the search to build a migration and asylum policy compatible with the international commitments assumed, as well as with the Brazilian tradition of country of migrations. Finally, the legal framework of statelessness in Brazil is presented, with a brief analysis of the new migratory law, especially in regard to the unprecedented regulation of statelessness in the country, which, it is concluded, matches with the construction of a Brazilian policy of hospitality.

Keywords: Stateless persons. Statelessness. Nationality. Global, transnational, post-national citizenship. Human right to citizenship. Policy of hospitality in Brazil.

RESUMEN

ASSUNÇÃO, Thiago. **Apatridia: La ausencia de nacionalidad y la construcción de una política brasileña de hospitalidad**. 2018. 324 f. Tesis (Doctorado en Derecho) - Facultad de Derecho, Universidad de São Paulo, São Paulo, 2018.

La apatridia, o ausencia de nacionalidad, afecta a más de 10 millones de personas en el mundo hoy. El principal objetivo de esta tesis es lanzar luces sobre el fenómeno de la apatridia, a partir del estudio del papel de la nacionalidad y su relación con el ejercicio de la ciudadanía. Inicialmente, se busca contextualizar históricamente el surgimiento del estado-nación, así como el principio de la nacionalidad, ligado a la soberanía estatal. A continuación, se estudia los criterios utilizados para la asignación de la nacionalidad por los estados, así como los progresivos límites a su discrecionalidad en esta área. El fenómeno de la apatridia es entonces desmenuzado, partiendo de su historia, concepto, causas y consecuencias. Se elucidan las respuestas construidas en el derecho internacional para su reducción y protección de las personas apátridas. Por último, se estudian los retos existentes para la erradicación de la apatridia en el mundo. En un segundo momento, la tesis problematiza las propias nociones de nacionalidad y ciudadanía, para analizar cómo las transformaciones en curso en el escenario internacional han afectado a esos institutos. A partir del estudio de la globalización, integración regional, transnacionalidad de los actores no estatales, del surgimiento de los derechos humanos y ascenso del individuo como sujeto de derecho internacional, y aún, de la intensificación de la movilidad humana internacional, se busca evaluar el impacto de esos factores para la nacionalidad y para el ejercicio de la ciudadanía. En particular, se revela el surgimiento de nuevas formas de pertenencia y asociación de los individuos, a partir del pluralismo que caracteriza las identidades en la contemporaneidad. Esta tendencia apunta a una internacionalización de la ciudadanía, especialmente considerando la creciente afirmación de los derechos humanos de los no-ciudadanos. Además, la naturalización y la múltiple nacionalidad pasan a ser cada vez más reguladas por el derecho internacional, a la luz del principio de la no discriminación y de la autonomía individual. Se busca, así, comprender la existencia de una ciudadanía comunitaria en Europa, a partir de la supranacionalidad de la Unión Europea, así como el surgimiento de lo que la doctrina llama ciudadanía global, transnacional o posnacional, a partir del despegue de la idea de nacionalidad y ciudadanía. Por último, el trabajo apunta a la construcción de un derecho (humano) a la ciudadanía. En el último capítulo, la tesis presenta a Brasil como estudio de caso, a partir de la clave de lectura de la hospitalidad en relación al Otro. Se analizan las recientes iniciativas de recepción de migrantes y refugiados en el país, en la búsqueda de construir una política migratoria y de asilo que sea compatible con los compromisos internacionales asumidos, así como con la tradición brasileña de país de migraciones. Finalmente, se presenta el marco jurídico de la apatridia en Brasil, con un breve análisis de la nueva ley de migraciones, especialmente en lo que se refiere a la inédita legislación de la apatridia en el país, lo que, se concluye, va al encuentro de la construcción de una política brasileña de hospitalidad.

Palabras clave: Apátridas. Apatridia. Nacionalidad. Ciudadanía global, transnacional, posnacional. Derecho humano a la ciudadanía. Política de hospitalidad en Brasil.

LIST OF ACRONYMS / LISTA DE SIGLAS

ADUS – Instituto de Reintegração do Refugiado

CEPAL – Comissão Econômica para a América Latina e o Caribe

CNIg – Conselho Nacional de Imigração

CONARE – Comitê Nacional para os Refugiados

ECOSOC – Economic and Social Council (United Nations)

EU – European Union

FARC – Fuerzas Armadas Revolucionarias de Colombia

FRONTEX - European Border and Coast Guard Agency

ICCPR - International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICJ – International Court of Justice

ILC – International Law Commission

MINUSTAH – United Nations Stabilization Mission in Haiti

NGO – Non-governmental organizations

PBMIH – Português Brasileiro para Migração Humanitária

PCIJ – Permanent Court of International Justice

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNHCR – United Nations High Commissioner for Refugees

UNRWA – United Nations Relief and Works Agency for Palestine Refugees in the Near East

USA – United States of America

USSR – Union of Soviet Socialist Republics

WTO – World Trade Organization

SUMMARY

INTRODUCTION	17
1. NATIONS AND NATIONALITIES	21
1.1. From the nation-state to nationality	21
1.1.1. The formation of the nation-state.....	21
1.1.2. State sovereignty and the principle of nationality.....	24
1.1.3. Conceptions and definition of nationality	28
1.1.4. Nationality and citizenship	32
1.2. Nationality attribution and its absence	33
1.2.1. Criteria for nationality attribution by states.....	33
1.2.2. Loss, deprivation or renunciation of nationality.....	37
1.2.3. Dual or multiple nationality.....	39
1.2.4. The absence of nationality.....	42
1.2.5. Limitations in international law to state discretion on nationality.....	44
1.2.6. Nationality as a human right or the “right to have rights”	50
2. THE PHENOMENON OF STATELESSNESS.....	59
2.1 Historical origins	59
2.2 Conceptualizing statelessness.....	60
2.2.1 <i>De jure</i> and <i>de facto</i> statelessness.....	63
2.3 Causes of statelessness.....	69
2.3.1 Conflicting nationality laws.....	69
2.3.2 Childhood statelessness	71
2.3.3. Statelessness upon change of civil status and gender-based discrimination .	74
2.3.4. Loss, withdraw and renunciation of nationality.....	77
2.3.5. Discriminatory or arbitrary deprivation of nationality.....	80
2.3.6. Statelessness in the context of state succession	83
2.3.7. Statelessness and migrations.....	88
2.3.8. Stateless and refugees.....	92
2.3.9. Statelessness and environmental displacements	94
2.4 Consequences of statelessness	97
2.5 International law answers to statelessness	101
2.5.1 The UNHCR’s mandate and role on the statelessness issue	102

2.5.2.	1954 Convention relating to the Status of Stateless Persons.....	106
2.5.3.	1961 Convention on the Reduction of Statelessness	108
2.5.4.	Actions and campaigns to address statelessness.....	113
2.6	Challenges for eradicating statelessness	118
2.6.1.	The question of identification.....	118
2.6.2.	Lack of procedures for determination of statelessness.....	121
2.6.3.	The discretion of states on nationality attribution.....	123
2.6.4.	The interest of the states on controlling citizenship.....	125
3	TRANSFORMING NATIONALITY AND CITIZENSHIP	129
3.1	Changes in nations and nationalities in contemporaneity	129
3.1.1	Globalization and its impact on nationalities.....	129
3.1.1.1	Denationalization of the nation-state	130
3.1.1.2	The decline of national sovereignty	133
3.1.2	Transnationality and the role of the non-state actors	140
3.1.3	Human rights and the rise of the individual as subject of international law	146
3.1.4	Regional integration and supranationality.....	155
3.1.5	International human mobility: a world in the move.....	164
3.2	Citizenship in the era of international human mobility.....	173
3.2.1	The emergence of the modern citizenship.....	173
3.2.1.1	Citizenship as rights	178
3.2.1.2	Citizenship as participation	180
3.2.2	Citizenship and statelessness	182
3.2.3	Citizenship and national belonging: the question of identity	184
3.3	The non-national other: citizenship and migrations	187
3.3.1	Interculturality and inclusion.....	187
3.3.2	Human rights of non-citizens.....	189
3.3.3	The “citizenship” of non-citizens.....	198
3.4	The contemporary multiplicity of memberships.....	203
3.4.1	The role of multiple nationality	203
3.4.2	Communitarian citizenship in Europe.....	207
3.4.3	Global, transnational or postnational citizenship.....	215
3.4.4	Inherited citizenship, pluralism and global virtues	230
3.4.5	Towards an international (human) right to citizenship	239

4 STATELESSNESS IN BRAZIL AND THE CONSTRUCTION OF A POLICY OF HOSPITALITY	245
4.1 Hospitality as a key for the relation with the Other.....	245
4.2 The recent attraction of migrants in Brazil.....	250
4.2.1 The policy of “humanitarian visas”	254
4.3 Brazil as an emergent destination for refugees	257
4.3.1 Reception of refugees and integration initiatives.....	262
4.4 Brazilian hospitality in the context of international human mobility	268
4.5 Statelessness in Brazil	271
4.5.1 The new legal framework for stateless persons in Brazil.....	277
FINAL CONSIDERATIONS	283
REFERENCES	295

INTRODUCTION

According to the United Nations High Commissioner for Refugees, more than 10 million persons do not have nationality nowadays. Under the law, they do not belong anywhere. Without this fundamental tie with a state, those stateless persons have serious trouble for exercising their rights, accessing public services, and pertaining to a political community. The aim of this research is to understand the phenomenon of statelessness, and the current role of nationality for the exercise of citizenship. The research question refers to how the development of international law, especially with the advent of globalization, the rise of human rights and the intensification of the international human mobility, have affected the international regulation of nationality, and the position of the state relating to its discretion on nationality attribution. The thesis will look to Brazil as a case study, and more specifically to the recent attempt of building a policy of hospitality for migrants, refugees and stateless persons in the country.

The legal institute of statelessness is not much studied in Brazil, and even in the world, in comparison with migrations and forced displacements. It is viewed almost as a residual issue, in face of the poverty, natural disasters, armed conflicts and all sorts of persecutions, which cause millions of people to flee from their countries of origin worldwide. However, many stateless persons are also refugees who are arbitrarily deprived of their rights, for reasons of discrimination. Moreover, some refugees become stateless because of the persecution to which they are subject. Others are born stateless, inheriting a condition that they did not choose nor had the chance to overcome. And some people remain stateless by force of revolutions, occupations and state successions, leading large groups to the limbo of pertaining nowhere.

Therefore, statelessness represents a very serious issue for the people concerned, producing in some cases situations of physical or psychological violence, mass migrations and forced displacements, affecting entire regions and producing generations of unrooted children. The relevance of the present study is to place the question of statelessness in the center of the academic debate, taking advantage of international legal sources, to explore its history and definition, causes and human consequences, the answers built in international law, as well as the challenges for its eradication in contemporaneity.

Uniting the analysis of nationality on the one hand, and its complete absence on the other, the research, in its first part, canvasses an analysis of the obstacles for eliminating statelessness. While some hurdles are practical and depend mostly on states' action, based

on the existing international law solutions and UNHCR recommendations, others are related to the exclusive discretion of the states on conferring nationality. Since no overturning in this legal framework is foreseen, its ascertainment allows the search for other changes occurring at international level, which affect nationality attribution as such, as well as the access to citizenship it entails.

For this narrative to have clarity, however, it is necessary to depart from the origins of the nation-state, understanding the appearance of the principle of nationality, connected later to state sovereignty. After exploring the theory of nationality, the way it is attributed, and then its absence, it is examined how there would be an actual detachment of the classic legal notion of nationality, understood as a link between the individual and the state, from the concept of citizenship, entailing access to rights and participation in the fate of a community. The study intends to demonstrate, from this point, how citizenship has been expanding, in face of the transformations of the international scenario, constituting what has been called postnational, transnational or global citizenship.

In this sense, the advent of globalization, not only economic, but human; the transnationalism of non-state actors, acting normatively apart from the states; the consolidation of the international human rights law, with the consequent rise of the individual as subject of international rights; the regional integration of states, from which a communitarian citizenship emerges; and above all, the challenges of migrations and forced displacements at the global level; are all elements pointing to the internationalization of the notion of citizenship.

At the same time, this internationalization of citizenship would be closely related to the assertion of human rights of the migrants, refugees and stateless persons at global level, blurring sometimes, from the practical point of view, the classical distinction between citizens and non-citizens. Although not necessarily a trend, in a context of increasing nationalisms and reinforcing border controls, some national legislations reveal that long-term resident migrants can have access to rights almost in equality with the nationals. One element in this sense is the fact that naturalization norms are being reviewed, to deal appropriately with recognized human rights standards such as non-discrimination. In addition, dual or multiple nationality has been increasingly accepted by the states, in a continuous recognition of the multiple attachments, to which individuals and their families are subject nowadays.

Those changes lead to a deeper transformation in the prospect of citizenship, since they add one or more layers of political membership which, although not substituting the

national belonging, especially in terms of identity and culture, leads to a deterritorialized access to rights, based more on personhood, attached to universal human rights, than on national citizenship. The national state retains its role of being the locus where those rights are implemented and exercised, although gradually losing its preeminence, in face of the rapid complexification of the international scenario.

Another important issue to be explored along this thesis, is the position of the non-nationals, called foreigners or “aliens” (in the American literature), and where the stateless persons are framed, together with immigrants and refugees. This work will seek to demonstrate how this Other, seen and treated as a different, although resulting of the historically recurrent and widespread phenomenon of international human mobility, ought to be received with hospitality, since the Other, in effect, mirrors our own human condition.

It is based on this reflection that the work focus, in the end, on a more factual analysis of the Brazilian experience over the last seven years, since the number of asylum seekers and migrants started to raise in the country. Some of the responses built, as the issuance of the “humanitarian visas”, as well as the efforts constructed jointly by the civil society, academia, UNHCR and the government for the reception and integration of migrants and refugees are examined, revealing a reaction that seeks to deal with the question from a differentiated manner, in face of the so called “refugee crisis”. In this sense, the adoption of a new migratory law, containing an unprecedented regulation of statelessness in Brazil, is examined to assess if stateless persons can receive an hospitable treatment in the country from now on.

What follows is an overview of the contents of the thesis. In the first chapter, the aim is to rescue the origin of the nation-state, considering the emergence of state sovereignty as fundament of the idea of nationality. A first clarification is made between the possible differences between nationality and citizenship, and the legal theory of nationality is described, with the criteria used for its attribution by the states, as well as the cases of loss, deprivation and renunciation. The phenomenon of multiple nationality is introduced, and a first look to the absence of nationality comes into question. Finally, this chapter ends by analyzing the emerging limitations in international law to state discretion on nationality, and the legal developments which turn it into a human right.

The second chapter is dedicated to unveil the phenomenon of statelessness. It is explored its historical origins and the conceptualization of the institute, revealing the complex debate on *de jure* and *de facto* statelessness. The causes of statelessness are thoroughly reviewed, as well as its human consequences. The construction of legal answers

in international law for dealing with the question is subsequently examined, as the role of the UNHCR for preventing and reducing statelessness, and protecting stateless persons. This chapter ends by looking to the remaining challenges for the eradication of statelessness.

On a third moment, the work delves into the emerging transformations on nationality and citizenship on contemporaneity. This part seeks to demonstrate how the nation-state is losing its preeminence, with a growing questioning of the reserved domain in terms of nationality attribution. The chapter will, in the first part, start by studying globalization and its impact on nationality, revealing a denationalization of the state and the decline of national sovereignty, passing through the transnationality of the non-state actors and the emergence of human rights as well as the rise of the individual as subject of the international law. It ends by examining the theory of regional integration, with special reference to the appearance of the supranationality, and by looking to the consequences of the increasing international human mobility on nationality and citizenship. The second part builds on developing the concept of citizenship and exploring its complexity, from the historical origin of modern citizenship to the contemporary multiplicity of memberships, leading to a global, transnational or postnational citizenship, with the claim of an international right to citizenship emerging in the horizon.

In the fourth and last chapter, a more empirical analysis searches to understand the place of Brazil in regard to the legal context above. The idea is to introduce the notion of hospitality in relation to the foreigner, as referred under different lens by Vitoria, Grotius, Kant and Derrida, to subsequently examine some recent initiatives, policies and the transforming legislation on the question in Brazil, identifying how hospitality towards the Other has been built, mainly by the civil society and academia, on the basis of a past as a migratory country, with innovative solutions as the humanitarian visa, and the increasing reception and attempts of integrating refugees, not without difficulties and challenges to overcome. Finally, the brand new migratory law is briefly examined, mainly to focus on the unprecedented regulation of statelessness in Brazil, what is considered the culmination of a deep reformulation of the treatment of the subject in the country, more in line in effect with the quest for a migratory policy based on hospitality.

1. NATIONS AND NATIONALITIES

This chapter presents an overview of the idea of nationality, starting by the recovery of the formation of the nation-state. It seeks to understand the political-juridical link between the individual and the State, from its historical perspective. Further, the concept of sovereignty and its relation to the principle of nationality will be analyzed. The intention is to enable a first reflection on the sovereignty of the nation-state, for later scan its challenges, which as will be studied along this thesis. In the second part, it is examined the criteria for nationality attribution by the states, the hypothesis of loss, deprivation or renunciation of nationality, the occurrence of double or multiple nationality, an introductory note on the absence of nationality, and ultimately, the current limitations in international law regarding state discretion for conceding nationality.

1.1. From the nation-state to nationality

1.1.1. The formation of the nation-state

First, it is necessary to delimit some concepts, to better situate the question. When the phrase “nation-state” is mentioned, there are two distinct concepts in question: on the one hand the state; and on the other, the nation; both have different meanings, but a specific sense when put together. According to Dallari, the first time the word “state” was used to name an independent territory was in 1513 with Machiavelli, in his masterwork *Il Principe*. The state can be studied from a juridical or sociological point of view, in the classic division of Jellinek¹. Without the pretention to discuss the history or theory of the state, and the relations between government and society, which would escape the scope of this work, it is important to review, even if briefly, how the modern state emerged.

Although the term state has been used since the end of the Middle Ages, the medieval order was characterized by some elements that did not constitute a centralized and independent political organization. Nevertheless, the precariousness and fragmentation of power in the hands of feudal lords, the constant situation of war, the secular power of the church and the undefinition of political boundaries, were factors that end up for not resisting the transformations brought mainly by the growing commerce, which originated the capitalism.

¹ DALLARI, Dalmo de Abreu. *Elementos de teoria geral do Estado*. 32. ed. São Paulo: Saraiva, 2013, p. 59.

The modern state arises mainly with the reorganization of territoriality. The power of the feudal lords, coming from the possession of the land, declined with the emergence of the right of property, in the early nineteenth century². The end of the Thirty Years War, with the signing of the Treaties of Münster and Osnabrück in 1648, which became known as the “Peace of Westphalia”, marked the end of the religious conflicts in Europe, paving the way for secularization of the power, and the emergence of the monarchs. The treaties inaugurated the preponderance of the principle of territoriality, which will require not only an uncontested delimitation of borders, but the need of a sovereign power to independently administer each territory.

Thus, here we have the essential components of the form of state that inaugurates modernity, and whose structure, added to the idea of nation and sovereignty, has remained not much changed since then, what is one of the points to be analyzed during this work. In the definition of Dallari, the state would be, therefore, the “sovereign legal order that has as its aim the common good of a people situated in a determined territory”³.

The term “nation”, instead, entails a much more complex concept, involving not only political and legal elements, but also historical, social and cultural factors. For Hobsbawm,

the nations are, from my point of view, dual phenomena, constructed essentially from above, but which, however, cannot be understood without being analyzed from below, that is, in terms of the assumptions, hopes, needs, aspirations and interests of people which are not necessarily national and even less nationalistic⁴.

Therefore, the nation carries a notion of sense of belonging of the population to a certain territory and collectivity. For Benedict Anderson, in his classic “Imagined Communities”, some factors explain the origins of national consciousness. The first would be the emergence of capitalism, directly linked to the invention of the press. The dissemination of ideas through the written word in Europe, expanded access to markets and standardized communications, facilitating trade⁵.

The second factor was the Reformation, since the texts of Luther popularized the editions of books and translations of the Bible in vernacular, while the Catholic Church maintained its writings in Latin, language inaccessible to the masses of the time. And the

² AMARAL JÚNIOR, Alberto do. **Curso de Direito Internacional Público**. São Paulo: Atlas, 2015, p. 26, our translation.

³ DALLARI, Dalmo de Abreu. **Elementos de teoria geral do Estado**, op. cit., p. 122. our translation.

⁴ HOBBSAWM, Eric. **Nações e Nacionalismo desde 1780**. Programa, mito e realidade. São Paulo: Paz & Terra, 2013, p. 19, our translation.

⁵ ANDERSON, Benedict R. **Comunidades Imaginadas: reflexões sobre a origem e difusão do nacionalismo**, p. 75, our translation.

third, “the slow, geographically irregular diffusion of certain vernaculars as instruments of administrative centralization, by certain well-placed monarchs with absolutist pretensions”⁶.

Thus, for Anderson, the language played a fundamental role in the constitution of the nation-state, or in the early “non-dynastic” states of the European continent. In his words, “the convergence of capitalism and press technology over the fatal diversity of human language created the possibility of a new form of imagined community, which [...] set the stage for the modern nation”⁷. Despite the emphasis of the author on the language for the emergence of the nation, Hobsbawm identifies also the union of citizens of a given territory with common goals, as a criterion for defining nationality. For the historian, “what characterizes the nation-people from below is precisely the fact that it represents the common interest against privilege, as is actually suggested by the term that the Americans used before 1800”⁸.

Thus, from a political point of view, the idea of nation would be linked to the advent of the liberal revolutions. It is with those events that the aspiration to popular self-determination arises. In the United States Declaration of Independence, the expressions used are “our people”, “free people”, and “rights of the people”⁹. The French Declaration of Rights of 1795 repeats this reference, adding the idea of popular sovereignty: “each people is independent and sovereign, regardless of the number of individuals that compose it and the extent of the territory it occupies”¹⁰.

Despite the indiscriminate use of the word *people*, it is often the *population* of a state that includes all the inhabitants living in its territory. However, this meaning is broad enough to include migrants who live in the territory of the State, who are traditionally not considered as “part” of that State (because they are nationals of another state), and at the same time, restrictive in the sense of excluding persons who live abroad, but are connected to the state by the bond of nationality¹¹. Therefore, here the term *nation* gains relevance, since it “applies to a community of historical and cultural background, belonging to it, as a rule, those born in a certain cultural environment made of traditions and customs”¹², while population would simply be the totality of the inhabitants of a state. Therefore, the nation is seen as a group of

⁶ ANDERSON, Benedict R. **Comunidades Imaginadas...** op. cit., p. 76, our translation.

⁷ Ibid., p. 82, our translation.

⁸ HOBBSAWM, Eric. **Nações...** op. cit., p. 33, our translation.

⁹ UNITED STATES; **The declaration of independence**. 1776. Available at: <https://www.archives.gov/founding-docs/declaration-transcript> Accessed on 10 Oct. 2017.

¹⁰ HOBBSAWM, Eric. **Nações...** op. cit., p. 32, our translation.

¹¹ DINH, Nguyen Quoc; DAILLIER, Patrick; PELLET, Alain. **Direito Internacional Público**. 2. Ed. Lisboa: Fundação Calouste Gulbenkian, 2003, p. 419, our translation.

¹² DALLARI, Dalmo de Abreu. **Elementos...** op. cit., p. 122, our translation.

people who inhabit a certain territory (not necessarily the same state), which share similar customs, traditions and aspirations¹³.

It should be noted that “no rule of international law imposes that to each state corresponds one ‘nation’ and one only”¹⁴. In addition “the very idea of ‘nation’ is, moreover, a fiction for numerous new states created upon federations of ethnicities by the colonizers”¹⁵. Thus, one begins to perceive how problematic is the supposed correspondence between state and nation. That came to be challenged by the recognition, in the post-Second War, of a right of self-determination of the peoples, allowing the political independence of several nations imprisoned by the colonial powers¹⁶.

The formation of the modern state, coupled with the emergence of the ideal of nation, created a new form of political organization crystallized with the Peace of Westphalia, the so-called nation-state. As asserted by Siciliano, “the nation-state is not a natural form of political and social organization, nor the best form possible, but only the one that better adapted to the social and political values in force after the end of the religious domain”¹⁷.

For Lefort, the formation of the nation is related to the idea of sovereignty, considering that if the territory of a nation was not delimited, for allowing the exercise of a sovereign authority, it would be the case to talk about ethnicities, that is, simply distinguishing the groups of the population which share origins, similar customs or language¹⁸. Therefore, it is necessary to analyze the state sovereignty and its consequences for nationality.

1.1.2. State sovereignty and the principle of nationality

Another element that composes the historical construction of the nation-state is the sovereign power, sovereign equality between states, or simply *sovereignty*. The first to develop the concept was Jean Bodin, in the work “Les Six Livres de La Republique” (1576). For him, “sovereignty is the absolute and perpetual power of a Republic”¹⁹. By absolute, Bodin understands that the only limitations to the sovereign power of the ruler would be the

¹³ See RENAN, Ernest. **Qu'est-ce qu'une nation?: et autres essais politiques**. Presses pocket, 1992.

¹⁴ DINH, Nguyen Quoc; DAILLIER, Patrick; PELLET, Alain. **Direito....**, op. cit., p. 420, our translation.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ SICILIANO, André Luiz. O Papel da Universalização dos Direitos Humanos e da Migração na Formação da Nova Governança Global. **SUR. Revista Internacional de Direitos Humanos**, São Paulo, v. 9, n. 16, jun. 2012, p. 1.

¹⁸ LEFORT, Claude. Nação e soberania. In: NOVAES, Adauto. **A crise do Estado-nação**. Rio de Janeiro: Civilização Brasileira, 2003, p. 34.

¹⁹ BODIN, Jean. **Os seis livros da República**: livro primeiro. 1. ed. São Paulo: Ícone, 2011, p. 267, our translation.

divine and natural laws. Rousseau confronted this view that legitimized absolutism in his work “The Social Contract” (1762), bringing the idea that the entitlement of the sovereign power belonged not to the ruler, but to the people²⁰.

Therefore, sovereignty “is the supreme power, *summa potestas*, of declaring the law in a determined territory. The expression *summa potestas* designates supremacy in the sense that the state does not recognize any power that is superior to it”²¹. This way, sovereignty would be the engine that defines and guides international relations. The assumption behind the idea of sovereignty is that only one state has jurisdiction over a given territorial space, and thus all terrestrial spaces, with exceptions as the Antarctica and the oceans, are under the tutelage of a sovereign political entity.

Moreover, state sovereignty includes the power to decide who does and who does not belong to the nation, that is, to attribute nationality, and in case of the non-nationals, to define who can enter, remain or must leave the territory. It is worth mentioning, however, that this logic of men being “confined to the piece of territory from which they are seen as fruits”²² does not seem to be in line with the many political, economic, social and cultural changes that have occurred in the last three decades, as will be demonstrated along this work. In any case, “the monopoly on the legitimacy of mobility is considered one of the foundations of sovereignty”²³ and “the autonomy of the State in the field of migration is one of the main characteristics of traditional international law”²⁴.

Given the studied notions of state, nation and sovereignty, it is important to look now to the historical attempt to make the state coincide with the nations, or what became known as the principle of nationalities²⁵. The greatest moment of institutionalization of nationalities, following their connection with the sovereign state, was soon after the First World War, when with the fall of the great multinational empires in Europe (Austro-Hungarian, Russian and Ottoman), occurs a fragmentation. The consequence is the creation of new states, in an attempt to identify them with the ethnic formations present in the territory. But the idea of

²⁰ DALLARI, Dalmo de Abreu. **Elementos de teoria geral do Estado**, op. cit., p. 24, our translation.

²¹ AMARAL JÚNIOR, Alberto do. **Curso de Direito...** op. cit., p. 31, our translation.

²² SICILIANO, André Luiz. O Papel da Universalização dos Direitos.... op. cit., p. 116.

²³ REIS, Rossana Rocha. Soberania, direitos humanos e migrações internacionais. **Revista Brasileira de Ciências Sociais**, São Paulo, v. 19, n. 55, 2004, our translation.

²⁴ Ibid, our translation.

²⁵ According to Dinh, Daillier and Pellet, the principle of nationalities means that “all individuals belonging to the same nation have the right - but not the obligation - to live within a State, which is their own. The state then coincides with a nation and is a ‘national state’. Not being admitted as a general principle by international law, the principle of nationalities dominated various conventional regimes of the nineteenth and twentieth centuries [...] we find it exacerbated in some contemporary conflicts (ex-Yugoslavia, former USSR)”. DINH, Nguyen Quoc; DAILLIER, Patrick; PELLET, Alain. **Direito...**, op. cit., p. 421.

identifying states with the nations, contained in the Wilson's Fourteen Points, reveals problematic, since none of the newly created states were homogeneous in terms of nationality. It turns out that some majoritarian nationalities were chosen to govern, "winning" the internal struggle for power, what created tensions in relation to the national minorities, who were not represented or started to suffer persecution.

In her criticism to the peace treaties of the First World War, Hannah Arendt explains:

The treaties united several peoples in one state, granted to some the status of "state peoples" and entrusted them with the government [...] And, with equal arbitrariness, created with the peoples that left a third group of nationalities called minorities, adding to the many burdens of the new states, the problem of observing special regulations, imposed from outside, on part of its population. As a result, non-state-affiliated peoples, whether "national minorities" or "nationalities", regarded the Treaties as an arbitrary game that gave power to some, putting others into bondage.²⁶

For Hobsbawm, it was evident that "the complete impracticability of the Wilsonian principle of making state borders coincide with the borders of nationality and language [...] has simply not worked"²⁷. Trying to equalize the issue were signed the League of the Nations Minority Treaties, intended to protect national minorities in the post First War. However, in the successor states of the empires, from the more than 100 million inhabitants, 30 per cent were part of these national "exceptions"²⁸. According to Arendt,

the worst aspect of this situation was not the fact that it became natural for 'nationalities' to be disloyal to the government imposed on them, and to governments oppress their nationalities in the most efficient way possible, but that the nationally frustrated population²⁹.

As for these minorities enclosed in the new states, which were supposed to represent the nations, Hobsbawm says that "given the real distribution of peoples, most of the states newly created over the ruins of the old empires, were as multinational as the "prisons of nations" that they replaced³⁰.

Thus, it is evident that the tension related to nationalities intensifies in the period between the Wars. The difficulty of the rulers of the time to create states based on a few nationalities, at the expense of others classified as "minorities", is at the root of the unrest

²⁶ ARENDT, Hannah. **As origens do totalitarismo**. Trad. Roberto Raposo. São Paulo: Companhia das Letras, 2012, p. 373-374, our translation.

²⁷ HOBBSAWM, Eric. **Nações...** op. cit., p. 185, our translation.

²⁸ ARENDT, Hannah. **As origens...** op. cit., p. 374, our translation.

²⁹ Ibid., p. 375, our translation.

³⁰ HOBBSAWM, Eric. **Nações...** op. cit., p. 185.

that led to World War II. For Arendt, “the representatives of the great nations knew too well that minorities in a nation-state should sooner or later be assimilated or liquidated”³¹.

As Ernest Gellner has shown, the nationalist sentiment is a powerful force, a “political principle which holds that national unity and political unity must correspond to one another”, although “a territorial political unity can only become ethnically homogeneous when it kills, expels or assimilates all non-nationals”³².

The Nazi persecution of Jews and other minorities, the most terrible of the human endeavors, based on extreme nationalism, was a very serious warning against any attempt of further national homogenization. This horrifying experience, which had profound impacts on law, politics and international relations, laying the foundations for the emergence of a new world order, based on the rescue of the fundamental value of the human rights, with the dignity of the human person as the central element³³.

However, the basic structure of the nation-state remained almost untouched, and the international law which emerges from the Charter of the United Nations (1945) relies on those states, as well as on the principle of sovereign equality between them. Indeed, political scientists “assumed that the nation-state was the ideal reference unit in the international system, but did not question why the system was international. Even history has become the history of nations and not of men”³⁴.

In the current stand of the nation-state, boundaries delimit legal nationalities. Inside are those who pertain. If they do not belong, they are temporary, or need to find a path for belonging, fulfilling every and each bureaucratic step. The outsiders would be “aliens”³⁵, that is, belonging to another political community³⁶. If on the one hand, it makes sense that administrative divisions exist, so that governance becomes possible, on the other, this sharp division between *in* or *out*, *belongs* or *does not belong*, can lead to the exclusion of those whose membership is complex or formally inexistent.

The movement of migrants, in this context, is guided by the compartmentalized transfer, from one jurisdiction to another³⁷. For each change of territorial space, the individual must require a permission, fulfilling criteria formulated by the authorities who govern

³¹ ARENDT, Hannah. **As origens...** op. cit., p. 376, our translation.

³² GELLNER, Ernest. **Nações e nacionalismo**. Lisboa: Grávida, 1993, p. 13, our translation.

³³ LAFER, Celso. **A reconstrução dos direitos humanos: um diálogo com o pensamento de Hannah Arendt**. São Paulo: Companhia das Letras, 1988, p. 147, our translation.

³⁴ SICILIANO, André Luiz. O Papel da Universalização dos Direitos.... op. cit., p. 5, our translation.

³⁵ Term normally used in the USA to refer to foreigners.

³⁶ LISOWSKI, Telma Rocha. A Apatridia e o “Direito a ter Direitos”: Um Estudo sobre o Histórico e o Estatuto Jurídico dos Apátridas. **Revista Jurídica da Procuradoria do Estado do Paraná**, Curitiba, v. 3, p. 109-134, 2012.

³⁷ SICILIANO, André Luiz. O Papel da Universalização dos Direitos.... op. cit., p. 119.

another territorial space, in a scheme that was naturalized, but it was actually built recently in history, as seen above.

In any case, nowadays the individual is subject not only to national laws, but to universal rights that overlaps the sovereignty of the state. And the state can be denounced for the violation of those rights before international tribunals³⁸, whose decisions are binding, what calls into question the maintenance of the sovereignty as it was designed, centuries ago. Thus, it remains actual and extremely important to reflect on the elementary unity of the international system called nation-state, questioning its position as a centralized model of power, and determined to ultimately decide the fate of its inhabitants, being them nationals, migrants, refugees or stateless persons.

1.1.3. Conceptions and definition of nationality

After understanding the roots of the nation-state, the principle of nationalities, and the attempt of identifying the different nationalities with the modern state, it is worth studying briefly the definition and by which conceptions the notion of nationality is explained.

Two conceptions of nationality are mentioned by the doctrine. The objective theory, which understands nationality taking into account external facts such as language, ethnicity and cultural similarity among people³⁹; and the subjective theory, being the one that considers the psychological aspect, a personal sense of belonging or a “national conscience”, meaning a certain will of being part of a particular collectivity.⁴⁰ These two views refer to nationality in its sociological aspect, which gave birth to nationality as legal membership⁴¹.

Nationality is a matter of public law, being generally studied by international public law⁴². Some authors, in Brazil notably Professor Jacob Dolinger, include the topic in the program of international private law. He argues that nationality laws of one state can affect another, in the case of a person who has more than one nationality, or if a state wishes to recur to diplomatic protection, when it will be necessary to determine the person’s applicable nationality⁴³. We affiliate to the view that nationality, being the relation between the

³⁸ We mean here the regional human rights tribunals, such as the Interamerican Court of Human Rights.

³⁹ LAFER, Celso. **A reconstrução...** op. cit., p. 137, our translation.

⁴⁰ Ibid.

⁴¹ The latter is the aspect which interests us more in this first chapter, granted that the socio-political belonging will be explored when we analyze the concept of citizenship in the third chapter.

⁴² Cf. AUDIT, Bernard. **Droit international privé**. Paris: Ed. Economica, 1991, pp. 709-786, our translation.

⁴³ DOLINGER, Jacob. **Direito internacional privado**. 11. Ed. Rio de Janeiro: Forense, 2014, p. 42.

particular and the state, is more appropriately treated on the domain of international public law, in its international dimension⁴⁴, and in constitutional law, in its domestic perspective⁴⁵.

From the legal perspective, the most widely adopted definition of nationality is the one which considers it as “the legal and political bond between a population and a state”⁴⁶. The term population here can be replaced by “individual”, when referring to the legal bond of a particular person with a state. What characterizes this “special” relation of the person with a state is her status in relation to that state, since being a national of a state means for all effects not being a “foreigner”, that is, someone who is not considered to be a member of the political community in question, and as such is subject to a different national legal order.

From the point the view of the state, to have nationals is to exercise its “personal competence” over a certain group of people⁴⁷. At the same time, from the individual’s perspective, to be a national is a right referring to the recognition by the state, of the legal tie this person has with that state⁴⁸. It is based in this bond supposedly continuous and relatively stable, which some individuals have with one (or more) states, that distinction is made in relation to the “non-national”, “alien”⁴⁹ or “foreigner”, whose presence on the territory is ought to be authorized by the state in question.

This tie individual-state called nationality must be effective, at least if the state wants to exercise diplomatic protection of its national. The International Court of Justice stated, in the *Nottebohm* case, that “nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments”⁵⁰. The so called “social fact of attachment” is represented by a set of facts able to compose the “*genuine link*” for the purposes of nationality attribution. Among them: place of birth, descent, residence, family ties, language and ethnicity”⁵¹, depending on the nationality law of each state.

⁴⁴ The international dimension of nationality is the one which matters and prevail for the purpose of this thesis.

⁴⁵ CARVALHO RAMOS, André de. Pluralidade das fontes e o novo direito internacional privado. **Revista da Faculdade de Direito da Universidade de São Paulo**, São Paulo, v. 109. p. 597-620, jan./dez. 2014.

⁴⁶ LAFER, Celso. **A reconstrução...** op. cit.

⁴⁷ This is the way good part of the doctrine classifies the nationality, being the manifestation of the personal competence of the state, along with its territorial competence. See AMARAL JÚNIOR, Alberto do. **Curso de Direito Internacional Público**. São Paulo: Atlas, 2015.

⁴⁸ Nationality indeed has turned into an individual human right, recognized by the UDHR and other legal diplomas as will be studied in a subsequent topic.

⁴⁹ The term “alien” is commonly used in the English language, especially in the USA, for a person who is not a national of a given country, and comes from the Latin *alienus*, meaning “belonging to another person or place”.

⁵⁰ INTERNATIONAL COURT OF JUSTICE (ICJ). **Nottebohm Case (Liechtenstein v. Guatemala)**, Second Phase, 6 April 1955. Available at: <http://www.refworld.org/cases,ICJ,3ae6b7248.html>. Accessed on: 14 Sep. 2017.

⁵¹ VAN WAAS, Laura. **Nationality Matters: Statelessness under International Law**. School of Human Rights Research Series, v. 29. Tilburg: Intersentia, 2008. p. 32.

So, there is an essential feature of nationality, which is crucial to its international regime, and relevant to the discussion brought by this work: who regulates the nationality of every person in the world is uniquely and exclusively each sovereign state. “Just the state has competence to attribute nationality and each state has such power. This principle is firmly anchored in international practice, as jurisdictional as conventional”⁵².

It is what is called the *reserved domain* of the state, reaffirmed in the case *Tunis and Morocco Nationality Decrees*, judged in 1923 by the Permanent Court of International Justice. In this case, the Court was asked an Advisory Opinion, after Great Britain had complained about French Decrees which would impose French citizenship on British descendent, born in the French Protectorate areas of Tunis and Morocco⁵³. The Council of the League of Nations wanted to know if the object of dispute (the French nationality decrees affecting British nationals), was or was not, under international law, a matter of domestic jurisdiction⁵⁴. The decision of the court was as follows:

The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an *essentially relative question; it depends upon the development of international relations*. Thus, *in the present state of international law*, questions of nationality are, in the opinion of the Court, *in principle* within this reserved domain⁵⁵.

As seen, this decision does not attest that nationality simply *is* in the reserved domain of the states, instead recognizing that, until that moment (1923), it *had been* a matter

⁵² DINH, Nguyen Quoc; DAILLIER, Patrick; PELLET, Alain. *Direito...*, op. cit., p. 505.

⁵³ In the dispute, the British argued that “the power of a State to confer or impose its nationality is inseparably linked to, and exclusively derived from, its sovereignty”, and defended a right for the individuals affected to opt against the imposed French nationality, while the French asserted that “in conflicts between nationality based on *jus sanguinis* and nationality based on *jus soli*, the latter should prevail”, and that “the right of option was not a principle of international law, and the decisive question was, which nationality was the effective nationality”. In the end, both States settled the question by direct negotiations, with the French agreeing with not imposing nationality on British born nationals in Tunis, without giving them the opportunity to decline.

⁵⁴ Covenant of the League of Nations. Article 15. “If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof. (8) If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement”. LEAGUE OF NATIONS. **Covenant of the League of Nations**. Including Amendments adopted to December, 1924. Available at: http://avalon.law.yale.edu/20th_century/leagcov.asp Accessed on: 02 May 2017.

⁵⁵ PERMANENT COURT OF INTERNATIONAL JUSTICE (PCIJ). **Advisory Opinion n. 4**. Second Extraordinary Session, 7 February 1923. Available at: http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_B/B_04/Decrets_de_nationalite_promulgues_en_Tunisie_et_au_Maroc_Avis_consultatif_1.pdf Accessed on: 02 May 2017, emphasis added.

regulated only by domestic jurisdiction, in any case, within the limits of state's obligations to other states according to international law⁵⁶

The fact is that even if nationality attribution remained until now relatively untouched by international law, which protected state sovereignty, “the possibility was never ruled out that nationality matters could be subject of international law, if states so decided”⁵⁷. Indeed, as will be seen along this thesis, international law has been more and more effective in regulating different aspects of nationality. As summarizes Grossman, there is “a modern shift in the nature and function of nationality from source of obligations towards source of rights”⁵⁸.

In any case, nationality as part of international law, is still attached to the consent based method, which is the normative basis of international law in a relatively unquestioned scenario so far⁵⁹. According to Van Waas, “without the all-important ‘consent to the bond’, a state cannot be compelled to accept new obligations under international law”⁶⁰. Which means that any international legal change in relation to the subject is made by the states or with their participation, through conventional law or customary law. Exception is made to the evolving *jus cogens* norms, which have been transforming international law, exactly because international tribunals (such as the International Court of Justice) are interpreting, contrasting with the traditional view, that there are some principles and values which do not depend necessarily on the consent of the states⁶¹.

However, important changes have been occurring in the domain of nationality internationally. The flourishing international human rights law is one of the main driving forces affecting the theme. Moreover, in face of the globalization, transnationalism, international human mobility and regionalization of citizenship, as well as the compelling fight against statelessness, states are being pressured to reconsider their nationality rules and practices.

⁵⁶ According to the decision mentioned, “it is enough to observe that it may well happen that in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law”. Ibid.

⁵⁷ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 36.

⁵⁸ GROSSMAN, Andrew. Nationality and the Unrecognised State. **International & Comparative Law Quarterly**, v. 50, n. 4, 2001, p. 850.

⁵⁹ After the Second World War, with the creation of the United Nations and the adoption of a series of treaties on human rights, the international case-law started to talk about an international law which brings obligations to the States towards *the international community as a whole* (ICJ Barcelona Traction, 1970), that is, in certain cases beyond the bilateral relations of the states concerned.

⁶⁰ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 36.

⁶¹ For a brief analysis of *jus cogens* and its importance for this work, see the section

The way nationality has been affected by the developments and changes in international law and politics will be object of analyses in the third chapter of this work.

1.1.4. Nationality and citizenship

Nationality and citizenship are terms which may refer to different aspects of the relation individual-state, but can also be used as synonyms. Indeed, establishing the distinction between the terms nationality and citizenship is a complex task. The traditional view is the one synthesized by Paul Weis:

The terms “nationality” and “citizenship” emphasize two different aspects of the same notion: State membership. “Nationality stresses the international, “citizenship” the national, municipal aspect. Under the laws of most States citizenship connotes full membership, including the possession of political rights⁶².

That is how the subject is normally treated in Brazil. Professor Dolinger argues that while nationality refers to the bond individual-state, citizenship encompasses an additional content, regarding the exercise of political rights, such as to vote and be voted, provided constitutionally. Indeed, the Brazilian Federal Constitution of 1988 distinguishes nationality, treated in Chapter III, where it is defined who is “Brazilian” (Art. 12), from citizenship, which is considered a fundament of the Republic (Art. 1º, II), as well as identified with the political rights (chapter IV)⁶³. Moreover, just who are in the full enjoyment of the political rights (the “citizen”) is legitimate to file a lawsuit known as “popular action” (Art. 5º, LXXIII), to propose complementary and ordinary laws (art. 61) and to denounce irregularities to the Court of Accounts (Art. 74, § 2º)⁶⁴.

Therefore, in Brazil it is necessary to be a national to become a citizen, but it is also possible to be a national, without being a citizen. That is the case of who did not achieve the age of majority, the interdicted or civil incapable, and others who cannot exercise political rights⁶⁵. Finally, it is worth mentioning that there are other uses for the word citizenship, not necessarily in the legal context, and as such, not directly related to nationality or international law⁶⁶.

⁶² WEIS, Paul. **Nationality and statelessness in international law**_Alphen aan den Rijn: Sijthoff & Noordhoff, 1979, p. 4-5.

⁶³ BRASIL. **Constituição** (1988). Constituição da República Federativa do Brasil. Brasília, DF: Senado, 1988.

⁶⁴ BRASIL. **Constituição** (1988). As explained by DOLINGER, Jacob. **Direito internacional privado...** op. cit., p. 46 (our translation).

⁶⁵ LAFER, Celso. **A reconstrução...** op. cit., p. 135.

⁶⁶ In Brazil, that use is common when one refers to effective political participation, that is, the civic struggle for a better society through active interest, engagement or contribution to the *polis* or the country.

In the opinion of Rainer Baubock, “nationality” is used to refer to the legal status of citizenship in international law, comprehending both authoritarian and democratic regimes, while there would be a use of the term “citizenship” referring specifically to the condition of members of democratic states, since they have guaranteed access to rights and participation⁶⁷.

Nevertheless, in the context of the more recent international law studies, it is clear how most scholars choose to use the two terms interchangeably, since “making such a clear distinction is not always necessary or helpful”⁶⁸. In fact, as explained by Professor Celso Lafer,

the texts of contemporary international public law, in the area of human rights, tend to assimilate the nationality to the citizenship. They invoke the term citizenship to characterize who is member of the State and owe it loyalty in virtue of his nationality, in contrast to other individuals who do not have the same legal relation⁶⁹.

Therefore, having explored the difference between the two terms, and aware that they can (and are) used as synonyms in the context of international law, we subscribe to this approach and advert that the terms “nationality” and “citizenship” may be used interchangeably during this work, except when we are going to look at the specificities of the citizenship studies from a more political perspective, in the second part of the third chapter. Otherwise, if the difference of meaning between the terms becomes relevant, it will be indicated.

1.2. Nationality attribution and its absence

1.2.1. Criteria for nationality attribution by states

Nationality, as seen, was forged historically, and is far from being a merely legal institute. However, from the legal perspective, the question is how nationality is distributed, that is, under which conditions it is decided by the states who belong to determined political society and who is an “outsider”⁷⁰. The question is not new, as

⁶⁷ BAUBOCK, Rainer. Stakeholder Citizenship: An Idea Whose Time Has Come? In: Bertelsmann Stiftung, European Policy Centre, Migration Policy Institute (eds.) **Delivering Citizenship**. The Transatlantic Council on Migration, Verlag Bertelsmann Stiftung, Gütersloh, 2008, p. 31-48.

⁶⁸ EDWARDS, Alice. The meaning of nationality. In: EDWARDS, Alice; VAN WAAS, Laura. **Nationality and Statelessness under International law**. Cambridge: Cambridge University Press, 2014, p. 11-43.

⁶⁹ LAFER, Celso. **A reconstrução...** op. cit., p. 135, our translation.

⁷⁰ It is worth mentioning the discussion there is about the nationality of societies (e.g. enterprises) and things (such as ships). Even though some authors study this issue as “nationality” of the legal person, we affiliate to the line of thought which believes legal entities do not have nationality from the perspective of the international

This problem of defining who is “us” and who is “them” has been challenging societies throughout the ages, from determining who were citizens of the polis in Ancient Greece to deciding who are nationals of the modern nation-state⁷¹.

That is an important question for the purpose of this work, because it takes to the reflection on the place which is assigned to each human person in the world, and eventually, the space where each one is allowed to be and stay. Collective identities are also defined to some extent by which nationality will be attributed to whom. In other words, in today’s world each one lives in one place territorially demarcated, a place where in the Westphalian order will always be the territory of a national state⁷². In this sense, before considering the criteria states follow to determine nationality, it is important to realize that those criteria, instead of being take for granted, were built in historical basis, by specific interests related to propriety, inheritance and territorial security.

No doubt, the most important timeframe related to nationality is the birth of a child, considering it “entails the arrival of a new human life which must be given its place in the global political system”⁷³. The importance of birth for nationality takes us to the fundamental question that ordinary nationality is given as a rule by birthright, according with two main principles: *jus soli*, meaning nationality attributed by place of birth (territory), and *jus sanguinis*, which means nationality given by blood (parentage).

Jus soli doctrine comes from feudal times, when attachment to the land was of highest importance. Countries of the “new world”, which received many immigrants since the beginning of their colonization, but also after their independence, adopted *jus soli* considering the people who chose the country to settle as potential citizens. Thus, giving them nationality was a way of increase their sense of membership, and their children would be nationals of the host state automatically⁷⁴, in a peopling strategy which helped to build demographically some nations of the new world.

When a person is born and grows up in a determined territory, normally her tie with the immediate surrounding is built gradually and by force of the facts, considering her physical presence and the necessary familiar and social relations she establishes therein.

law, considering their bond with one state or another is of administrative character, far from the social and cultural human relation to the state, known traditionally as nationality. In this respect, see: RESEK, José Francisco. **Direito internacional público**: curso elementar. 13. ed., São Paulo: Saraiva, 2011.

⁷¹ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 31.

⁷² This rule is not absolute if one considers territories which are not subject to States’ jurisdiction, as the Antarctic continent.

⁷³ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 32.

⁷⁴ Ibid.

Nationality by born in the territory of the country was the way millions of immigrants from Europe and Japan, spreading around the world and settling in other territories, built their home and raised their children, in new places where they sons and daughters became full citizens. Those “second generation migrants” were then “locals” since they were born, and by consequence, have no nationality issues to solve. One can even say this “second generation” terminology does not apply, considering those people are, from the beginning, nationals of a state which for them is not new, being in reality “their own country”⁷⁵. So, from the legal perspective, they are simply citizens of the place where they were born⁷⁶, even if from the cultural perspective, their language, customs and traditions will be, in most cases, deeply influenced by the nationality of origin of their family.

The *jus sanguinis* principle is instead based on parentage, that is, familiar national origin. It would be the nationality given by “blood”, and thus depending on the nationality of the parents. It has its origins in the ancient Greece and it was largely adopted by the European countries ever since⁷⁷. It is said to be used preferably by the countries of a predominant emigration character, comprising most part of European, Asian and Arab nations, “as a way of retaining the allegiance of populations that have moved abroad”⁷⁸. With this criteria in place, it does not matter where the individual is born, but instead which nationality his parents already have.

That can create situations in which the child is born in a different state of their immigrant parents, and even growing in the host country, she will not have its nationality, what can provoke cultural identity issues, as well as diminished access to rights. According to Peter Spiro,

⁷⁵ Clearly, from the cultural perspective, their language, customs and traditions will be, in many cases, heavily influenced by the nationality of origin of their parents.

⁷⁶ There has been debates about the *jus soli* birthright citizenship, mainly in the USA, which adopts this principle as a rule by force of the 14th Amendment to US Constitution (approved in 1868). The debate is about foreign women who come to the country to give birth to a child with the objective of making the baby receive automatic U.S citizenship, what eventually could also help them with their migratory status or avoiding deportation. The pejorative term “anchor-babies” was even used by Republican politicians in the last presidential campaign, referring to what has been called “birth tourism”, that is, when foreign nationals visit the country with the intention of giving birth there. Cf. BRAIT, Ellen. 'Anchor babies': how the controversial term became an election talking point. **The Guardian**, New York, 21 Aug. 2015. Available at: <https://www.theguardian.com/us-news/2015/aug/21/anchor-babies-2016-election-immigration>. Accessed on: 29 Jun 2017. Reportedly, there has been mothers in Brazil adopting this practice and even paying for specific medical care in the US with this objective. Cf. FELLETT, João. Por filho americano, brasileiras viajam a Miami para dar à luz. **BBC Brasil**, Washington DC, 8 Sept. 2015. Available at: http://www.bbc.com/portuguese/noticias/2015/09/150907_bebes_americanos_jf_ik Accessed on: 29 Jun 2017. Although controversial, this is just one of the questions which permeate the specificities domestic nationality laws, as the complexity of globalization and increased human mobility are putting pressure on the role of Westphalian nation-state in this domain.

⁷⁷ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 33.

⁷⁸ Ibid.

although *jus sanguinis* remain an acceptable basis for qualifying birthright citizenship, major human rights NGOs [Open Society Justice Initiative mentioned], as well as political theorists [mention to Rainer Baubock], have highlighted the inherently discriminatory aspects of citizenship regimes based wholly on *jus sanguinis*⁷⁹.

Thus, the pure *jus sanguinis* principle can lead to considerable distortions. That is the reason why in most countries it is adopted a combination of the two criteria, *jus sanguinis* and *jus soli*, what helps to avoid the flaws of both principles⁸⁰.

Ayelet Shachar, in an eloquent book titled “The birthright lottery”, criticize both criteria, arguing that the unchallenged regime of allocating citizenship through a system of birthright nationality attribution (by territory of birth, or parentage), is comparable to the inherited propriety transmission, which perpetuates inequalities. In her opinion, since there is no choice of where one is born, nor to which parents, the acquisition of citizenship ends up being regulated by the “accident of birth”⁸¹. For instance, the political membership of a person, determined by the citizenship of a very poor state, will determine the individual’s life chances and opportunities, which will be radically different from someone who happened to have by birth the citizenship of a prosperous country⁸².

Finally, another way of acquiring nationality, though in a later stage of life, is by derivative nationality, based on *jus domicilii*, which is represented by the institute of naturalization. It “recognizes the bond that an individual develops with a state after a significant period of habitual or permanent residence”⁸³. The reason this legal solution was created is to make justice towards the people who choose another state to live in, and by remaining, working and contributing to the local society, demand the recognition of their full membership, passing from the situation of migrant to become a citizen of the host State. Substantial links to the state are generally required by domestic law, varying greatly among states, with a certain period of residence the most common requirement, but in effect, “there is no rule on international law restricting the qualifying conditions for naturalization as long as the

⁷⁹ SPIRO, Peter. Citizenship, nationality, and statelessness. In: CHETAIL, Vincent. **Research Handbook on International Law and Migration**. Cheltenham: Edward Elgar, 2014, p. 281-302.

⁸⁰ Which is exactly the case of Brazil. Cf. Art. 12, I. BRASIL. **Constituição** (1988)... op. cit.

⁸¹ SHACHAR, Ayelet. **The birthright lottery: citizenship and global inequality**. Cambridge: Harvard University Press, 2009, p. 30.

⁸² The criticism towards the “intergenerational transfers of wealth and power, as well as security and opportunity, which are currently maintained under the seal of the birthright regime of membership allocation”⁸² seems relevant, and as such it will be better explored in the third chapter. SHACHAR, Ayelet. **The birthright lottery...** op. cit.

⁸³ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 33.

naturalization is based on a voluntary act made with the objective of acquiring the nationality of the State concerned”⁸⁴.

There are also other ways of changing or acquiring nationality, as by being adopted by, or marrying a national of, a third country. In this case, the *raison d'être* relates basically to familiar ties which prevail, in order not to separate spouses, nor children from their parents. If in the past, a family unity preoccupation guided the adoption of laws which made the wife's nationality follow that of the husband, the sex equality principle has long superseded this idea, considering the vigorous battle of women for emancipation during the second half of XX century. However, although nowadays “the principle of sex equality governs the provisions concerning the nationality of married women in most modern enactments”⁸⁵, persist in some countries differences on women's right to acquire and pass nationality to their children⁸⁶.

1.2.2. Loss, deprivation or renunciation of nationality

A person can renounce to her nationality. Renunciation entails the loss of nationality motivated by a voluntary act by the individual towards the state in question⁸⁷. This is often related to the acquisition of another nationality, since some countries do not allow double nationality. But there can be other motivations, such as an objection of conscience of someone who do not want to carry the nationality of his country of origin⁸⁸. The problem is when the person becomes statelessness with this act, reason why some legislations do not authorize the renounce when this is the case.

In respect of loss and deprivation of nationality, even if the difference between them is not clearly established, both refer to the “withdrawal of nationality in circumstances other than at the request of the individual himself”⁸⁹. It seems that an adequate way of treating them differently is considering “loss of nationality” as a way of automatic withdrawal (*ex lege*), while “deprivation of nationality” would be caused by an action of the state⁹⁰. Clearly,

⁸⁴ WEIS, Paul. **Nationality...** op. cit., p. 100.

⁸⁵ WEIS, Paul. **Nationality...** op. cit., p. 97.

⁸⁶ See in this respect the topic in this thesis about gender-based discrimination, which can lead to statelessness.

⁸⁷ WEIS, Paul. **Nationality...** op. cit., p. 116.

⁸⁸ See the case of Mr. Garry Davis, which renounced his American citizenship after serving for the country in the war, in the second chapter, item “Loss, withdraw and renunciation of nationality”.

⁸⁹ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 34.

⁹⁰ Ibid.

the loss or deprivation of nationality can both lead to statelessness, hence it is a cause of statelessness to be explored carefully in the appropriate chapter⁹¹.

But who can deprive someone from his nationality? Logically, the same only entity who can grant nationality, that is, the state, since this authority composes an essential element of sovereignty, which only states have. According to Weis, deprivation of nationality was in the nineteenth century commonly used as a penal sanction, following the conviction for certain crimes, but later other grounds for denationalization were also created, such as: entry into foreign civil or military service; departure or sojourn abroad; undesirable political attitude; and racial or religious grounds⁹². Clearly, the last two causes are arbitrary ways of banning people whose presence is considered dangerous or undesirable. As known, mass denationalization of German Jews took place as part of the abominable Nazi project, being part of a broader dehumanizing policy, which first denied citizenship rights, for later turn them into non-citizens (legally not part of the society), to be taken to concentration camps.

To conclude, as seen, the absolute freedom of the States to decide who is national or not, connected to sovereignty, has been a cornerstone of the Westphalian system created on the seventeenth century. It is worth mentioning though, that the link between the monarch and his vassals, as the fundament of authority in a time when his figure confused with the State itself, changed consistently with the born of democracy. At this point, the link between the State and its citizens became much more impersonal, and as the sovereign power is said to “emanate from the people”⁹³, all that discretion about nationality attribution criteria has been object of increasing public debate.

Although nationality is usually provided by the respective Constitution of the State concerned, as a matter of reserved domain, international law is advancing on the basis of universal standards, which confer for individual, rights irrespectively of their personal condition, including the right to a nationality itself. The extension and effectiveness of such a right today, including the paradox of persisting cases of statelessness, will be subject of analysis along this thesis.

⁹¹ See section 2.3, on the causes of statelessness.

⁹² WEIS, Paul. **Nationality...** op. cit., p. 117-18.

⁹³ As stated, for instance, in BRASIL. **Constituição** (1988)... op. cit., article 1, single par.

1.2.3. Dual or multiple nationality

Nationality attribution by the states can be overlapped when the person is entitled of acquiring nationality of more than one state, or can fall in a vacuum when by some reason no nationality is attributed at all.

Before entering in the second case, amounting to statelessness, it is important to realize that the individual might have more than one nationality. That can happen for many reasons, such as someone who has recognized his original *jus sanguinis* citizenship, having already a *jus soli* nationality⁹⁴; by naturalizing in a third country, when the new nationality is added to the former, if the states in question allow the maintenance of both nationalities; or by the fact that in many legislations the spouse acquires the nationality of the partner, being allowed to maintain his/her original one⁹⁵. Actually, there is an indefinitely number of situations able to lead to multiple nationality, since it can happen uncoordinatedly, by the operation of different national laws, even without the person concerned control.

The use of “conflict of laws” in the case of multiple nationality is not appropriate, since it is not the kind of legal issue which needs a choice of the applicable law, typical of the international private law. But this classification persists considering that in the past multiple nationality was truly seen as undesirable, giving the indisposition of the states to tolerate it. The main reason was the worries by the states about conflicting military loyalty of its citizen with another state, and that feeling among governments were especially strong after the First World War, with the many changes of nationalities occurred due to state succession and peace treaties.

This view is represented by the preamble of the 1930 The Hague Convention on Certain Questions Relating to the Conflict of Nationality Law, the only universal treaty dealing with multiple nationality, which recognizes an “ideal towards [...] the abolition of all cases both of statelessness and of double nationality”⁹⁶. However, the treaty does little to avoid

⁹⁴ This is the case of millions of Brazilians descents of Italians who immigrated to Brazil, especially in the end of XIX and beginning of the XX century. Since *jus sanguinis* is applied in the European country as a rule, and no limitation of generations is imposed, many Brazilians search for their ancestor’s personal documents to reconstruct their family tree, with the objective of asking the Italian consulates in the country to formally recognize their Italian birthright citizenship. The Brazilian Constitution authorizes the maintenance of Brazilian nationality in the case of recognition of foreign original nationality, by force of Art. 12, § 4º, II, “a”. BRASIL. **Constituição** (1988)... op. cit.

⁹⁵ DINH, Nguyen Quoc; DAILLIER, Patrick; PELLET, Alain. **Direito...**, op. cit., p. 507.

⁹⁶ LEAGUE OF NATIONS. Convention on Certain Questions Relating to the Conflict of Nationality Law. LEAGUE OF NATIONS, **Treaty Series**, v. 179, n. 4137, p. 89, 13 April 1930. Available at: <http://www.refworld.org/docid/3ae6b3b00.html>. Accessed on: 4 Aug. 2017.

multiple nationality, being more focused on establishing how states should deal with multiple nationals, as well as trying to prevent statelessness⁹⁷.

A case sometimes mentioned as regarding multiple nationality is the case *Liechtenstein v. Guatemala* (ICJ, 1955), known as Nottebohm case. In this dispute, the naturalization of Mr. Nottebohm in Liechtenstein, with the aim of receiving diplomatic protection by this state in opposition to Guatemala, was considered ineffective. According to Alfred Boll, this case is mistakenly confused as being about multiple nationality, considering the ICJ proposed a test of “effective nationality” to sustain the validity of the bond individual-state, commonly used ever since, but Mr. Nottebohm in fact lost his German nationality with the naturalization in Liechtenstein. Rather, the case involved the right of a state not to recognize another state’s attribution of nationality, excluding the second from the possibility of exercising diplomatic protection⁹⁸. That means the Court does not put in question the criteria by which Liechtenstein naturalized Mr. Nottebohm, and thus his new nationality itself, but just finds that, considering his lack of “genuine link” with Liechtenstein, this new nationality could not be invoked for the exercise of diplomatic protection by the country⁹⁹.

Therefore, authorized authors defend that the effective link test cannot be generalized as necessary *tout court* for every nationality issue¹⁰⁰, since

if effective nationality on the international plane means that an individual is more closely connected to one state than to any other, what about a world in which individuals increasingly have legal ties to more than one state, such legal status being built into national legislation and policy?¹⁰¹

The decision in the Nottebohm case did not affect the discretion of the states to confer nationality, provided this discretion does not affect the interests of other states. In other words, the “genuine link” test was built to avoid interstate conflicts, not to worry about the rights of the individual.

⁹⁷ According to Alfred Boll, “The Convention attempts to prevent the occurrence of multiple nationality only in relation to married women, in a clearly discriminatory fashion (articles 8–11)”, but its value is reduced by the low number of ratifications (22 to date), and general tolerance with multiple nationality ever since. Moreover, three years later the Conference of American States adopted the Convention of the Nationality of Women, “the first treaty to prohibit all sex-based discrimination regarding nationality”. BOLL, Alfred M. **Multiple nationality and international law**. Leiden/Boston: Martinus Nijhoff, 2007, p. 195.

⁹⁸ BOLL, Alfred M. **Multiple...** op. cit.

⁹⁹ Boll criticizes the decision, bringing conclusions of dissenting judges, affirming that “applying a test of effective nationality to naturalized persons only, belies the fact that even native-born nationals may have no ‘effective link’ to their state of nationality [and] questioning the lack of an effective link on the basis of naturalization would distinguish naturalized persons from other nationals in a way that is hardly justifiable”. BOLL, Alfred M. **Multiple...** op. cit., p. 195.

¹⁰⁰ Cf. WEIS, Paul. **Nationality...** op. cit., p. 421.

¹⁰¹ BOLL, Alfred M. **Multiple...** op. cit., p. 111.

In any case, some states until today do not allow their citizens to have simultaneously the nationality of another country, such as Austria and Azerbaijan. But even though nothing can be done against a state, that chooses not to allow a citizen to maintain his nationality in case of acquiring a second one, “general trend is observed indicating increasing acceptance of multiple nationality in national legislation, policies, and treaty obligations. The development of national and international human rights norms and law has also influenced this area of the law”¹⁰².

Spiro goes further in defending that, if once double nationality was questioned, “it is now perceived in part as a matter of individual autonomy and identity, and there are signs that, at least in some circumstances, the retention of more than one citizenship will be protected under international law”¹⁰³. A first sign of this trend is the provisions on the matter of the 1997 European Convention on Nationality, which differently from its predecessor (1963), does not condemn multiple nationality, instead recalling the need to find appropriate solutions in regard of the rights and duties of multinationals¹⁰⁴. Moreover, the convention gives a big step by obliging the states to allow multiple nationality in case of children born with this status, and in the case of acquisition of a second nationality by marriage¹⁰⁵.

The increasing tolerance with multiple nationality by states benefit of course the individuals who are in this situation, since they can easily move, study and work in their states of nationality¹⁰⁶. It can also be in the interest of states, both the country of origin, as the one of new nationality. A state which allows its citizens to acquire another citizenship abroad, by maintaining the tie with its own citizen, guarantees that remittances and investment from its emigrated nationals are able to eventually return in an easier fashion. From the perspective of the state of new citizenship, conferring nationality to people who have connections with the country, as well as migrants of long residence, is likely to improve their integration, sense of membership and reward for their economic contribution¹⁰⁷, what has the potential to translate in more development and social justice.

¹⁰² BOLL, Alfred M. **Multiple...** op. cit., p. 195.

¹⁰³ SPIRO, Peter J. *Mandated Membership, Diluted Identity. Citizenship, Globalization, and International Law.* In: BRYSK, Alison; SHAFIR, Gershon. **People out of place: globalization, human rights, and the citizenship.** London: Routledge, 2004, p. 88.

¹⁰⁴ *Ibid.*

¹⁰⁵ COUNCIL OF EUROPE. *European Convention on Nationality.* In: COUNCIL OF EUROPE. **European Treaty Series**, n. 166. Strasbourg, 6 November 1997, Article 14. Available at: <http://www.refworld.org/docid/3ae6b36618.html> Accessed on: 9 Aug. 2017.

¹⁰⁶ In addition, in the case of the European Union, since by force of the Maastricht Treaty (1992) it was created a regional citizenship, the acquisition of citizenship of a state member of the Union means free movement and the possibility to live, study and work in any of the member states part of the Schengen Agreement.

¹⁰⁷ EDWARDS, Alice. **The meaning of nationality...** op. cit.

As seen, multiple nationality plays an important role in the questioning of the sufficiency of nationality attribution rules in our changing world¹⁰⁸. Its recognition and full acceptance constitutes a kind of bridge to the construction of a more open, human rights based approach to nationality, especially in the context of international migrations and increasing of non-nationals' integration needs.

1.2.4. The absence of nationality

When even considering the place of birth and the parentage, a person is unable to acquire the nationality of any state, she would remain uncovered from this basic relation with a state that most people have recognized. In fact, the indefinite variations on different domestic nationality laws lead many people to find themselves in a *Kafkaesque* search for citizenship recognition. This is a fundamental cause of statelessness.

Every person today depends entirely on the states' discretionary norms about nationality to be part of one or another national community, and the criteria as seen above varies among states. The individual alone cannot choose its nationality. Therefore, in face of the complexities of globalization and increased international human mobility, is it recurrent the cases of inadvertent (or deliberate) statelessness¹⁰⁹. That is, individuals cannot have control on the nationality which falls on them, and are susceptible to the combination of different domestic laws applying to their particular case. Apart from the mass denationalizations occurred in the middle of last century, the uncoordinated and unsupervised liberty of states to confer nationality based on their sovereign discretion is a factor of permanent legal insecurity for many people across the globe.

Jus sanguinis nationality attribution is considered more likely to lead to the vacuum of no nationality entitlement. For instance, some countries have been limiting the generations to which nationality is passed, by requiring additional proof of connection with the state of origin if the person emigrates, in order to allow nationality recognition¹¹⁰.

Other states privilege the nationality of the father in detriment of the mother, when conferring nationality to the children by blood, what can lead to statelessness. A study of the

¹⁰⁸ For this reason, the theme will be analyzed critically in the section 3.4.1.

¹⁰⁹ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 36.

¹¹⁰ It is the case of United Kingdom, where "the first generation of children born abroad to a British national still automatically acquire British nationality *jus sanguinis*. However, these individuals are termed 'British citizens by descent' - a status which impacts on their right to pass on their British nationality *jus sanguinis*. The child of a 'British citizen by descent', if born outside the United Kingdom, is not automatically entitled to British nationality". VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 51.

UNHCR reveals that twenty-six states still do not give the possibility of mothers to confer their nationality for their children in equal conditions with the father¹¹¹. The problem is particularly common in countries of the Middle East and North Africa.

Another issue is unequal rights between men and women on the matter. Women are many times impaired when it comes to marriage and divorce rules, sometimes losing their original nationality and not being able to reacquire it when necessary. Govil and Edwards argue that feminization of migration and the growing migratory fluxes have resulted in more mixed marriages, leading to contradicting nationality laws which can produce statelessness among women¹¹².

A third problem related to *jus sanguinis* principle is the possibility of the child inherit statelessness from the parents. This is likely to occur when the parents are stateless themselves, but also when their nationality is unknown or undetermined¹¹³. We can imagine that kind of problem occurring in isolated and poor rural areas, where eventually the parents never had documents. Even if they are nationals of the country, their “de facto” stateless condition can impede their children to attest their citizenship, turning them into “de jure” stateless.

But this kind of “negative conflict” of nationality can also occur in *jus soli* countries, for instance when the delimitation or control over the territory is in question. Other difficulties can derive when children are born in ship or aircrafts, for instance. As a matter of fact, no overall solution to avoid the negative of nationality can be based solely on universal adoption of one of the two existing attribution criteria¹¹⁴. What the 1961 Convention on Reduction of Statelessness did was prescribing to states parties which adopt *jus sanguinis* doctrine, to allow *jus soli* nationality attribution when otherwise the child would be stateless; and on the other hand, requiring states of *jus soli* tradition to create an exception, conferring nationality by blood to those children born abroad, who otherwise would be stateless¹¹⁵.

¹¹¹ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Background Note on Gender Equality, Nationality Laws and Statelessness 2017**, 8 March 2017. Available at: <http://www.refworld.org/docid/58aff4d94.html>. Accessed on: 7 August 2017.

¹¹² GOVIL, Rhada; EDWARDS, Alice. **Women, nationality and statelessness: the problem of unequal rights**. In: EDWARDS, Alice; VAN WAAS, Laura. *Nationality and Statelessness under International law*. Cambridge: Cambridge University Press, 2014, p. 169-193. p. 171.

¹¹³ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 52.

¹¹⁴ *Ibid.*, p. 54.

¹¹⁵ UN GENERAL ASSEMBLY. *Convention on the Reduction of Statelessness*, 30 August 1961. In: UNITED NATIONS. **Treaty Series**, New York, v. 989, 1975. Available at: <http://www.refworld.org/docid/3ae6b39620.html> Accessed on: 24 June 2017.

As seen, there is nowadays an increasing difficulty to the traditional nationality doctrine, with its old nationality attribution schemes, when it faces the growing complexity and transnationality of today's world,

since people may cross borders, marry nationals of other states or bare children in a state in which they are not themselves a citizen, if states do not communicate or cooperate on nationality matters, then conflicts between their individual policies may leave some individuals entirely overlooked and without the nationality of any state¹¹⁶.

That is why nationality policies have been gaining more attention and starts to be more closely debated nowadays in international law. Limitations on the absolute discretion of nationality attribution by states are being shaped, coming mainly from international human rights law, but also through the renewed consensus against statelessness, in a search to address more appropriately every person's need to be a citizen of somewhere and, as such, to exercise their rights without unjustifiable constrains.

1.2.5. Limitations in international law to state discretion on nationality

As seen above, although international law recognizes traditionally the state sovereignty as being the driving force behind nationality, making it a matter of reserved domain, there is a progressive trend to limit this discretion, which is built upon the elements analyzed herein¹¹⁷.

In the case *Tunis and Morocco Nationality Decrees*, judged by the Permanent Court of International Justice in 1923, nationality was recognized to be a matter regulated in principle by domestic jurisdiction, within the limits of states obligations to other states according to international law¹¹⁸. That is a clear departure point, since it means that if nationality was not regulated by international law before, it does not mean that it cannot be in the future.

The Hague Convention of 1930 confirms this view by stressing that, when exercising its autonomy in respect of their own nationality regulations, the state is limited to the extent

¹¹⁶ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 36.

¹¹⁷ For a complete study on the limitations in international law, for the state discretion *on the right of entry* of foreigners, see VEDOVATO, Luis Renato. **Ingresso do estrangeiro no território do Estado sob a perspectiva do direito internacional público**. 2012. Tese (Doutorado em Direito Internacional) - Faculdade de Direito, Universidade de São Paulo, São Paulo, 2012.

¹¹⁸ PERMANENT COURT OF INTERNATIONAL JUSTICE (PCIJ). **Advisory Opinion n. 4...** op. cit.

that its law is “consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality”¹¹⁹.

In that sense, Alice Edwards brings a wide list of obligations which have been limiting the discretion of states, based either in general principles, customs or treaty obligations. The first is the prohibition on the arbitrary deprivation of nationality¹²⁰, recognized as a general principle of international law¹²¹ and reinforced by many human rights instruments, enlightened by the Article 15 of the UDHR¹²².

The second are the non-discrimination norms in nationality matters. Discrimination based on nationality is expressly prohibited in the Convention on the Elimination of Racial Discrimination (art. 5, “d”, III) and the 1961 Stateless Convention (art. 9). Gender discrimination in terms of nationality is also forbidden in the 1979 Convention on the Elimination of All Forms of Discrimination against Women (art. 9). Already the 1933 Montevideo Convention on Nationality of Women adopted clear gender equality in respect of nationality¹²³. In addition, the 1957 Convention on Nationality of Married Women proscribes automatic changes on women’s nationality caused by marriage or change of the husband’s nationality¹²⁴. At the same time, there are countries which still discriminate in matters of nationality, even if adopting *jus soli* approach, as Dominican Republic, which was condemned by the Inter-American Court of Human Rights in 2005, by refusing to register children of Haitian descent¹²⁵.

Discrimination is also a concern in relation to naturalization. Although it is to date unquestionable that states are free to choose their nationality criteria, with the limits here indicated, some naturalization practices reveal easier citizenship access to specific racial or

¹¹⁹ LEAGUE OF NATIONS, Convention on Certain Questions Relating... op. cit.

¹²⁰ As explained by Peter Spiro, during the 20th century, states used to strip their citizens nationality as punishment for acts of disloyalty. Although that practice lost track, in part because of the international norms against statelessness, the underlying idea is sometimes revived, as it is the case of the debate on terrorism since the 9/11 (but also more recently with the 2015/2016 terrorist attacks in Paris). Voices for expatriation of terrorists were confronted with the prohibition of statelessness, but even if applied just in case of dual nationals, that kind of practice can easily amount to discrimination against dual nationals, as well as compromising the access to citizenship for habitual residents. Cf. SPIRO, Peter. Citizenship... op. cit., p. 299.

¹²¹ UN GENERAL ASSEMBLY. **Resolution A/RES/50/152**, par. 16, 9 February, 1996.

¹²² UDHR. Art. 15 (1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

¹²³ ORGANIZATION OF AMERICAN STATES (OAS). **Convention on the Nationality of Women**, 26 December 1933. Available at: <http://www.refworld.org/docid/3ae6b36710.html>, Accessed on: 9 Aug. 2017.

¹²⁴ UN GENERAL ASSEMBLY. **Convention on the Nationality of Married Women**. New York, 29 January 1957. Available at: <http://www.refworld.org/docid/3ae6b3708.html>; Accessed: 9 Aug. 2017.

¹²⁵ See COSTA RICA. Inter-American Court of Human Rights. *Girls Yean v. Dominican Republic*, par. 171, in which this practice was considered discriminatory according to Art. 20 of the American Convention of Human Rights judged on 8 Sep. 2005. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_%20ing.pdf Accessed on: 09 Aug. 2017.

ethnic groups, being therefore considered discriminatory¹²⁶. Also, some states give advantages in naturalization for people coming from other countries with historical affinity, case of Spain in relation to Iberian states¹²⁷. Other states discriminate based on religious or ethnic identity, such as Kuwait concerning ineligibility of non-Muslims and easier naturalization for Arabs; and Israel, where Jews are entitled to citizenship simply by settling in the country, as non-Jews must satisfy additional requirements¹²⁸. Indeed, “naturalization preferences are coming under closer scrutiny especially when they appear to reflect bias against a group disadvantaged by the regime”¹²⁹.

In this regard, it is our view that the practice of conferring citizenship through naturalization, favoring some nationalities, ethnicities or religions in detriment of others, is incompatible with a human rights’ based approach, especially the anti-discrimination norms above mentioned. Anti-discrimination is also in risk when dual nationality is tolerated only in case the other nationality is from some certain countries, as the German nationality law which allows double nationality just if the other citizenship is from a European Union member-state or Switzerland¹³⁰. And finally, the loss or deprivation of nationality cannot take place, for any person or group, on racial, ethnic, religious or political grounds, by force of the Article 9 of 1961 Convention on Reduction of Statelessness¹³¹.

The third international constrain in nationality law and policy would be the duty to prevent statelessness. The 1930 Hague Convention already brought some provisions in this regard¹³². After the Second World War, the 1961 Convention on Reduction of Statelessness outlined a series of legal tools to avoid statelessness to occur. As it will be examined in a specific section, the Convention brought useful safeguards, based on existing states’ practice. However, it is symptomatic that the draft adopted was not the one which provided for the *elimination* of statelessness, instead being adopted a final version containing norms for the *reduction* of the phenomenon.

¹²⁶ Which was the case of the conclusion of UN human rights treaty bodies towards Japan’s requirement to ethnic Koreans to change their names and South Korea regarding ethnic Chinese. As cited by SPIRO, Peter. *Citizenship... op. cit.*, p. 296.

¹²⁷ The Spanish law requires in general ten years of residence for naturalization, but two years of the person is natural-born of an Ibero-American country, Andorra, Philippines, Equatorial Guinea, Portugal, or is a Sephardi Jew, and five years in the case of a recognized refugee. Spiro argues that this disadvantages a large number of immigrants from Morocco. Spiro, *op. cit.*

¹²⁸ SPIRO, Peter. *Citizenship... op. cit.*, p. 297.

¹²⁹ *Ibid.*

¹³⁰ SPIRO, Peter. *Citizenship... op. cit.*, p. 299.

¹³¹ UN General Assembly. *Convention on the Reduction of Statelessness... op. cit.*

¹³² See Arts. 7, 9 and 14. LEAGUE OF NATIONS, *Convention on Certain Questions Relating to the Conflict of Nationality Law... op. cit.*

Thus, although the 1961 Convention is the only universal treaty attempting to directly limit state discretion in terms of nationality, not to cause statelessness, it falls short by repeating the mantra of state sovereignty regarding nationality attribution, adding a general rule against statelessness and a series of conditions excepting this rule¹³³. However, this is probably the closest international law has arrived in trying to regulate state discretion about nationality, marking a watershed in the fight against statelessness¹³⁴.

In the context of state succession, there are specific international rules to be followed for avoiding statelessness¹³⁵. After the territorial instabilities in Central and Eastern Europe following the end of Cold-war, and the controversies on citizenship norms adopted, in regard to rearrangement of nationalities in the region, state practices on succession of states are now more aware of the human rights framework to be taken into consideration. This is reflected in the articles on the question drafted by the International Law Commission in 1999¹³⁶. Moreover, the universally adopted Convention on the Rights of the Child¹³⁷ has affirmed the right to nationality for every child, “in particular where the child would otherwise be stateless” (art. 7)¹³⁸. Edwards synthesizes as follows:

nationality rules are domestic matters only in so far as international law (including general principles, customs or international agreements) does not regulate the practice to the contrary, and as long as domestic rules do not otherwise conflict with international law¹³⁹.

The above limitations can be considered procedural norms, since they deal basically with nationality attribution. But there are also substantial issues connected to the right of nationality. One of them is diplomatic protection, which is a right of the state to protect its

¹³³ See Article 1. UN GENERAL ASSEMBLY. Convention on the Reduction of Statelessness, op. cit.

¹³⁴ See the specific topic which analyses the 1961 Convention, in the second Chapter of the thesis.

¹³⁵ Apart Article 10 of the above mentioned 1961 Convention, the 1997 European Convention on Nationality also brings rules to be followed in case of state succession, and even more specific, the 2006 Council of Europe Convention of the Avoidance of Statelessness in Relation to State Succession, which set up useful norms in this regard for European states. See also: INTERNATIONAL LAW COMMISSION. **Articles on Nationality of Natural Persons in Relation to the Succession of States** (With Commentaries). Supplement n. 10 (A/54/10), New York, 3 April 1999. Available at: <http://www.refworld.org/docid/4512b6dd4.html> Accessed on: 23 May 2017.

¹³⁶ See INTERNATIONAL LAW COMMISSION. **Articles on Nationality of Natural Persons in Relation to the Succession of States...** op. cit.

¹³⁷ All the United Nations member states ratified the Convention, except for the United States of America. The non-UN member states of Cook Islands, Niue, the State of Palestine, and the Holy See are also parties to the convention.

¹³⁸ UN GENERAL ASSEMBLY. Convention on the Rights of the Child. In: UNITED NATIONS, **Treaty Series**, New York, v. 1577, p. 3. 20 November 1989. Available at: <http://www.refworld.org/docid/3ae6b38f0.html>. Accessed on: 10 Aug. 2017.

¹³⁹ EDWARDS, Alice. The meaning of nationality... op. cit.

nationals in face of other states¹⁴⁰. Nonetheless, in the ILC's Draft Articles on Diplomatic protection there is an interesting exception. Articles 3(2) and 8 provide that a state can exercise diplomatic protection on behalf of recognized *refugees and stateless persons*, if they are habitual residents, and are lawfully present in the country at the date of the injury and of the official presentation of the claim¹⁴¹.

Another consequence of nationality for the state is to comply with the right to consular assistance¹⁴², which imposes obligations in case of arrest or detention of a foreign national, with the objective to guarantee the right to counsel and due process, through consular notification and effective access to consular protection¹⁴³. The ICJ's *Avena* case (2004) was emblematic, since in its judgment, the Court found that the United States had breached its obligations under the Vienna Convention on Consular Relations, by not allowing legal representation from the Mexican consulate to meet with Mexican citizens imprisoned in the United States¹⁴⁴.

In addition, a consequence of having nationals under its guard is the duty of readmission, that each state owes *vis-à-vis* other states. That means states are obliged to clear entrance or return to their nationals, also by force of human rights law, since Art. 12 of ICCPR reads: "no one shall be arbitrarily deprived of the right to enter his own country"¹⁴⁵. If readmission is denied, that can be indicative of the loss of nationality of the concerned state. What is new in this regard is the trend in human rights case law to recognize a right to readmission also to habitual or "long-term residents" (non-citizens), represented by the cases *Stewart v. Canada* (1996) and *Nystrom v. Australia* (2007) in the UN Human Rights

¹⁴⁰ Thus, not a right of the individual.

¹⁴¹ UNITED NATIONS, Draft Articles on Diplomatic Protection with commentaries. In: INTERNATIONAL LAW COMMISSION. **Yearbook of the International Law Commission**, v. II, Part Two, 2006. available at: <http://www.refworld.org/docid/525e7929d.html>. Accessed on: 8 Aug. 2017.

¹⁴² As provided by Article 36 of the 1963 Vienna Convention. UNITED NATIONS. **Vienna Convention on Consular Relations**. 24 April 1963. Available at: <http://www.refworld.org/docid/3ae6b3648.html>. Accessed on: 8 Aug. 2017.

¹⁴³ EDWARDS, Alice. The meaning of nationality... op. cit.

¹⁴⁴ INTERNATIONAL COURT OF JUSTICE (ICJ). **Case Avena and Other Mexican Nationals (Mexico v. United States of America)**. Judgment of 31 March 2004. Available at: <http://www.icj-cij.org/en/case/128>. Accessed on: 29 Jun 2017.

¹⁴⁵ UN GENERAL ASSEMBLY. International Covenant on Civil and Political Rights, 16 December 1966. In: UNITED NATIONS. **Treaty Series**, New York, v. 999, p. 171, 1983. Available at: <http://www.refworld.org/docid/3ae6b3aa0.html>. Accessed on: 10 Aug. 2017.

Committee¹⁴⁶. As such, those cases extend a typical feature of nationality to nationals of other states, as well as stateless and others in specific circumstances¹⁴⁷.

Peter Spiro canvass yet other emerging limitations on nationality regulation in international law, as changes in birthright citizenship practices, finding there is a growing debate on the access to citizenship for habitual residents (long-term migrants), founded on democracy and equality values¹⁴⁸. For instance, the states adopting *jus sanguinis* would be gradually conceding citizenship rights to children of habitual lawful residents, especially those who were born themselves in the territory (called *double jus soli*)¹⁴⁹. The 1997 European Convention on Nationality require state-parties to “facilitate in its internal law the acquisition of its nationality [for] persons who were born on its territory and reside there lawfully and habitually”¹⁵⁰. Germany is a good example, since before its nationality law reform of 1999, who was born in the territory to non-citizen parents, despite they were also born in Germany, was not German by law. That created a contingent of second and third generations of people born in the country but excluded from citizenship. The changes of 1999 came also because of growing international criticism, with human rights groups and regional organizations praising the changes. Other European states followed the same path of including elements of *jus soli* into their *jus sanguinis* based legislations¹⁵¹.

In regard to naturalization, most states require a residence period in the country to confer nationality for someone after birth. Although states practices remain uneven, the 1997 European Convention on Nationality provides that this timeframe should be limited to ten years, the application shall be processed in a reasonable time, and eventual fees should be reasonable¹⁵². Additional requirements are usually requested, such as clear criminal record, proof of language knowledge and civics tests. When those requisites are excessive or are considered discriminatory¹⁵³, human rights mechanisms become alert. The Committee on the

¹⁴⁶ As brought by EDWARDS, Alice. The meaning of nationality... op. cit. In a similar way, in both cases the UN treaty based body found that the author had the right to be readmitted in their “own country”, given long-term residence and sufficient ties with the country.

¹⁴⁷ According to UN HUMAN RIGHTS COMMITTEE (HRC). **CCPR General Comment No. 27**: Article 12 (Freedom of Movement). Adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999. Available at: <http://www.refworld.org/docid/45139c394.html> Accessed on: 8 Aug. 2017.

¹⁴⁸ SPIRO, Peter. Citizenship... op. cit., p. 286.

¹⁴⁹ Ibid.

¹⁵⁰ COUNCIL OF EUROPE. European Convention on Nationality... op. cit., Article 6 (4).

¹⁵¹ HOWARD, Marc Morjé. **The Politics of Citizenship in Europe**. Cambridge University Press, New York: Cambridge University Press, 2009.

¹⁵² COUNCIL OF EUROPE. European Convention on Nationality... op. cit., Article 6 (3).

¹⁵³ In this sense, naturalization, once available, shall “guarantee procedural minimum standards, which include reasonably low fees that do not create financial deterrents for applicants, clearly stated requirements that do not allow for arbitrarily dismissing applications and that limit administrative discretion in judging substantive questions, written justifications for rejections and judicial review of decisions with individual rights of appeal”.

Elimination of Racial Discrimination and other UN treaty bodies have been warning states, when naturalization practices are too strict, that they can violate recognized human rights¹⁵⁴.

An emerging right to maintain multiple nationality entwines with these naturalization standards. The 1997 European Convention demands that states do not require renunciation or loss of original nationality to allow naturalization, when such act is impossible or cannot reasonably be required¹⁵⁵. This kind of requirement can difficult naturalization to the point of making it impracticable, harming the possibility of political membership and equality among prospective citizens in the concerned state¹⁵⁶.

For Cristiane Lopes, the discretion of the states cannot be read without considering the finality for which it was created, that is, to allow the political choice, among various ways possible, of what better leads the common good¹⁵⁷. Thus, given these growing limitations on nationality law-making and practices by states, it becomes evident that the regulation of the subject is far from being completely on the discretion of states as once was.

The centrality of the international human rights law is the main constrain to the liberty of state in this regard, since it has been evolving, in terms of new norms and interpretation of the existing ones, to cover the complexities of human mobility and the needs of migrants, refugees and stateless people in today's world.

1.2.6. Nationality as a human right or the “right to have rights”

Nationality has been considered a human right, since it was declared as such by Article 15 of the Universal Declaration of Human Rights in 1948: “(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right

Baubock, RAINER; PERCHINIG, Bernhard. Evaluation and recommendations. In: BAUBOCK Rainer; ERSBØLL, Eva; GROENENDIJK, Kees; WALDRAUCH, Harald. **Acquisition and Loss of Nationality**. IMISCOE Research. Amsterdam: Amsterdam University Press, 2006. v. 1: Comparative Analyses. Policies and Trends in 15 European States.

¹⁵⁴ As an example, see the UNITED NATIONS. Committee on the Elimination of Racial Discrimination (CERD). **Consideration of reports submitted by States parties under article 9 of the Convention**. Concluding observations of the Committee on the Elimination of Racial Discrimination. Switzerland, CERD/C/CHE/CO/6, 23 September 2008, Available at: <http://www.refworld.org/docid/48eb24a02.html>. Accessed on: 9 Aug. 2017.

¹⁵⁵ COUNCIL OF EUROPE. **European Convention on Nationality**... op. cit.

¹⁵⁶ SPIRO, Peter. *Citizenship*... op. cit., p. 291.

¹⁵⁷ LOPES, Cristiane Maria Sbalqueiro. **Direito de Imigração: o Estatuto do Estrangeiro em uma perspectiva de Direitos Humanos**. Porto Alegre: Núria Fabris, 2009.

to change his nationality”¹⁵⁸. Although the Declaration is not a treaty, its precursory value as lighthouse of the human rights law is unquestionable¹⁵⁹.

Apart from the right to nationality, the article brings other two norms: a right of the individual not to be *arbitrarily* deprived of his existing nationality, which means this is not an absolute right, since the withdrawn of someone’s nationality remains possible, if not arbitrary; and a right to change nationality, which cannot be denied (also in an arbitrary manner). Arlettaz reminds that changing nationality does not mean an indirect right to receive another state’s nationality, since the correspondent obligation of the states is missing, as already studied. Rather, it means no obstacles to change nationality when there is a state willing to concede its nationality to the person concerned¹⁶⁰.

The International Covenant on Civil and Political Rights repeats the generic right to a nationality, now with unquestionable value of treaty, but only in relation to the child¹⁶¹. In the opinion of Van Waas, “it appears that nationality issues and statelessness were still considered too complex to enable states to reach a consensus on a general affirmation of the right to a nationality”¹⁶². This right is reaffirmed by the Convention on the Rights of the Child, which adds the right to be registered just after birth, to have a name, and connects nationality with the child’s identity¹⁶³.

The non-discrimination principle, one of the cornerstones of the international human rights regime, apart from affecting the rules on naturalization, as seen above, is tidily connected with the right to nationality itself. Discrimination based on nationality is proscribed in the International Convention on the Elimination of All Forms of Racial Discrimination¹⁶⁴. In addition, the Convention on the Elimination of All Forms of Discrimination Against Women qualifies the right to nationality with gender equality, to make sure no difference is to be made by the fact of marriage, nor to turn spouses stateless¹⁶⁵.

¹⁵⁸ UN GENERAL ASSEMBLY. **Universal Declaration of Human Rights**, 10 December 1948. Available at: <http://www.refworld.org/docid/3ae6b3712c.html>. Accessed on: 10 Aug. 2017.

¹⁵⁹ See the discussion about the value of the Universal Declaration of Human Rights in the topic dedicated to human rights, in the third chapter.

¹⁶⁰ ARLETTAZ, Fernando. La nacionalidad en el derecho internacional americano. Universidad Nacional Autónoma de México-Instituto de Investigaciones Jurídicas. **Anuario Mexicano de Derecho Internacional**, v. XV, 2015, p. 420, our translation.

¹⁶¹ UN GENERAL ASSEMBLY. International Covenant on Civil and Political Rights... op. cit., Art. 24 (3).

¹⁶² VAN WAAS, Laura. **Nationality Matters...** op. cit. p. 58.

¹⁶³ UN GENERAL ASSEMBLY. Convention on the Rights of the Child... op. cit., Articles 7 and 8.

¹⁶⁴ UN GENERAL ASSEMBLY, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965. In: UNITED NATIONS, **Treaty Series**, New York, v. 660, p. 195, 1971. Available at: <http://www.refworld.org/docid/3ae6b3940.html>. Accessed on: 10 Aug. 2017.

¹⁶⁵ According to the convention: “1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her

The problem is that none of these documents correlate with any duty of the states to attribute nationality to anyone¹⁶⁶. In this sense, Resek criticizes the effectivity of the right to nationality enshrined in the 1948 UDHR, considering it lacks a precise recipient¹⁶⁷, and Horváth even questions if nationality is really a right as such¹⁶⁸. In any case, although there are practically no efforts compelling states to confer nationality, except in case of state succession¹⁶⁹, withdrawing someone's nationality has been an increasingly difficult task, particularly because of the international human rights law, as well as a growing awareness against statelessness.

Arlettaz refers to a *generic* right to nationality, relating to the abstract aspect of such a right, represented by a proclamation of an ideal with no direct consequence to the states. In contrast, there would be a separate *concrete* right to nationality, when this right is asserted in a way that requires a duty from the state to confer nationality to the individual or the group concerned¹⁷⁰. This concrete right to nationality appears connected to the avoidance of statelessness, especially in the 1961 Convention on the Reduction of Statelessness, which affirms:

Art. 1.1 A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. [...] Art. 4.1 A Contracting State shall grant its nationality to a person who would otherwise be stateless and who is unable to acquire the nationality of the Contracting State in whose territory he was born¹⁷¹.

In the case of the Interamerican law, the 1948 American Declaration of the Rights and Duties of Man (approved before the Universal Declaration), already stated a right to

stateless or force upon her the nationality of the husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children". UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <http://www.refworld.org/docid/3ae6b3970.html> [accessed 10 August 2017]

¹⁶⁶ According to Arlettaz, "el derecho genérico a tener una nacionalidad no impone a los Estados la obligación de otorgar indiscriminadamente su nacionalidad a las personas que están bajo su jurisdicción; ni siquiera el deber de otorgarla a los apátridas que están debajo su jurisdicción". ARLETTAZ, Fernando. *La nacionalidad...* op. cit., p. 428.

¹⁶⁷ In the words of Resek, « L'énoncé fait suite, dans le contexte de l'article 15 de la déclaration, à l'assertion que 'tout individu a droit à une nationalité' – règle qui fait l'objet d'une sympathie unanime, mais qui manque d'effectivité, faute d'un destinataire précis ». REZEK, José Francisco. *Le Droit International de La Nationalité. Recueil des Cours de l'Académie de Droit International de la Haye*. Haye, n. 198, 1986, p. 354.

¹⁶⁸ HORVÁTH, Eniko. **Mandating Identity**. Citizenship, kinship laws and plural nationality in the European Union. Alphen aan den Rijn: Kluwer Law International, 2007, p. 18.

¹⁶⁹ See the ILC Draft Articles on Nationality at State Succession (annex to the UN GENERAL ASSEMBLY. **Resolution 55/153**. Nationality in Relation to the Succession of States, 2000); the 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, and Article 10 of the 1961 Convention on the Reduction of Statelessness.

¹⁷⁰ ARLETTAZ, Fernando. *La nacionalidad...* op. cit. p. 413-447.

¹⁷¹ UN GENERAL ASSEMBLY. *Convention on the Reduction of Statelessness...* op. cit.

nationality in its Article 19: “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”¹⁷². The discretion of the states is clear in the final part of the Article. The American Convention on Human Rights goes further, by expressly proscribing the arbitrary deprivation of nationality:

1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it¹⁷³.

The American Convention repeats the generic formula, but the novelty is that it brings a specific nationality right, manifested in a subsidiary *jus soli* application by states, as a way of avoiding statelessness (see item 2 above)¹⁷⁴. Moreover, according to Article 27, the right to nationality cannot be suspended by any exceptions¹⁷⁵.

In addition, one should remember the existence of the Convention on the Nationality of Women of 1933, adopted in Montevideo at the Seventh International Conference of American States. This Interamerican instrument is considered the world's first treaty of equality for women¹⁷⁶, serving as inspiration to the later UN Convention on the Nationality of Married Women, adopted in 1957. It affirms that in regard to the state-parties, “there shall be no distinction based on sex as regards nationality, in their legislation or in their practice”¹⁷⁷. Nevertheless, it was superseded by the UN Convention on the Elimination of All

¹⁷² INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (IACHR). **American Declaration of the Rights and Duties of Man**. Bogotá: 2 May 1948. Available at: <http://www.refworld.org/docid/3ae6b3710.html>. Accessed on: 11 Aug. 2017. Regarding the legal nature of the Declaration, although it is not a treaty, it is recognized as producing legal obligations to the state-parties to the Organization of the American States (OAS), according to the Interamerican Court on Human Rights: “*Para los Estados Miembros de la Organización, la Declaración es el texto que determina cuáles son los derechos humanos a que se refiere la Carta. [...] Es decir, para estos Estados la Declaración Americana constituye, en lo pertinente y en relación con la Carta de la Organización, una fuente de obligaciones internacionales*”. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (IACHR). **Interpretación de la Declaración Americana de los Derechos y Deberes del Hombre en el marco del artículo 64 de la Convención Americana sobre Derechos Humanos** opinión consultiva OC-10/89 de 14 de julio de 1989.

¹⁷³ ORGANIZATION OF AMERICAN STATES (OAS). **American Convention on Human Rights, "Pact of San Jose"**. Costa Rica, 22 November 1969. Available at: <http://www.refworld.org/docid/3ae6b36510.html>. Accessed on: 11 Aug. 2017.

¹⁷⁴ ARLETTAZ, Fernando. La nacionalidad... op. cit., p. 424.

¹⁷⁵ ORGANIZATION OF AMERICAN STATES (OAS). **American Convention on Human...** op. cit.

¹⁷⁶ ORGANIZATION OF AMERICAN STATES (OAS). Inter-American Commission of Women. **The World's First Treaty of Equality for Women**. Montevideo, Uruguay, 1933. Available at: <http://portal.oas.org/Portal/Topic/Comisi%C3%B3nInteramericanadeMujeres/Historia/TratadosobreigualdadparalaMujerUruguay1933/tabid/660/Default.aspx?language=en-us> Accessed on: 09 Aug. 2017.

¹⁷⁷ ORGANIZATION OF AMERICAN STATES. **Convention on the Nationality of Women...** op. cit.

Forms of Discrimination against Women (1979), much broader and more detailed¹⁷⁸. The 1933 Convention remains relevant just for the United States, which being part of it, is the only state in the Americas that is not part of the UN's Women Convention¹⁷⁹.

The Interamerican Court of Human Rights has expressly manifested about the right to nationality. It is the case of the Advisory Opinion 4 of 1984, on *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, in which this state asked the Court to evaluate its projects of reform of naturalization legislation, in face of the American Convention on Human Rights. The Court found that the proposals were not against the Article 20 of the Convention, considering that, although it would make more difficult to naturalize in the country, the rules did not consist in arbitrary deprivation of nationality; denying nationality to whom has the right to it; or frustrate the right to change nationality¹⁸⁰. As for it would be possible to make the law harder in the context of derivative nationality acquisition, the Court understood by majority¹⁸¹ that it would not address questions of political nature, which are in the reserved domain of the state¹⁸².

In the case *Yean and Bosico v. Dominican Republic* (2005), two children of Haitian origin, born in Dominican Republic, had denied their birth certificate, and thus their prove of nationality, since Dominican Republic applies *jus soli* principle. After passing by the Commission, the Court understood that the state parties of the *Pacto de San José* cannot adopt practices or legislation which restrict the access to nationality of those who have the right to acquire it, by operation of its law. Moreover, the Court sustained that by applying their own criteria of nationality attribution, states shall act in a non-arbitrary manner: “the requirements should be specified clearly and be standardized, and their application should not be left to the discretion of State officials, in order to guarantee the legal certainty”¹⁸³. In

¹⁷⁸ ARLETTAZ, Fernando. La nacionalidad... op. cit., p. 443.

¹⁷⁹ The U.S. signed the treaty in 17 Jul. 1980, but did not ratified it to date. See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en Accessed on 11 Aug. 2017.

¹⁸⁰ COSTA RICA. Inter-American Court of Human Rights (IACrTHR), **Advisory Opinion OC-4/84 on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica**. 19 January 1984, Available at: <http://www.refworld.org/cases,IACRTHR,44e492b74.html>. Accessed on: 11 Aug. 2017.

¹⁸¹ Judge Piza dissented, affirming that the rights recognized by the American Convention have a progressive character, meaning that once its content was incorporated by the state, it would not be possible to retrocede. ARLETTAZ, Fernando. La nacionalidad... op. cit., p. 427.

¹⁸² The Court argued it could not opine about “whether the spirit underlying the proposed amendments as a whole reflects, in a general way, a negative nationalistic reaction prompted by specific circumstances relating to the problem of refugees, particularly Central American refugees, who seek the protection of Costa Rica in their flight from the convulsion engulfing other countries in the region; whether that spirit reveals a tendency of retrogression from the traditional humanitarianism of Costa Rica”. COSTA RICA. Inter-American Court of Human Rights. **Advisory Opinion...** op. cit.

¹⁸³ COSTA RICA. Inter-American Court of Human Rights. **Case Girls Yean v. Dominican Republic**, op. cit.

this regard, the Court also recognized that the case is part of a context of general vulnerability of Haitian migrants and Dominicans of Haitian origin in Dominican Republic, which suffer with discrimination, in particular the children, whose “vulnerability arising from statelessness affected the free development of their personalities, since it impeded access to their rights and to the special protection to which they are entitled”¹⁸⁴.

Another important position arising from this judgment is when the Court asserts that the access to nationality cannot depend on the migratory status of the individual, and that the parent’s migratory status is not transmissible to their children¹⁸⁵. This view was a response to the Dominican Republic argument that the parents were “in transit”, which is a state constitutional exception to the concession of nationality via *jus soli*¹⁸⁶. The Court held that, although it would not interfere on the criteria adopted, “to consider that a person is in transit, [...] the State must respect a reasonable temporal limit and understand that a foreigner who develops connections in a State cannot be equated to a person in transit”¹⁸⁷, and as such, this criterium did not apply to the parents of the girls, since they have been living in the country for many years.

Finally, the Court held that the state violated the American Convention on Human Rights concerning the right to nationality (Art. 20), equality before the law (art. 24), the right to non-discrimination (art. 1.1), as well as the rights of the child (art. 19)¹⁸⁸.

The European Convention on Human Rights is completely silent in respect to nationality matters, as well as the 1981 African Charter on Human and Peoples' Rights. The two regions’ human rights protection systems are mainly based on those documents, and in the case of Europe, in the Convention’s additional protocols. However, by the time of adoption, no consensus was reached to include nationality in each one of those mechanisms. According to Mónica Ganczer, the European states are “reluctant to extend the supervisory role of the European Court of Human Rights to matters of nationality”¹⁸⁹.

Nevertheless, both regions have adopted newer instruments which deals with the question. The 1997 European Convention on Nationality, although not a proper human rights instrument, represents an important guide to be followed by states when dealing with

¹⁸⁴ COSTA RICA. Inter-American Court of Human Rights. **Case Girls Yean v. Dominican Republic**, op. cit.

¹⁸⁵ Ibid.

¹⁸⁶ Cf. DOMINICAN REPUBLIC. **Constitution** (1994). Constitution of the Dominican Republic promulgated on August 14, 1994, Article 11.

¹⁸⁷ COSTA RICA. Inter-American Court of Human Rights. **Case Girls Yean v. Dominican Republic**, op. cit.

¹⁸⁸ COSTA RICA. Inter-American Court of Human Rights. **Case Girls Yean v. Dominican Republic**, op. cit..

¹⁸⁹ GANCZER, Mónica. The Right to a Nationality as a Human Right? In: **Hungarian Yearbook of International Law and European Law**. The Hague: Eleven International Publishing, 2014. p. 15-33.

nationality law. In practice, the convention is a consolidation of the prevailing European states practices in terms of nationality. But it has also set up clear basic principles on the matter, represented by its Article 4:

a) everyone has the right to a nationality; b) statelessness shall be avoided; c) no one shall be arbitrarily deprived of his or her nationality; d) neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse¹⁹⁰.

The European Court of Human Rights, recognizing that nationality is not a human right recognized in the regional system, seeks to address the individual consequences of statelessness, connecting it to the right of respect to private and family life, as stated in Article 8 of the European Convention on Human Rights¹⁹¹. In the opinion of Dionisi-Peyrusse, this right would entail a right to individual's own identity, as well as right to develop social relations. The arbitrary refuse or withdraw of nationality would harm those rights, in addition to the non-discrimination principle¹⁹². In any case, to apply the Article above, the Court must find that there was harm to the person's private life.

Turning back to Africa, another instrument covered the right to nationality in relation to children. It is The African Charter on the Rights and Welfare of the Child of 1990, whose Article 6 requests that every child shall be the right to a name, to be registered immediately after birth and to acquire nationality, and includes protection against statelessness by asserting: "a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws"¹⁹³.

The Arab Charter on Human Rights, signed under the auspices of the League of Arab States also proclaims nationality as a right, stating that "no citizen shall be arbitrarily denied of his original nationality, nor denied his right to acquire another nationality without legal basis"¹⁹⁴. The same with the Association of Southeast Asian Nations (ASEAN), whose Human Rights Declaration affirms "every person has the right to a nationality as prescribed by

¹⁹⁰ COUNCIL OF EUROPE. European Convention on Nationality... op. cit.

¹⁹¹ COUNCIL OF EUROPE. European Court of Human Rights (ECHR). **Decision as to the admissibility of Application n. 31414/96 by Karassev family v. Finland**, 12 January 1999, Part the Law, 1.b)

¹⁹² DIONISI-PEYRUSSE, Amélie. **Essai sur une nouvelle conception de la nationalité**. Collection de Thèses, Faculté de Droit de Toulouse, Tome 31. Paris : Defrénois, 2007, p. 349.

¹⁹³ ORGANIZATION OF AFRICAN UNITY (OAU). **African Charter on the Rights and Welfare of the Child**, 11 Jul 1990, Available at:<http://www.refworld.org/docid/3ae6b38c18.html>. Accessed on: 11 Aug. 2017.

¹⁹⁴ LEAGUE OF ARAB STATES. **Arab Charter on Human Rights**, 15 September 1994. Available at: <http://www.refworld.org/docid/3ae6b38540.html>. Accessed on 11 Aug. 2017.

law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality”¹⁹⁵. Finally, the right to nationality, as well as the prohibition of deprivation of nationality, was integrated into the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States (1995)¹⁹⁶.

Nevertheless, the fact that no obligation is yet clearly set in international law, compelling states to confer nationality in cases not involving arbitrary deprivation or statelessness is symptomatic, relating to the architecture of the interstate system built since 1648, which at least in regard to nationality, has been challenged by the transformations on international law during the last seven decades.

¹⁹⁵ ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN). **ASEAN Human Rights Declaration**, 18 November 2012. Available at: <http://www.refworld.org/docid/50c9fea82.html>. Accessed on: 11 Aug. 2017.

¹⁹⁶ COMMONWEALTH OF INDEPENDENT STATES. **Convention on Human Rights and Fundamental Freedoms**, Minsk, 26 May 1995, Art. 24.

2. THE PHENOMENON OF STATELESSNESS

2.1 Historical origins

After understanding the bound of nationality, the objective of this chapter is to look to the absence of nationality, when the individual finds himself uncovered by this legal relation, preventing in general, the exercise of rights related to a state.

Even though statelessness is not something new, an international regime for dealing with it starts to be delineated shortly after the Second World War. A central thinker who draws attention in advance to the matter, as experiencing herself the condition of being a stateless person, Hannah Arendt explains that the first stateless were called *Heimatlosen*, produced by the dissolution of the Austro-Hungarian Empire as consequence of the Peace Treaties of 1919¹⁹⁷. From the First to the Second Wars, the world assists the denationalization of millions of Russians and Germans, and hundreds of thousands of Armenians, Romanians, Hungarians and Spanish, all victims of social convulsions which led to the denationalization of the “undesirable” by the victorious governments¹⁹⁸. Most of them were Jews, as the majority among the “minorities” established in Central Europe by the peace treaties. After the mass expulsions and denationalizations, and until the recognition that those minorities became actually without a state, they were called simply “displaced persons”¹⁹⁹.

Arendt demonstrates how the right of asylum had to be rebuilt in face of the great contingent of people without a homeland. The attempt to ignore the stateless failed, given the magnitude of the problem, and initiatives of repatriation collapsed, because there was no country willing to accept them back. In some cases, they were simply dumped from one state to another, and since no rule existed in regard of their situation, unlawful actions were committed by the host countries polices, such as arbitrary detentions, expulsions and smuggling to other countries²⁰⁰. Also, naturalization in the beginning revealed a complicated endeavor, since these persons remained factually attached to their nationality of origin.

Without a legal status, most stateless had no right of residence or to work, and therefore they had to live in constant transgression of the law. The political philosopher will famously argue that for a stateless with no legal existence, committing a crime would turn them from the anomaly inexistent in law, to the anomaly that was provided by law. Turning

¹⁹⁷ ARENDT, Hannah. *As origins...* op. cit., p. 381.

¹⁹⁸ *Ibid.*, p. 382.

¹⁹⁹ *Ibid.*, p. 383.

²⁰⁰ *Ibid.*, p. 387.

into a criminal would possibly make their condition improve, since it would be a way of recovering some human equality: while a law transgressor the stateless could be protected by the law, being offered a lawyer, complaining about the treatment given in prison and most of all, be finally heard. “He is no longer the scum of the earth but important enough to be informed of all the details of the law under which he will be tried”²⁰¹. The only other way of being recognized was becoming a genius, since “one of their problems was solved when they achieved the degree of distinction that will rescue a man from the huge and nameless crowd”²⁰².

As becomes evident, the question of statelessness is interrelated with the plight of refugees. After three years of the adoption of the 1951 Convention on the Status of Refugees, it was adopted the Convention relating the Status of Stateless Persons (1954). However, while the problem of refugees received deservedly much attention in the following decades, statelessness was practically forgotten²⁰³, even if many other causes of the phenomenon existed or were created, apart from the mass denationalizations above mentioned.

Far from being only an individual problem, what clearly can be devastating for the life of a person, statelessness is also a collective problem. Many groups of people are affected by the issue all over the world. Some countries which have very large numbers of stateless people today include Myanmar, Bangladesh, Nepal, Latvia, Estonia, Kenya and Syria, but people lacking nationality are also present in Europe and along Africa, Asia and Americas.

2.2 Conceptualizing statelessness

The concept of statelessness, in principle, does not entail much debate. Paul Weis, in a seminal book from 1979 asserts that “a person not having a nationality under the law of any State is called stateless, *apatride*, *apolide*, or *heimatlos*”²⁰⁴. He also classifies statelessness in two kinds: whether the person is born stateless; or became later stateless by losing his nationality, without acquiring another one. The first are called “original” or “absolute” stateless; the second, “subsequent” or “relative” stateless²⁰⁵, although this classification is not adopted by the subsequent doctrine.

²⁰¹ ARENDT, Hannah. *As origins...* op. cit., p. 390, quoted from the original in English.

²⁰² *Ibid.*

²⁰³ VAN WAAS, Laura. *Nationality Matters...* op. cit., p. 10.

²⁰⁴ WEIS, Paul. *Nationality...* op. cit.

²⁰⁵ *Ibid.*, p. 161-162. Although this distinction is not made by international law, nor has relevance to the recognition of a stateless person.

Professor José F. M. Guerios analyzed the term *apátrida* in Portuguese, in his thesis to accede to the position of Professor of Private International Law in 1936, at Federal University of Paraná (UFPR, Brazil). In a pioneering research, he discussed the subject before the Second World War, which revealed and multiplied the problem worldwide. In his view, from the adjective *apátrida* (stateless) results the noun “*apatridia*”²⁰⁶ (statelessness), “which means etymologically ‘*sem pátria*’ [without homeland], from the Greek *a* ‘prefix of deprivation’, and *pátrida*, derived from *patris*, *patridos*, ‘*pátria*’ [homeland]”. Thus, statelessness would legally mean “the irregular status of individuals without homeland, due to ignorance of their origin, deficiency of legislation or errors of conduct of these same individuals”²⁰⁷. Even if this concept is not precise anymore, due to all the legal development of the institute ever since, it is useful to uncover the antiquity of the question, as well to shed light in the etymological origin of the term.

The most authorized concept of statelessness is the one provided by the 1954 Convention on the Status of Refugees, which states that stateless is “a person who is not considered as a national by any State under the operation of its law”²⁰⁸. This concept is consolidated to the point that the International Law Commission has considered it as part of the customary international law²⁰⁹, which means that it should be used by all states when dealing with the question of statelessness, even if they have not acceded to the convention²¹⁰.

What matters for the definition of statelessness is the existence or not of a formal bond of nationality, without consideration in principle to the effectiveness of this tie. Which means that, since nationality is the bond between the individual and the state, the absence of this legal tie is what international law calls statelessness.

Firstly, it is necessary to look to what is a “state”, being suggested by the UNHCR, for the application of the definition, the criteria asserted in the 1933 Montevideo Convention on Rights and Duties of States. Accordingly, a state must have permanent population,

²⁰⁶ Nowadays in Portuguese the word used is *apatridia*, without accent.

²⁰⁷ GUERIOS, José Farani Mansur. **Condição Jurídica do Apátrida**. Tese de concurso à cadeira de direito internacional privado da Faculdade de Direito do Paraná (UFPR). Curitiba, 1936. p. 7, our translation. In the original: “significa, etimologicamente ‘*sem pátria*’, do grego *a* ‘prefixo de privação’, e *pátrida*, derivado de *pá-tris*, *patrielos*, ‘*pátria*’”.

²⁰⁸ UN GENERAL ASSEMBLY. Convention Relating to the Status of Stateless Persons, 28 September 1954. In: UNITED NATIONS. **Treaty Series**, New York, v. 360, p. 117, 1960. Available at: <http://www.refworld.org/docid/3ae6b3840.html> Accessed on: 4 Sept. 2017.

²⁰⁹ UNITED NATIONS. Draft Articles on Diplomatic Protection with commentaries... op. cit.

²¹⁰ VAN WAAS, Laura. The UN stateless conventions. In: EDWARDS, Alice; VAN WAAS, Laura. **Nationality and Statelessness under International law**. Cambridge: Cambridge University Press, 2014, p. 72.

defined territory, a government and capacity to enter in relations with the others²¹¹. It is not necessary, for being a state, to have received large scale recognition, nor have become a member of the UN²¹². Conversely, if a state does not exist under international law, the person is automatically stateless, unless she has another nationality.

Secondly, the meaning of “under operation of its law”²¹³ in the definition should be understood broadly, “to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice”²¹⁴.

And finally, to establish whether an individual is not considered as a national under the operation of a state law, it is required a careful analysis on each individual case, since it is not just a matter of law, but also of facts, since “a State may not in practice follow the letter of the law, even going so far as to ignore its substance”²¹⁵. Thus, a meticulous analysis of the nationality legislation of the states to which the individual might have links is ought to take place.

The stateless condition is an exceptional situation. Thus, it is preferable to grant a nationality for those who do not have one, making available all the rights attached to the condition of being a citizen, then to recognize them as stateless²¹⁶. Nevertheless, a recognition and protection international framework was built to identify these persons, and give them a legal status, guaranteeing minimal rights and a standard of treatment, while they do not count with a proper nationality.

In addition, the definition above applies whether the individual is inside or outside of his country origin, habitual residence or former nationality. It does not matter if he crossed

²¹¹ In addition, “once a State is established, there is a strong presumption in international law as to its continuity irrespective of the effectiveness of its government. Therefore, a State which loses an effective central government because of internal conflict can nevertheless remain a ‘State’ for the purposes of Article 1(1)”. UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Handbook on Protection of Stateless Persons**. 30 June 2014. Available at: <http://www.refworld.org/docid/53b676aa4.html> Accessed on: 28 Apr. 2017.

²¹² According the UNHCR, “in making an Article 1(1) determination, a decision-maker may be inclined to look toward his or her State’s official stance on a particular entity’s legal personality. Such an approach could, however, lead to decisions influenced more by the political position of the government of the State making the determination rather than the position of the entity in international law”. Ibid.

²¹³ “‘Under the operation of its law’ should not be confused with ‘by operation of law’, a term which refers to automatic (*ex lege*) acquisition of nationality. Thus, in interpreting the term “under the operation of its law” in Article 1(1), consideration has to be given to non-automatic as well as automatic methods of acquiring and being deprived of nationality”. UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Expert Meeting - The Concept of Stateless Persons under International Law**. May 2010. "Prato Conclusions". Available at: <http://www.refworld.org/docid/4ca1ae002.html> Accessed on: 28 Apr. 2017.

²¹⁴ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Handbook on Protection of Stateless Persons...** op. cit.

²¹⁵ Ibid.

²¹⁶ Ibid.

or not an international border, differently from the definition of refugee²¹⁷. Nevertheless, an individual can be a refugee, and a stateless at the same time. When this is the case, the stateless refugee must benefit from the protection of the 1951 Convention on the Status of Refugees, in addition to the protection of the 1954 Statelessness Convention, since the former has in most circumstances a higher standard of protection, including the prohibition against *refoulement*²¹⁸.

However, the concept above describes just part of the problem, as many people do have the formal bond of nationality to a state, but they are not able to count on their country of nationality for any protection. That means they are not able to access the rights associated to their nationality, such as to return home from abroad, or to receive diplomatic protection or consular assistance. The question made the phenomenon of statelessness be conceptually split in two categories: *de jure* statelessness and *de facto* statelessness. This distinction is not pacific in the doctrine; therefore, it is the case to analyzed it properly below.

2.2.1 *De jure* and *de facto* statelessness

De jure stateless persons are those recognized by the 1954 Convention as not having a nationality of any state, under the operation of its law. As seen, that refers not to the effectivity of nationality, that is, if and how the person has access to the rights attached to nationality, but rather to the existence of a legal tie between the individual and the state, at least under the law²¹⁹. The UNHCR avoids qualifying who falls under this concept as *de jure* stateless, since it is not the term used in the treaty²²⁰. Therefore, the terms *stateless* and *statelessness* in general refer always to *de jure* statelessness. *De facto* statelessness is in practice an additional category, whose affirmation is still under construction, as seen below.

The history of the so called *de facto* statelessness begins with the persecution against the Jews during the Nazi rule. The Nuremberg laws (1935) divided the Germans between the “citizens of the Reich” (*Reichsbuerger*), with German or related blood and all rights

²¹⁷ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Expert Meeting** - The Concept of Stateless... op. cit.

²¹⁸ Ibid.

²¹⁹ According to the UNHCR, “Article 1(1) does not require a “genuine and effective link” with the State of nationality in order for a person to be considered as a “national”. The concept of “genuine and effective link” has been applied principally to determine whether a State may exercise diplomatic protection in favour of an individual with dual or multiple nationalities, or where nationality is contested. [...] The relevant criterion is whether the State in question considers a person to be its national”. UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Expert Meeting** - The Concept of Stateless... op. cit.

²²⁰ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Handbook on Protection of Stateless Persons**... op. cit.

concerning nationality, and the remainder were “subjects of the state” (*Staatsangehoerige*), without any citizenship rights. These “other German nationals”, despite having German nationality, were deprived of any protection by the state. The Jews subsequently turned into *de jure* stateless, when a decree canceled their German nationality in 1941²²¹. Their appalling situation explains why, in the beginning, *de facto* stateless were view as the same as refugees, since their persecution emptied their nationality, forcing them to leave for other countries.

In 1946, the Intergovernmental Committee on Refugees issued a Memorandum establishing a difference between *de facto* and *de juris* statelessness. *De facto* statelessness would refer to the situation of intentional refusal by the state to offer protection to its national who finds himself abroad²²². The Report “A Study on Statelessness”, published by the UN Secretary General in 1949²²³, added that *de facto* stateless could also refer to whom voluntarily renounced to the protection of the state of nationality. However, the Study did not make clear distinction between refugees and stateless persons, referring mostly to the displaced and “unprotected” persons²²⁴. Indeed, as seen above, *de facto* stateless at the time were roughly identified as being refugees. After adopting the 1951 Convention on Refugees, the states were convinced that, once they have dealt with “*de facto*” unprotected people (the refugees), they would then address the “*de jure*” unprotected, that is, stateless people²²⁵.

When adopting the 1954 Statelessness Convention, the states decided not to include *de facto* stateless persons under its protection, since the common understanding was that statelessness was a problem of *legal* disconnection between the individual and a state, whether refugees were the ones who suffered from a *factual* lack of protection of a state²²⁶. In addition, there was also a perception that the protection of *de facto* stateless could benefit who would renounce to nationality for personal reasons²²⁷.

Nevertheless, by suggestion of the Belgium Government, at the Final Act of the 1954 Conference it was adopted a recommendation stating that

²²¹ MASSEY, H. **UNHCR and *de facto* Statelessness**. Geneve: United Nations High Commissioner for Refugees (UNHCR), 2010.

²²² UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Expert Meeting - The Concept of Stateless...** op. cit.

²²³ UN AD HOC COMMITTEE ON REFUGEES AND STATELESS PERSONS. **A Study of Statelessness**. New York: United Nations, August 1949. Available at: <http://www.refworld.org/docid/3ae68c2d0.html>. Accessed on: 28 Apr. 2017.

²²⁴ BATCHELOR, Carol. Stateless persons: some gaps in international protection. **International Journal of Refugee Law**, Oxford, v. VII, n. 2, p. 232-259, 1995.

²²⁵ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 21.

²²⁶ Ibid.

²²⁷ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Convention relating to the Status of Stateless Persons**. Its History and Interpretation, 1997. Available at: <http://www.refworld.org/docid/4785f03d2.html>. Accessed on: 8 Oct. 2017.

the Conference recommends that each Contracting State, when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to that person the treatment which the Convention accords to stateless persons²²⁸.

This was considered a tacit recognition of the existence of *de facto* stateless persons in international law, although it is not a binding provision. However, the recommendation refers only to persons who renounced to the protection of the state, leaving uncovered those who are victims of a state action/omission amounting to a lack of protection. In addition, it leaves up to the states to decide what would constitute “valid reasons” for the renunciation of protection²²⁹. Since reasons of personal convenience cannot be considered valid, according to the conference, the only reasons recognized as valid were those amounting to persecution, as stated in the 1951 Refugee Convention.

A similar situation occurred in the Conference which adopted the 1961 Convention on the Reduction of Statelessness, with the Belgians defending the idea that the uncertainty about the nationality status of refugees present in their territory, justified an additional layer of protection. Most states disagreed, and in the Final Act of the Conference it was approved just another recommendation, stating: “The Conference recommends that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality”²³⁰. Despite being a clearer recognition of the problem, the impact of the recommendation, approved by “humanitarian reasons” is limited, among other reasons because of the small number of ratifications to the treaty²³¹.

In this sense, the problem of the people who do not receive appropriate protection by the state according to their nationality persists, considering some people do not qualify for protection as refugees according to the 1951 Convention (or later expanded definitions of refugee), nor they can be considered *de jure* stateless, provided they do have a formal nationality, but it is not effective.

Undoubtedly, the 1954 Convention refers only to *de jure* statelessness, but the debate continues. According to Van Waas, solving the problem of a *de jure* stateless means conferring an *effective* nationality. But “the enduring problem of an *ineffective* nationality is simply

²²⁸ UN GENERAL ASSEMBLY. Convention Relating to the Status of Stateless Persons... op. cit.

²²⁹ FRANCO, Raquel Trabazo Carballal. **Cidadãos de lugar nenhum**: o limbo jurídico e a apatridia de facto dos emigrados cubanos proibidos de retornar. 2014. 180 f. Dissertação (Mestrado em Direito). Universidade de Brasília, Brasília, 2014.

²³⁰ UN GENERAL ASSEMBLY. Convention on the Reduction of Statelessness... op. cit.

²³¹ FRANCO, Raquel Trabazo Carballal. **Cidadãos de lugar nenhum**... op. cit.

evidence of a continuing need to address the non-compliance of states with their human rights obligations”²³². In the same direction, Jason Tucker challenges the concept of *de facto* statelessness, arguing that the problem is actually related to “*de facto* citizenship”, that is, the actual ineffective citizenship to which are subject irregular migrants and other vulnerable groups inside a state. The author defends that trying to expand the concept of statelessness to include those who have trouble in exercising their citizenship can weaken the real statelessness protection. In order to illustrate his finding, he analyses the case of the *de facto* citizens, but *de jure* stateless Estonians of Russian origin²³³.

Nevertheless, there are three main factors to support the need to protect *de facto* stateless persons. First, people lacking *de facto* protection usually suffer the same difficulties of those recognized as stateless, so “to address only the fact and not the quality of nationality is to create an arbitrary and unjust distinction between these two similarly situated groups”²³⁴. In addition, if the preoccupation is focused only in solving the lack of formal nationality, there is a risk of turning people *de jure* stateless into *de facto* stateless, that is, conferring nationality without any care whether the person receives effective possibility to access the benefits of citizenship, would simply not solve the human consequences of statelessness. And finally, the distinction between *de jure* and *de facto* can be in practice very hard to assert, as nationality of people can be many times undetermined or unknown²³⁵. Here becomes clear the importance of creating in each State, specific stateless determination procedures, for providing a clear and efficient administrative channel for the stateless condition to be determined²³⁶.

Even if the problem of ineffective nationality is serious, at the same time it is important not to make an indiscriminate use of *de facto* stateless terminology, especially in order not to undermine the already established *de jure* stateless category. The UNHCR emphasizes that the 1954 Convention do not use the phrase “*de jure* stateless”, since just someone who falls into the concept of Article 1 is entitled to receive protection under international

²³² VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 25.

²³³ Margaret Somers called *de facto* stateless persons some groups in the USA victims of the Hurricane Katrina in 2005, whose needs during the emergence were not adequately addressed by the Federal Government, denoting a pattern of ineffective citizenship by those impoverished residents of certain areas affected by the disaster. See SOMERS, Margaret R.; WRIGHT, Olin. **Genealogies of citizenship: Markets, statelessness, and the right to have rights**. Cambridge: Cambridge University Press, 2008.

²³⁴ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 22.

²³⁵ *Ibid.*, p. 23.

²³⁶ See UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Statelessness Determination Procedures and the Status of Stateless Persons** ("Geneva Conclusions"), December 2010. Available at: <http://www.refworld.org/docid/4d9022762.html>. Accessed on: 3 May 2017.

law. But it remains valid the recommendation that states can choose to treat *de facto* stateless similarly as *de jure* ones.

In an expert meeting on the matter held by the UNHCR in 2010, dedicated to the study of the concept of statelessness under international law (known as “Prato Conclusions”), the participants agreed to adopt the definition of *de facto* statelessness suggested in a background study developed by Hugh Massey, as follows:

de facto stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality²³⁷.

Therefore, *de facto* statelessness is when a person is outside the territory of her country of nationality, and is unable to count on the diplomatic protection of the state, in its classical conception (when the state takes action against another state on behalf of its national, whose rights or interests have been injured), or cannot count on the state consular protection and assistance in general, including returning to his state of nationality. This inability refers to circumstances beyond the individual control, including when the country is unable to provide protection because it is in a state of war, or does not have diplomatic or consular relations with the host country²³⁸. Persons who are unable to return to their country of nationality are always *de facto* stateless, even if they can count with protection of this state on the host country. However, if a person is able to return to his country of nationality, it will not be considered *de facto* stateless²³⁹.

The person can be considered *de facto* stateless also if, for valid reasons, she is unwilling to count on the protection above. Valid reasons are considered the same elements which can turn someone into a refugee, according to the existing universal and regional protection instruments on the matter²⁴⁰. Persons who do not fall under one of those definitions

²³⁷ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Expert Meeting** - The Concept of Stateless... op. cit. “q conclusions”.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ In particular, the 1951 Convention/1967 Protocol relating to the Status of Refugees, the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, the 1984 Cartagena Declaration on Refugees, and the European Union Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

of refugee, or who refuse the protection of their country of nationality when it is available, by other reasons, are not considered *de facto* stateless²⁴¹.

In the case of irregular migrants, if they are unable or unwilling to avail to the protection of the country of nationality, there should be a request, and a refusal of protection by their country of nationality, before it is established if the person in question can be considered *de facto* stateless²⁴².

The definition above and its elements are built based on the 2010 Summary Conclusions of the UNHCR, since there is no international law norm which deals specifically with the matter. In any case, nothing precludes any person who has trouble in enjoying rights attached to nationality, where other citizens of the state do enjoy those rights, to be entitled to the general protection of human rights law, in this case, the non-discrimination principle and its corollaries²⁴³.

According to the UNHCR, some states have incorporated the concept of *de facto* statelessness into their statelessness determination procedures, considering it for conferring protection, alongside the concept of the 1954 Convention. Moreover, the UN Agency encourage states to provide protection to *de facto* stateless persons, since often they are in irregular situations or prolonged detention, caused by inability to return to their home country²⁴⁴.

It is important to realize, however, that should refugee status or *de jure* statelessness be applicable, they must be recognized as priority over *de facto* stateless condition, since in those cases specific international law protection is available²⁴⁵.

It remains to be seen how the recommendations above will develop over time. One open question refers to how other states would behave, in face of a state which decides to extend the protection of a *de jure* stateless, for a *de facto* stateless. Are other states obliged to abide by this decision, even when the person in question is formally its national?²⁴⁶ Would the person concerned be considered having double nationality, with the legal consequences that this situation can have regarding other legislations? As a practical matter, the Article 28 of the 1954 Convention mentions that travel documents should be issued and accepted for

²⁴¹ MASSEY, H. **UNHCR and *de facto* Statelessness...** op. cit., p. 6.

²⁴² UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Expert Meeting - The Concept of Stateless...** op. cit.

²⁴³ As seen above in the section 1.2.6, on nationality as a human right.

²⁴⁴ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Handbook on Protection of Stateless Persons...** op. cit.

²⁴⁵ Ibid.

²⁴⁶ FRANCO, Raquel Trabazo Carballal. **Cidadãos de lugar nenhum...** op. cit.

stateless persons, but the reference relates to *de jure* statelessness, as defined in Article 1. Therefore, could a state deny acceptance of a passport issued for a *de facto* stateless, if this state does not recognize such a category?²⁴⁷ Those and other questions will eventually be settled, if and when, cases like that emerge in the future.

2.3 Causes of statelessness

2.3.1 Conflicting nationality laws

Stateless can be caused by the unintentional consequence of a negative conflict of nationality laws. The most common case is when a child is born in the territory of a country which has nationality law based on *jus sanguinis*, but her parents are nationals of a state which uses *jus soli*. In this case, the child will not be entitled to nationality neither from the country of origin of her parents, because she was not born in that territory, neither be entitled to nationality of the country where she was born, because what matters for *jus sanguinis* countries is the nationality your parents have. Even if this is not a new problem, the growing international human mobility is increasing the cases where this kind of situation occurs.

Jus sanguinis principle is especially susceptible to create stateless people. Some states, for example, have adopted limitations to the possibility of passing nationality from one generation to another, when the national leaves the country and emigrates permanently. United Kingdom, for instance, limits the passing of nationality for the British born abroad. Those children still acquire automatically British nationality, but are called “British citizens by descent”, which means they cannot pass on their nationality to the next generation, if their children were not born in the United Kingdom²⁴⁸.

Another element by which *jus sanguinis* is considered sensitive to statelessness is the fact that in many countries, the mother does not pass on nationality as the father does. That makes the child vulnerable, by depending entirely on the father to acquire nationality. If the father is unknown; does not recognize the child; is stateless himself; is already dead; or is unwilling to take the necessary procedural steps to register the child, she can become stateless²⁴⁹ before a helpless mother.

²⁴⁷ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Convention relating to the Status of Stateless Persons...** op. cit.

²⁴⁸ VAN WAAS, Laura. **Nationality Matters...** op. cit, p. 51.

²⁴⁹ *Ibid.*, p. 52.

Criticism on the *jus sanguinis* principle is also voiced when it is acknowledged that it can perpetuate statelessness, considering it can become an inherited condition.

Just as the nationality of the child is determined according to the nationality of the parents, where the parent's nationality is lacking the child will simply inherit this status. The result, statelessness at birth, can be identical if the parents' nationality is unknown or underdetermined²⁵⁰.

Some scholars defend that it would be desirable to universally adopt the *jus soli* principle, since “every child is born somewhere and this place of birth is usually relatively easy to establish”²⁵¹. In addition, “the place of birth remains unaffected whether the child is legitimate or illegitimate and whether the parents are nationals, (irregular) foreigners or even stateless”²⁵².

Even if it could appear simple, in fact *jus soli* raises its own concerns, one of the most important being the possibility of increase in “birth tourism”, that is, a pregnant mother who chooses the country where she wants her child to be born, for nationality purposes²⁵³. In a world where inequality among rich and poor countries are huge, and life opportunities vary completely depending on where one is born, parents trying to improve their children future is not something to be blamed. At the same time, from the host state perspective, to have foreign people coming exclusively to give birth and so acquire its citizenship, without any effective link with the country, may appear for some a subversion of the nationality rules. For example, in the 2016 US Presidential elections, Donald Trump criticized the constitutional birthright citizenship, automatically given to any child born in the American territory, using the pejorative expression “anchor babies”, raising a fierce public debate²⁵⁴.

A mix of both *jus sanguinis* and *jus soli* criteria is the rule in most of the countries. In addition, legal reforms have been made in some states, in order to avoid negative conflicts of law from which could result stateless persons. For Van Waas, “the expansion of access to nationality and the convergence of the two doctrines on nationality attribution is by large a reaction to the increased mobility of populations in the late 20th and early 21st centuries”²⁵⁵.

²⁵⁰ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 52.

²⁵¹ *Ibid.*, p. 53.

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ CONSTANT, Leticia. Termo “bebê-âncora”, usado por Trump, gera polêmica na campanha eleitoral dos EUA. **RFI Brasil**, 24 Aug. 2014. Available at: <http://br.rfi.fr/geral/20150824-linha-direta-polemica-donald-trump> Accessed on: 17 May 2017.

²⁵⁵ VAN WAAS, Laura. The children of irregular migrants: A stateless generation? **Netherlands Quarterly of Human Rights**, v. 25, n. 3, Sep. 2007, p. 445.

There seems to be no magical or uniform solution, mostly because states keep being the only entities capable of conferring nationality, in an uncoordinated way. But although this seems to be considered self-evident, to the analysis proposed in this work, it is hard not to realize how vulnerable are human beings in a world where, depending on where the person is born, or which nationality her parents have, it will fall upon her a (not chosen) nationality, which can, realistically, make all the difference in respect to the kind of opportunities she will have access along her lifetime²⁵⁶.

2.3.2. Childhood statelessness

Nationality, as seen, is typically given at birth. When a child is born stateless, this condition can affect her for many years, if not for her entire life. She will most likely have problems to go to school, to receive health care, social assistance and many others particular rights designed to protect children. “This is why a child’s right to acquire a nationality is laid down in numerous international instruments, including the almost universally ratified 1989 Convention on the Rights of the Child (CRC)”²⁵⁷.

If the 1948 UDHR asserts in its article 15 the right of “everyone” to a nationality²⁵⁸, the International Covenant on Civil and Political Rights (ICCPR) assures that “every child” has the right to acquire nationality²⁵⁹. Even if neither one specifies to which state the child can exercise this right, nor when that should happen, it gives a generic right to nationality which would configure a bind obligation for state parties, at least in the case of ICCPR²⁶⁰. If read in conjunction with Article 24 (2), which demands states to provide immediate registration after birth, it means nationality is ought to be attributed immediately after birth²⁶¹. The Convention on the Rights of Children, in its article 7, is more specific, stating:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

²⁵⁶ See the bold criticism on the birthright citizenship made by Ayelet Shachar, in: SHACHAR, Ayelet. **The birthright lottery...** op. cit.

²⁵⁷ GROOT, Gerard-René de. Children, their right to nationality and child statelessness. In: EDWARDS, A; WAAS, L. V. **Nationality and Statelessness under international law**. Cambridge: Cambridge University Press, 2014, p. 144-168. p. 144.

²⁵⁸ UN GENERAL ASSEMBLY. **Universal Declaration of Human Rights**, 10 December 1948. Available at: <http://www.refworld.org/docid/3ae6b3712c.html>. Accessed on: 10 Aug. 2017.

²⁵⁹ UNITED NATIONS. Office of the High Commissioner for Human Rights (OHCHR). **International Covenant on Civil and Political Rights...** op. cit., article 24 (3).

²⁶⁰ GROOT, Gerard-René de. **Children...** op. cit.

²⁶¹ Ibid.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in *particular where the child would otherwise be stateless*²⁶².

The obligation to avoid childhood statelessness is not necessarily for the State where the child was born, but can be related to the State of nationality of the parents, depending on which nationality criterium is applied in the country concerned (*jus soli* or *jus sanguinis*)²⁶³.

Requiring special attention is the case of abandoned or orphaned children. A baby can be abandoned for many different reasons, including dramatic economic reasons, preference for male children, discrimination against interracial marriage, fear of children with birth defects, and when a child is born out of a stable relation or marriage²⁶⁴. The problem is that when a child is found abandoned, in most of the cases it is very difficult to determine where and when she was born, and who are the parents. It does not matter then if the state where she is located adopts *jus sanguinis* or *jus soli*, because in either case, it is impossible to prove her nationality. Orphaned children are also a matter of concern, especially when they are left very young, considering it may be also difficult to assert their parents' identity²⁶⁵.

Moreover, one of the most important concerns about childhood statelessness nowadays is when it is a result of irregular migration. Migration is a social fact present everywhere, gaining even more importance in a globalized world. Despite attempts to “close the borders” and other policies of stricter border controls in many countries, especially in the develop ones, international migrations and growing forced displacements keep happening, and when people do not see a way of doing it legally, in many cases they do it anyway, becoming what is called “irregular migrants”. For instance, in the United States alone, there are at least 11.4 million “unauthorized immigrants”²⁶⁶. The fact that many of those persons will naturally have children, who will live in the country, the access to citizenship for this children is a major concern. Even though many people may think the solution would be simply to concede nationality to every children in the country where they are born, based on *jus soli* doctrine, this “pure, utopian, all-inclusive form appears to be under threat”²⁶⁷.

²⁶² UN GENERAL ASSEMBLY. **Convention on the Rights of the Child**, article 7, emphasis added. In: UNITED NATIONS. **Treaty Series**, v. 1577, p. 3. New York: 20 November 1989. Available at: <http://www.refworld.org/docid/3ae6b38f0.html>. Accessed on: 10 Aug. 2017.

²⁶³ GROOT, Gerard-René de. *Children...* op. cit., p. 147.

²⁶⁴ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 69.

²⁶⁵ *Idem*.

²⁶⁶ BAKER, Bryan; RYTINA, Nancy. *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012*. DHS Office of Immigration Statistics. **Population Estimates**. Mar. 2013. Available at: https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202012_0.pdf Accessed on: 18 May 2017.

²⁶⁷ VAN WAAS, Laura. *The children of irregular migrants...* op. cit., p. 445.

Indeed, some receiving countries have introduced conditions in order to concede birthright citizenship, and the main target are irregular migrants, because

a particular (immigration) status is required of the parents of their children to be granted nationality *jus soli*. Instead of gaining citizenship, these children inherit their parents's immigration status with the somewhat bizarre result of them being labelled "irregular migrants" themselves, despite being born on the territory²⁶⁸.

In addition, one of the most problematic issues generating stateless children nowadays is lack of adequate birth registration. Birth registration is the act by which a birth is documented, and it is determinant to the establishment of nationality, simply because it is in this document that the place of birth and parentage of child is registered. As the lack of birth registration can raise doubts on State authorities over the child nationality, a birth certificate (an extract originated from birth registration) is generally required. And the birth certificate is certainly the most important document for a person to avoid statelessness caused by doubts on her origin. Indeed, "in the absence of a documented birth registration and certification, a state can dispute a child's nationality claim in their territory, greatly increasing the risk that child will not have citizenship ties to any state"²⁶⁹. Birth registration is even recognized as a human right in both the Convention on the Rights of the Child (Article 7) and the International Covenant on Civil and Political Rights (Article 24).

Yet, at least thirty percent of all births are not registered worldwide, affecting more than 40 million new-borns each year²⁷⁰. The most vulnerable children are the indigenous and the ones from particular minorities, such as isolated ethnic groups, children of refugees and internally displaced people, children born from illiterate parents or undocumented immigrants²⁷¹. Causes of non-registration amount to parents' lack of knowledge about the importance of registration, difficulties of time and resources to accede to registration, and in case of irregular migrants, fear of detention or deportation²⁷². Also, the state can be the cause of non-registration by imposing complex bureaucratic procedures, not providing this public

²⁶⁸ VAN WAAS, Laura. The children of irregular migrants... op. cit., p. 446.

²⁶⁹ NONNENMACHER, S.; CHOLEWINSKI, R. The nexus between statelessness and migration. In: EDWARDS, Alice; VAN WAAS, Laura. (Eds.). **Nationality and Statelessness under International law**. Cambridge: Cambridge University Press, 2014. p. 247-264, p. 258.

²⁷⁰ UNICEF. **The births of around one fourth of the global population of children under five have never been registered**. Available at: <https://data.unicef.org/topic/child-protection/birth-registration/> Accessed on: 19 May 2017.

²⁷¹ VAN WAAS, Laura. The children of irregular migrants... op. cit, p. 449.

²⁷² NONNENMACHER, S.; CHOLEWINSKI, R. The nexus between statelessness and migration... op. cit.

service appropriately or even connecting civil registration with migratory law, discouraging or impeding irregular migrants from registering their children²⁷³.

When the law of the state concerned do not provide adequate means for irregular migrants to proceed the registration, there would be a breach of the above mentioned universal human rights provisions. And that can also happen against a background of discrimination.

For instance, in Dominican Republic, registry officials reportedly refuse to register the birth of children of Haitians in irregular migratory situation. That situation was aggravated by the Constitutional Court judgment TC/0168/13, which ruled “that people born in Dominican territory children of migrants in an irregular migratory situation were not entitled to Dominican nationality”²⁷⁴. Already in the 2010 Dominican Constitution, nationality of the country was banned to children of persons whose immigration status was irregular according to internal law²⁷⁵. Then, the Law no. 169-14 confirmed the denationalization of thousands of Haitian descendent persons born in Dominican Republic, in a situation described by the Inter-American Commission of Human Rights as an arbitrary deprivation of nationality, which “created a situation of statelessness of a magnitude never before seen in the Americas”²⁷⁶.

2.3.3. Statelessness upon change of civil status and gender-based discrimination

Marriage has been an important issue related to statelessness because of the trend in nationality laws to give attention to familial facts which would affect the effective link between a person and a state. When a person marries another with a different nationality, and they choose one of the two countries to live in, typically the nationality of one of them becomes a matter to be considered, including in their family planning. Usually, the solution is

²⁷³ NONNENMACHER, S.; CHOLEWINSKI, R. The nexus between statelessness and migration... op. cit.

²⁷⁴ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (IACHR). **Report on the situation of human rights in the Dominican Republic**, 2015. Available at: <http://www.oas.org/en/iachr/reports/pdfs/DominicanRepublic-2015.pdf> Accessed on: 19 May 2017.

²⁷⁵ Constitución de la República Dominicana, proclamada el 26 de enero. Publicada en la Gaceta Oficial No. 10561, del 26 de enero de 2010. “Article 18: Nacionalidad. Son dominicanas y dominicanos: 3) Las personas nacidas en territorio nacional, con excepción de los hijos e hijas de extranjeros miembros de legaciones diplomáticas y consulares, *de extranjeros que se hallen en tránsito o residan ilegalmente en territorio dominicano*. Se considera persona en tránsito a toda extranjera o extranjero definido como tal en las leyes dominicanas;” (emphasis added).

²⁷⁶ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (IACHR). **Report on the situation of human rights in the Dominican Republic**... op. cit.

the acquisition by one of the spouses, of the nationality of the other upon marriage and other conditions, or have access to facilitated naturalization.

Although nowadays in most of the states, it does not matter which spouse is able to accede to the other's nationality, as a matter of fact, it is the woman's legal status which is normally affected, as it is persistent a tradition of what is called "dependent nationality", by which nationality laws connect the nationality of the wife with that of her husband²⁷⁷. Clearly discriminatory, the legislation of many states still have provisions alike²⁷⁸. "The way in which states frame their laws tells us a great deal about how they perceive and treat their women"²⁷⁹.

Situations of statelessness may arise, for instance, when the marriage with a non-national by the wife, is "punished" with the loss of her original nationality. If the state of nationality of the husband does not provide the spouse with automatic conferral of nationality by marriage, she will become stateless.

In the situation of divorce, some legislations provide that the nationality obtained through the marriage is lost, and in the case the person does not have another nationality or has lost the original one, she will be rendered stateless. It is the case of Vietnam, where more than 50,000 brides married foreigners since 2002, and some close richer countries (e.g. Taiwan) require that, in order to have naturalization by marriage, they renounce first their Vietnamese nationality. But if the marriage does not go well and they have to divorce, they simply lose their newly acquired nationality and become stateless.²⁸⁰

One of the biggest legal matters which still today causes statelessness are the legal differences provided in many nationality legislations between men and women. Reportedly, up to sixty countries in the world have gender-discriminatory provisions²⁸¹. Globalization and the increase of contemporary international migrations have as one of its consequences the raise in binational marriages, what in the context of unequal gender nationality laws can create additional difficulties to women's access to nationality, or not to be deprived of it. That is unfortunately still a pattern, since "discriminatory nationality laws reproduce gendered hierarchies and disadvantages in society"²⁸².

²⁷⁷ GOVIL, Rhada; EDWARDS, Alice. **Women, nationality and statelessness...** op. cit., p. 178.

²⁷⁸ Most countries with nationality laws which do not respect gender equality are from the Middle East and Africa. Reform of those laws are slowly taking place, with the support of UNHCR. For an updated analysis of the legislation of each country, see UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Background Note on Gender Equality...** op. cit.

²⁷⁹ GOVIL, Rhada; EDWARDS, Alice. **Women, nationality and statelessness...** op. cit., p. 192.

²⁸⁰ MCKINSEY, Kitty. The stateless brides of Vietnam. **Refugees Magazine**, n. 147, 2007. p. 24-27.

²⁸¹ Available at: <http://equalnationalityrights.org/countries/global-overview> Accessed on: 12 May 2017.

²⁸² GOVIL, Rhada; EDWARDS, Alice. **Women, nationality and statelessness...** loc. cit.

Historically, gender-based discrimination was connected to a principle which praised the “unity of nationality of the family”, by which the family is ought to have the same nationality, that of the husband or father²⁸³. In common law tradition, there was a legal prevalence of a kind of “head of family” mentality, which made women dependent on the husband nationality; and in countries where the tradition was civil law, the Roman private law influenced by making family law giving predominance for the husband/father (as preferred guardianship rights), what was emulated in many countries in their written law systems²⁸⁴.

Along colonization, those metropolitan rules where extended to the colonized territories, and the new born states did little to recognize women’s right to equality in nationality matters, what is likely to be “a restatement of what new elites perceived to be ‘traditional’ family values, and at other times, the automatic continuation of colonial legal values and codes without criticism or review”²⁸⁵.

The application of the principle of dependent nationality causes many women to see changed their nationality when they marry a non-national husband. If safeguards are not in place in order to prevent statelessness, the woman can be rendered stateless in case of death or divorce from the husband. In addition, if she had to renounce her original nationality to acquire that of the husband, she remains dependent on the naturalization laws of the state of nationality of the husband, which can oppose its own legal and administrative restrictions, increasing the risk of statelessness, even if temporary (until she acquires the new nationality). It is also the case when the woman divorces before acquiring the nationality of the husband, if her country poses problems to reacquire original nationality²⁸⁶. That is the case of the Vietnamese brides mentioned before, although the Vietnamese government changed its law in 2008, allowing the restoration of nationality for women in that situation.

In the case of naturalization in general, also women have disadvantages in some countries. It is common that requirements in this sense are different for men and women²⁸⁷.

For what concerns international adoption, when the nationality of the adopting child is different from the adoptive parents, it is necessary to check if it would be possible for this child to acquire the nationality of her prospective parents. The practice of many states point in the direction of automatically granting the nationality of the adoptive parent to the adopted

²⁸³ GOVIL, Rhada; EDWARDS, Alice. **Women, nationality and statelessness...** op. cit., p. 172.

²⁸⁴ *Ibid.*, p. 173.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*, p. 179.

²⁸⁷ *Ibid.*, p. 180.

child with another nationality, but not all countries act like that, and some provide the automatic loss of nationality, when a child is adopted abroad²⁸⁸.

Therefore, cross-national adoption require a careful previous assessment to avoid turning children into stateless persons, as adoption itself indeed represents a big change in the civil status, and can rise problems of conflicting nationality laws.

2.3.4. Loss, withdraw and renunciation of nationality

The possibility of Loss of original nationality is something common in most national legislations. When the state provides that, by acquiring another nationality, the individual loses his original one, that is not much of a problem, since it could be just a nationality change. That is normally motivated by the supposed end of *allegiance* with the former state of nationality, used sometimes in cases which the person emigrates for a long time, losing the connection with the first country of nationality and building it with another one.

Some states, such as Malawi, India and Sudan have provisions by which they revoke the nationality of people who leave permanently the country²⁸⁹. That is seen as a kind of voluntary renunciation of nationality, rather than the deprivation by the state itself. The problem is that in many cases, those people are not entitled to the nationality of their new state of residence, what can make them statelessness. Indeed, naturalization criteria in each State is independent and completely not connected to the nationality of provenience of the individual concerned²⁹⁰.

Another serious question is the deprivation of nationality which occurs when, by any reason, someone's nationality is taken away by the State. There are many reasons for that to occur, namely:

a change of allegiance which may be evidenced by the pledging of a formal oath of allegiance to a foreign state; voluntary service in the armed forces or government of a foreign state; committing acts which are in contravention with the vital interests of the state; prison sentence within a certain period after naturalization in the country of nationality; and acquisition of nationality by misrepresentation or fraud (for example during the naturalization procedure)²⁹¹.

²⁸⁸ VAN WAAS, Laura. *Nationality Matters...* op. cit., p. 73.

²⁸⁹ *Ibid.*, p. 78.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*, p. 80.

Persons who have achieved nationality by naturalization are more vulnerable to deprivation of nationality, considering there are often legal mechanisms to punish this “adopted citizens” if they do not correspond with righteous criteria specified by the legislation, such as not committing certain types of crimes, for example. It is the case in Brazil, where the 1988 Constitution states that it will lose Brazilian nationality the naturalized citizen who “had cancelled its naturalization, by judicial decision, due to activity harmful to the national interest”²⁹². It also states that the Brazilian nationality is lost when the person acquires a new one, except if it is the recognition of an original nationality (*jus sanguinis*)²⁹³.

There is also the possibility that the States leave their citizens free to renounce their nationality, without any safeguards to prevent statelessness. In fact, as there are cases in which naturalization is only conceded based on renunciation to prior nationality²⁹⁴, to avoid dual nationality²⁹⁵, the liberty of renunciation is fundamental. The problem is that not all states require the acquisition of a new nationality before authorizing the nationality renounce. That situation can lead to statelessness.

Statelessness can also arise when a person renounces to its nationality to naturalize in a new state, but this application for any reason is not successful. There are many reported cases of people who stay in a limbo, being forced to renounce their original nationality in order to apply to become a national of another State.

Even though it is clear that the renunciation of nationality prior to the acquisition of another is a source of statelessness, some states nevertheless make the prior renunciation of one’s original nationality a requirement for entering an application for naturalization²⁹⁶.

Moreover, although not common, becoming stateless can be a free choice, if the domestic legislation allows that possibility. It is the curious case of Garry Davis, an American born gentleman, who after serving for the United States at World War II as a bomber pilot,

²⁹² BRASIL. **Constituição** (1988)... op. cit., Article 12, § 4º, I. Original text: “§ 4º - Será declarada a perda da nacionalidade do brasileiro que: I - tiver cancelada sua naturalização, por sentença judicial, em virtude de atividade nociva ao interesse nacional”.

²⁹³ BRASIL. **Constituição** (1988)... op. cit., Article 12, § 4º, II, “a”. This disposition protects the millions of Brazilian who have the originary right of Italian, German, Portuguese and other European country nationality via *jus sanguinis*.

²⁹⁴ NONNENMACHER, S.; CHOLEWINSKI, R. The nexus between statelessness and migration... op. cit.

²⁹⁵ Dual nationality can be cause of tension between states, as became evident in the Nottebohm case before the ICJ in 1955.

²⁹⁶ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 80.

decided to renounce to his American nationality, and declared himself a “citizen of the world”²⁹⁷, becoming a *de jure* stateless.

Some authors, however, believe that nationality cannot be opted-out, as Ziemele, who argues, when analyzing the Council of Europe’s 2006 Convention on the Avoidance of Stateless in relation to State Succession, that

it is hard to imagine that a person’s wish to remain stateless should also be respected in view of the fundamental principles on which the two European Conventions rely, that is, the existence of the right to a nationality as linked to the obligation to avoid statelessness and the obligation to prevent persons from becoming stateless in state succession situations. Therefore, it should be concluded that once the state has put in place reasonable procedures for granting nationality, the persons concerned should make use of them²⁹⁸.

Finally, there are cases of persons who renounce their nationality on purpose, to become stateless and have facilitated naturalization in another country, taking advantage of special provisions for stateless people²⁹⁹. Although the UNHCR understands that voluntary renunciation does not preclude an individual to be considered stateless, since the manner in which the person became stateless is not considered in the 1954 Convention, some states can take the voluntary renunciation of the former nationality as relevant to determine the most appropriate solution in each case³⁰⁰. This kind of distortion demonstrates how complex can become the puzzle of nationality, eventually opening space for individual calculations on the basis of migratory interests.

²⁹⁷ When Mr. Davis renounced American citizenship, and established in Paris in 1948, he created a movement called One World, which received support from Albert Einstein, Albert Camus and Jean Paul Sartre. He then created the International Registry of World Citizens, which started to issue “world citizen” passports. Since then, reportedly half a million passports have been issued (the service exists until today, Washington D.C. based), and “Burkina Faso, Ecuador, Mauritania, Tanzania, Togo, Zambia — have formally recognized the passport”, allowing people to enter their territory with it, according to the NY Times. Mr. Davis died in 2013 aged 91, but not without leaving many stories and a persistent utopian dream as legacy. More information at <http://worldservice.org>. FOX, Margalit. Garry Davis, Man of no Nation Who Saw One World of No War, Dies at 91. **The New York Times**, New York, 28 Jul. 2013. Available at: http://www.ny-times.com/2013/07/29/us/garry-davis-man-of-no-nation-dies-at-91.html?pagewanted=all&_r=0 Accessed on: 19 may 2017.

²⁹⁸ ZIEMELE, Ineta. State Succession and issues of nationality and statelessness. IN: EDWARDS, Alice; VAN WAAS, Laura. **Nationality and Statelessness under International law**. Cambridge: Cambridge University Press, 2014, p. 227.

²⁹⁹ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 80.

³⁰⁰ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Expert Meeting - The Concept of Stateless...** op. cit.

2.3.5. Discriminatory or arbitrary deprivation of nationality

One of the most serious situations that can lead to statelessness is when a state deliberately denies or withdraws the nationality of a person or group, on the grounds of any given difference considered unjustifiable, amounting to a form of discrimination. The 1948 UDHR clearly states that “no one shall be arbitrarily deprived of his nationality (...)”³⁰¹. A Report by the UN Secretary General to the Human Rights Council, considered that prohibition of arbitrary deprivation of nationality has become a principle of customary international law³⁰².

Therefore, an important element to consider is *arbitrariness*, which according to the Oxford dictionary amount to “the quality of being based on random choice or personal whim, rather than any reason or system”³⁰³. System may be understood here as a legal one, so either the national law of a state, or international law. Connecting this concept with the prohibition of non-discrimination, it is possible to affirm that arbitrary would be a nationality withdrew or denied based on a particular condition or membership. For instance, nationality can be used by a government for political reasons, when the state withdraws arbitrarily someone’s nationality based on his political opinions³⁰⁴. The Human Rights Council has included in the list of discriminatory grounds which violates human rights, “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including disabilities”³⁰⁵. It is interesting to note how this list has been evolving, gaining new words representing the broadening scope of non-discrimination³⁰⁶.

One of the big issues about denial or deprivation of nationality concerns minority groups, which by any historical or political reason are discriminated inside a State and thus, the government will either denationalize or deny access to citizenship for the members of

³⁰¹ UN GENERAL ASSEMBLY. **Universal Declaration of Human Rights**, 10 December 1948, Article 15 (2). Available at: <http://www.refworld.org/docid/3ae6b3712c.html>. Accessed on: 10 Aug. 2017.

³⁰² UN HUMAN RIGHTS COUNCIL, **Human rights and arbitrary deprivation of nationality**: report of the Secretary-General, 14 December 2009, A/HRC/13/34. Available at: <http://www.refworld.org/docid/4b83a9cb2.html> Accessed on 7 Oct. 2017.

³⁰³ OXFORD Dictionary. Available at: <https://en.oxforddictionaries.com> Accessed on 22 May 2017.

³⁰⁴ CLARO, C. A. B. Os 60 anos da Convenção da ONU sobre o Estatuto dos Apátridas e seus Reflexos na Legislação Brasileira. In: Carlos Alberto Marinho Cirino; Teresa Cristina Evangelista dos Anjos; Cleber Batalha Franklin. (Org.). **Direito e Cidadania**. 1ed. Boa Vista: Editora da UFRR, 2015, v. 1, p. 11-40.

³⁰⁵ UN HUMAN RIGHTS COUNCIL, **Human rights and arbitrary deprivation of nationality**: resolution adopted by the Human Rights Council, 15 July 2016, A/HRC/RES/32/5. Available at: <http://www.refworld.org/docid/57e3dc204.html> Accessed on 7 Oct 2017.

³⁰⁶ The text of the 1961 Convention on Reduction of Statelessness, mentioned only “racial, ethnic, religious or political grounds”, while successive United Nations Human Rights Council resolutions and Secretary General reports increased the list until it gains the above shape. VAN WAAS, Laura. **Nationality Matters...** op. cit. p. 106.

such group. The most well-known example is the Nazi persecution towards Jews and other minorities, part of whom managed to flee to escape extermination and were then denationalized, becoming stateless. But existing groups nowadays include Kurds in Iraq and Syria, the Rohingyas in Myanmar, many Haitians in Dominican Republic and the Lhotshampas in Bhutan.

There is a discussion whether the deprivation of nationality which results in statelessness should be considered arbitrary *per se*³⁰⁷, or just if results from discrimination. Although some scholars and civil society organizations defend that “deprivation of nationality that results in statelessness must be considered arbitrary, because the right to a nationality is a fundamental human right”³⁰⁸, the most recurrent account is that the demonstration of the arbitrariness, and by consequence, prohibition of nationality deprivation, is connected to the failing to comply with relevant procedural and substantive standards³⁰⁹.

Some of the procedural standards present in international law are “the right to have the reasoned decision issued in writing, open to administrative or judicial review and subject to an effective remedy”³¹⁰. Thus, although it is possible to be deprived of nationality by the state, in the first place this act has to respect legal guarantees for the individual, allowing him to appropriately question the act, recur if it is the case, and have access to justice in order to defend his view and ask for reform of the decision.

Also, there are important substantive standards which amount to the need of “legitimate purpose” for deprivation of nationality, and respect for the principle of proportionality³¹¹. Although the general principle is seeking to avoid statelessness³¹² resulting from nationality deprivation, the 1961 Statelessness Convention brings an exhaustive list of causes which would serve as legitimate purpose to deprive someone of nationality in certain situations, even if it can lead to statelessness. Basically, those situations are: a) when a naturalized

³⁰⁷ VAN WAAS considers that “there is an emerging view among scholars that any deprivation of nationality resulting in statelessness is, by definition, arbitrary and thereby prohibited under international human rights law”. VAN WAAS, Laura. *The UN stateless conventions...* op. cit., p. 85.

³⁰⁸ BRANDVOLL, Jorunn. Deprivation of nationality: limitations on rendering persons stateless under international law. IN: EDWARDS, Alice; VAN WAAS, Laura. **Nationality and Statelessness under International law**. Cambridge: Cambridge University Press, 2014, p. 194-216. p. 198. See also OPEN SOCIETY JUSTICE INITIATIVE. **Citizenship and Equality in Practice, Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to be Free from Arbitrary Deprivation of Nationality, and Combating Statelessness**. Submission to the UN Commission on Human Rights for consideration on its 62nd Session, November 2005.

³⁰⁹ BRANDVOLL, Jorunn. Deprivation of nationality... op. cit., p. 196.

³¹⁰ *Ibid.*, p. 197. See also: COUNCIL OF EUROPE. *European Convention on Nationality...* op. cit., Articles 10 to 13.

³¹¹ *Ibid.*

³¹² However, “seek to avoid” does not mean that the Convention covered all the cases by which someone can be rendered stateless if someone is deprived of nationality, as seen below.

person lives abroad for more than seven consecutive years, and he fails to declare to the authorities of the state his intentions to retain its nationality³¹³; b) in the case of the person who was born outside the territory of the state, when he fails either to register under the appropriate authority of his country abroad, or to reside in the state concerned until after one year of attaining majority, if this is a condition to acquire nationality³¹⁴. Those two situations regard people living abroad. Any other cause of depriving nationality “on the ground of departure, residence abroad, failure to register or on any similar ground” are not allowed³¹⁵.

Therefore, the 1961 Convention does not oppose against nationality deprivation which can cause statelessness in the following situations: a) if nationality is acquired on the basis of misrepresentation of fraud³¹⁶; b) if the national “has conducted himself in a manner seriously prejudicial to the vital interests of the State”³¹⁷ or, if against the law of the state, the citizen renders services or receives emoluments to another state³¹⁸. The rationale in both cases refer to the “duty of loyalty with the Contracting state”³¹⁹. A third provision concerns a break of “allegiance” with the state, represented by taking an oath in other state, or any definitive evidence of repudiation to the allegiance with the state of nationality expressed abroad³²⁰. So, even though the 1961 Convention was created to avoid statelessness, the compromise reached by state parties at the time of adoption left those gaps, mainly connected to the idea of “loyalty” and “allegiance” between the individual and the state.

The European Convention on Nationality of 1997 reaffirms some principles present on the 1961 UN Convention, but reduces the possibility of rendering a person stateless by deprivation of nationality to just one hypothesis: “acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant”³²¹. There are in this regional treaty a series of causes by which someone can lose nationality *ex lege* or by initiative of the state, but the convention explicitly forbids that such loss result in statelessness³²².

The Interamerican human rights protection system is the most progressive in the case of deprivation of nationality³²³. The American Convention on Human Rights provides in its

³¹³ UN GENERAL ASSEMBLY. Convention on the Reduction of Statelessness... op. cit., Articles 7(4).

³¹⁴ UN GENERAL ASSEMBLY. Convention on the Reduction of Statelessness... op. cit., Articles 7(5).

³¹⁵ Ibid., Articles 7(3).

³¹⁶ Ibid., Articles 8(2), b.

³¹⁷ Ibid., Articles 8(3), a, (ii).

³¹⁸ Ibid., Articles 8(3), a, (i).

³¹⁹ Ibid., Articles 8(3), a.

³²⁰ UN General Assembly. Convention on the Reduction of Statelessness... op. cit., Articles 8(3), b.

³²¹ COUNCIL OF EUROPE. European Convention on Nationality... op. cit., Article 7(1), b.

³²² Ibid., Article 7(3).

³²³ BRANDVOLL, Jorunn. Deprivation of nationality... op. cit., p. 206.

Article 20 (3): “No one shall be arbitrarily deprived of his nationality or of the right to change it”³²⁴. An example of application of this provision is the Interamerican Court of Human Rights Case *Yean and Bosico v. Dominican Republic*, about two children of Haitian origin born in Dominican Republic, which had denied their birth certificate, and thus their prove of nationality, considering Dominican Republic adopts *jus soli* principle. The Court held that the State acted with racial discrimination, turning the children stateless³²⁵.

In addition, a new cause for deprivation of nationality has been in question lately. It refers to the situation related with the commitment of acts of terrorism. It could be argued that “terrorist acts are found to be seriously prejudicial to *vital state interests*”³²⁶, amounting to the permissibility of deprivation of nationality provided in the Article 8(3), “a”, (ii), of the 1961 Convention, and Article 7(1), “d” of the European Nationality Convention. Indeed, a comparative study of nationality policies across Europe refers to a trend on tougher nationality policy in the states member of the European Union, especially in the aftermath of the September 11 (2001), with some states facilitating the deprivation of nationality in cases of crimes against the state, including terrorism³²⁷.

Reflecting on whether there is or not a trend by the states on “eliminating certain grounds for deprivation of nationality that are ‘out of tune’ with other developments in international law”³²⁸, Brandvoll concludes that the 1961 Convention standards, even if not closing the doors to all possibilities of deprivation of nationality causing statelessness, it is leading to reforms in some nationality laws, bearing in mind the growing concern on reducing statelessness, independently of ratification or not of the Convention by the states³²⁹.

2.3.6. Statelessness in the context of state succession

Whenever there is change in sovereignty of a given territory, the question of what happens to the population living in that territory imposes, as it forms the human element of the new state itself. If the nationality attribution by a state normally comprises the setting of criteria to award access to nationality, in the case of state succession it is necessary to establish transitory rules, as well as new ones, defining the criteria chosen to regulate both the

³²⁴ ORGANIZATION OF AMERICAN STATES. **American Convention on Human Rights...** op. cit.

³²⁵ COSTA RICA. Inter-American Court on Human Rights (ICHR). **Case of Expelled Dominicans and Haitians v. Dominican Republic. Series C N. 282.** Judgment of August 28, 2014.

³²⁶ BRANDVOLL, Jorunn. Deprivation of nationality... op. cit., p. 202, emphasis added.

³²⁷ BAUBOCK Rainer; ERSBØLL, Eva; GROENENDIJK, Kees; WALDRAUCH, Harald. **Acquisition and Loss of Nationality...** op. cit., p. 29.

³²⁸ BRANDVOLL, Jorunn. Deprivation of nationality... op. cit., p. 209.

³²⁹ Ibid.

access to nationality of the new state, as the adaptation for the inhabitants of the former state now living under a new state's law.

But this is not an easy task, considering that historically state succession has been a major cause of statelessness. One of the difficulties is that the decision making often overlooks certain people affected, either because of politic, ethnical or cultural differences, but also considering the complexity of the task, which can lead to unintended consequences caused by gaps in the legislation.

It is worth noting, however, that the deliberate exclusion of a particular group of inhabitants can amount to an arbitrary or discriminatory deprivation of nationality³³⁰, thus taking the question to another sort of statelessness, the one which, as seen above, is proscribed by international law.

Both the First³³¹ and the Second World Wars produced a big contingent of stateless people. Since the end of the Second War, the decolonization process led to the appearance of more than one hundred new states, and with the end of the Cold War, yet others became independent. A considerable amount of the today stateless are still from one of those complicated transitions. “The Estate Tamils in Sri Lanka, the Tatars in the Ukraine, the Bihari in Bangladesh and the ex-Russians in Latvia and Estonia are but a few examples”³³².

In fact, the decolonization period brought many issues of state succession. Nevertheless, instead of codifying international norms, it was used a case-by-case approach³³³. The most common solution adopted was to give nationality to all the people living in the territory of the new born state. This is called the “zero-option”, and it was used by many of the African decolonized countries³³⁴. But often this solution is not very easy to apply, since it depends much of the relation of the former state with the new one, demographical variants and local ethnicity questions. One of the problems is that the zero-option solution exclude the people who were living abroad by the time of the creation or liberation of the new states. It was the case of Ukraine, which had the Tatars from Crimea deported during the Second World War, accused by the URSS of collaborating with the Nazi. Because of that, around 100,000 of them were out of the country when independence was declared in 1991, so they did not

³³⁰ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 123.

³³¹ One of the first examples of mass statelessness occurred in the heart of central Europe. After the end of First World War, with the dissolution of the Austro-Hungarian Empire, and the rearrangement of the European map, many people remained stateless. They were called literally *heimatlosen*, meaning “homeless”. VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 122.

³³² VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 122.

³³³ ZIEMELE, Ineta. State Succession and issues of nationality and statelessness... op. cit., p. 222.

³³⁴ VAN KRIEKEN, Peter. Disintegration and statelessness. **Netherlands Quarterly of Human Rights**, v. 12, 1994. p. 26

acquire automatic citizenship, remaining stateless³³⁵. Successive efforts from the Ukrainian government with the support of UNHCR, later solved part of the problem, but after the Crimean Declaration of Independence of 2014, followed by Russian annexation, citizenship issues for Tatars became once again at stake³³⁶.

A second criterium used is when the new born state bases nationality law on the previous nationality of the people living in that territory. This is the case in many states which were somehow incorporated or lived under foreign occupation, and reconquered their independence afterwards. A good example is the Baltic countries, specially Latvia and Estonia³³⁷, after the collapse of the URSS. The nationality criteria they adopted was based on a historical “restored” citizenship, by which just those who lived in those territories before the Soviet occupation (1940) and their descendants had the right to acquire instantaneous citizenship³³⁸. Which means that many thousands of people who arrived or were born there not to national citizens (mostly Russians), between 1940 and 1991, became stateless³³⁹. As they were not qualified to original nationality, the only way was to opt for a complicated naturalization procedure in Latvia or Estonia, or applying for Russian nationality³⁴⁰. In the last case, they would have to leave as foreigners in their own country of origin or residence.

Yet a third way of dealing with nationality in the context of state succession is taking ethnicity as the main factor. Although ethnic arguments are usually not explicitly mentioned in the legislation, they play a role in many countries³⁴¹, especially the ones with great ethnical diversity, such as Indonesia, Chad and Myanmar. Nationality laws are, in certain cases, apparently designed to exclude particular groups, as occurred in Sri Lanka, separated from India; and Bangladesh, separated from Pakistan³⁴². Around 200,000 Tamil ethnic group

³³⁵ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 127.

³³⁶ In 2014, following disturbs in Ukraine which led to the fall of President Viktor Yanukovich, the Autonomous Republic of Crimea declared independence, after a referendum in which more than 80 per cent of the population asked Crimea and the city of Sevastopol to be incorporated by Russia (around 60 per cent of the population is composed by ethnic Russians). The peninsula was in this moment under Russian military occupation, so Western countries did not recognize as legitimate the referendum, nor the legality of the subsequent Russia incorporation of the territory. RT. Facts you need to know about Crimea and why it is in turmoil, RT, Moscow, 27 Feb 2014. Available at: <https://www.rt.com/news/crimea-facts-protests-politics-945/> Accessed on 19 May 2017.

³³⁷ Lithuania “adopted instead a model that combined aspects of the restored citizenship model with a system of attributing nationality based on residence, thereby limiting the incidence of statelessness on its own territory”. VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 126.

³³⁸ VAN KRIEKEN, Peter. Disintegration and statelessness... op. cit., p. 26.

³³⁹ At the end of 2015, there was 262,802 stateless people in Latvia, and 88,076 in Estonia, according to the UNHCR. UN HIGH COMMISSIONER FOR REFUGEES, **UNHCR Statistical Yearbook 2014**, 14th edition, 8 December 2015. Available at: <http://www.refworld.org/docid/5666f04b4.html> Accessed on 7 Oct. 2017.

³⁴⁰ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 126.

³⁴¹ WEIS, Paul. **Nationality...** op. cit., p. 155.

³⁴² VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 128.

remained stateless until recently, by being descendants of people taken by British colonizers in the XIX century from India to nowadays Sri Lanka, to work on tea plantations. They remained many decades without recognition of Sri Lankan nor Indian citizenship. Agreements between India and Sri Lanka conferred nationality to most of these people during the years 2000³⁴³.

As already studied, each State has the liberty to create its own rules regarding who are and who are not national of the State³⁴⁴. But this discretion is limited by rules accorded internationality by the States, especially when considered certain questions such as multiple nationality and statelessness. State succession, conceptualized as being “the replacement of one state by another in the responsibility for the international relations of territory”³⁴⁵, is also subject to international norms which try to avoid problems resulting from it, especially statelessness³⁴⁶.

The 1961 Convention on the Reduction of Statelessness was the first treaty to mention the question. Its Article 10 states:

1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavors to secure that any such treaty made by it with a State which is not a party to this Convention includes such provisions. 2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons³⁴⁷.

The Article tries to encompass all the problematic of statelessness resulting from state succession, and can be summarized as the obligation of state parties “either conclude treaties

³⁴³ WIJETUNGA, Chetani Priyanga. **Feature: Sri Lanka makes citizens out of stateless tea pickers**. UNHCR, 07 Oct. 2004, Available at: <http://www.unhcr.org/news/latest/2004/10/416564cd4/feature-sri-lanka-makes-citizens-stateless-tea-pickers.html> Accessed on: 19 May 2017.

³⁴⁴ LEAGUE OF NATIONS. **Convention on Certain Questions Relating to the Conflict of Nationality Law...**, Article 1, op. cit.

³⁴⁵ ZIEMELE, Ineta. **State Succession and issues of nationality and statelessness...** op. cit., p. 218.

³⁴⁶ At the regional level, the 1997 European Convention on Nationality addresses the question of nationality in the case of state succession in its Article 18, which brings general principles on the matter. It was the more specific 2006 Council of Europe Convention of the Avoidance of Statelessness in Relation to State Succession, which set up useful norms for the European states to consider in the context of state succession, including acknowledging the role of the individual choice of nationality, when the person is at the situation of being able to acquire more than one citizenship. According to Article 7 of the Council of Europe Convention, “a successor State shall not refuse to grant its nationality under Article 5 paragraph 1, sub-paragraph b, where such nationality reflects the expressed will of the person concerned, on the grounds that such a person can acquire the nationality of another State concerned on the basis of an appropriate connection with that State”. Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680083747> Accessed on 23 may 2017.

³⁴⁷ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Convention on the Reduction of Statelessness**. UNHCR, 30 August 1961.

or confer nationality to ensure statelessness will not occur as a result of a transfer of territory”³⁴⁸. The article, significantly changed in the final version compared to the original ILC draft, it is too broad and has interpretative problems, leaving room for disputes³⁴⁹.

The UN General Assembly adopted in 2000 the Resolution 55/153 regarding Nationality in Relation to the Succession of States, calling for the codification of the theme, and including Articles prepared by the ILC³⁵⁰. Some advancements proposed are the consideration of a provision meant to be used if none of the known nationality conferral criteria could be applied. Nationality should be conferred then by “any other appropriate connection” of the individual with the territory³⁵¹. In the commentaries, the ILC states that it was not by accident they chose the expression “appropriate connection”, which

should be interpreted in a broader sense than the notion of “genuine link”. The reason for this terminological choice is the paramount importance attached by the Commission to the prevention of statelessness, which, in this particular case, supersedes the strict requirement of an “effective nationality”³⁵².

Also in this document, which for now is just a proposal to be taken in consideration by the states, the ILC recognizes the role of the individual, by being able of choosing his own nationality, when that possibility is presented before someone who has more than one nationality option in a particular case³⁵³. That can indicate an important change in interpretation of the right to nationality, since “the right of option might change the traditional approach in matters of nationality and state succession”³⁵⁴. On the other hand, there are concerns that giving the right to opt, when more than one nationality is available, can lead involuntarily to statelessness. This is the case when someone refuses one nationality in detriment of another, but then is not able to accomplish one or more formal requisites to acquire the desired nationality³⁵⁵. Conferring to the individual the possibility of having a role, in the choice of his own nationality could be seen as an advancement, but given the configuration

³⁴⁸ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 133.

³⁴⁹ Ibid.

³⁵⁰ UN GENERAL ASSEMBLY, **Nationality of natural persons in relation to the succession of States:** resolution adopted by the General Assembly, 30 January 2001, A/RES/55/153. Available at: <http://www.refworld.org/docid/4ae9accb8.html> Accessed on 7 Oct. 2017.

³⁵¹ ZIEMELE, Ineta. State Succession and issues of nationality and statelessness... op. cit., p. 229.

³⁵² UNITED NATIONS. International Law Commission, **Articles on Nationality of Natural Persons...** op. cit.

³⁵³ ZIEMELE, Ineta. State Succession and issues of nationality and statelessness... op. cit., p. 230.

³⁵⁴ Ibid.

³⁵⁵ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 129.

of the question of nationality nowadays, as seen above, there are many obstacles to overcome to arrive at this point³⁵⁶.

A last discussion concerns the questions whether new born states would be obliged or not by the provisions about state succession, since they would be in the beginning of their existence, and therefore, they have not signed any treaties yet, being bound in principle only by customary international law. The 1978 Vienna Convention on succession of States in respect of treaties ensures that “any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed”³⁵⁷. The problem is that only 22 states ratified this instrument to date. Nevertheless, the state practice and the *opinio juris* go in the direction that human rights treaties remain binding for the successor state, independently of formal consent³⁵⁸. Although that does not mean that the successor state has an obligation to grant nationality (as seen, no state does according to international law), human rights provisions concerning the right to nationality, and more specifically, not to be deprived of it arbitrarily, remain fully applicable. That helps to protect people from arbitrary or discriminatory deprivation of nationality within the territory concerned.

2.3.7. Statelessness and migrations

The link between statelessness and migration is clear. Many stateless people are migrants, sometimes for reasons not connected to their situation of statelessness, but migration can also be the consequence of the stateless condition. Migration of stateless people is especially problematic when, by lack of the appropriate identification and/or travel documents, they find themselves into the category of “irregular migrants”, what can lead to arbitrary detentions, or a prolonged lack of personhood legal status, opening space to economic and social rights violations³⁵⁹, such as deny of the right to education, healthcare, work and social assistance.

³⁵⁶ The contributions of the third Chapter, about the gradual detachment of nationality from citizenship in contemporaneity point in this direction, but still with limited room for the individual free choice.

³⁵⁷ UNITED NATIONS. Vienna Convention on Succession of States in respect of Treaties. Vienna, 23 August 1978. In: UNITED NATIONS. **Treaty Series**, New York, v. 1946, p. 3, 2000. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=XXIII-2&chapter=23&clang=_en Accessed on: 17 Aug. 2017.

³⁵⁸ KAMMINGA, Menno. State Succession in Respect of Human Rights Treaties. **European Journal of International Law**, v. 7, n. 4, p. 469-548, jan./1996. p. 483.

³⁵⁹ NONNENMACHER, S.; CHOLEWINSKI, R. The nexus between statelessness and migration... op. cit., p. 247.

De facto stateless persons, when they do not receive diplomatic or consular protection from their country of nationality, in a situation of migration, can have trouble in returning to their country (e.g. by a denial of expedition or renovation of passport), what would violate their essential right of freedom of movement³⁶⁰.

Statelessness can induce migration by the constraints suffered by stateless people on their country of origin. The lack of legal recognition and by consequence, the denial of many human rights can force people to escape, seeking better life conditions in other places. Migration can become the only solution for avoiding “discrimination, marginalization and even persecution that may, in turn, make irregular migration in search of protection or alternative economic and social opportunities an even more likely consequence”³⁶¹.

At this point, it is important to distinguish the stateless who flee from persecution, war or mass violations of human rights, making them possible refugees, from general stateless who migrate by other reasons. In the case of international migration, push factors include hardships in everyday life, lack of opportunities, restrictions on political, religious and movement freedoms, and discriminations of any kind³⁶². There are also pull factors in the countries of destination, including professional and educational opportunities, familiar reunification and search for a freer, safer and dignified life. Those are just some examples, since there is a plethora of factors which amount to international migrations nowadays.

One of the main problems concerning stateless people in migratory context is the hardship caused precisely by their lack of nationality. As there is a human right to leave and return to one’s own country³⁶³, there is not a correspondent right to enter in another state, since as seen, this is considered intrinsic linked with state sovereignty. Thus, if on the one hand, a stateless person is not able to leave “his country”, as he is not a citizen of any country, and consequently, could be denied the right to return; on the other hand, a third state would not be willing to let him enter, since in case the authorities need to return or want to expel him, there is no “country of nationality” with the duty to readmit them back³⁶⁴.

As seen in the section dedicated to childhood statelessness, irregular migrants can face difficult circumstances in order to register the birth of their children, including fear of

³⁶⁰ UN GENERAL ASSEMBLY. **Universal Declaration of Human Rights...** op. cit., Article 13(2): “Everyone has the right to leave any country, including his own, and to return to his country”.

³⁶¹ NONNENMACHER, S.; CHOLEWINSKI, R. The nexus between statelessness and migration... op. cit., p. 250.

³⁶² Ibid.

³⁶³ UN GENERAL ASSEMBLY. **Universal Declaration of Human Rights...** op. cit., Article 13: “Everyone has the right to leave any country, including his own, and to return to his country.”

³⁶⁴ NONNENMACHER, S.; CHOLEWINSKI, R. The nexus between statelessness and migration... op. cit., p. 251.

arrest and deportation, what can lead to undocumented children falling into the statelessness dilemma.

In addition, some countries adopting *jus soli* doctrine provide that, for the child to acquire nationality, the parents should have a particular migratory status, mainly not to be in irregular situation. The problem then is when the child, in a peculiar situation, inherits the “irregular migrant” condition of her parents, even if she was born in the concerned country. In this case, the child depends on having the right to a nationality via *jus sanguinis*, becoming dependent of her parents’ nationality, or turning into a permanent migrant in her country of residence. But if her parents are stateless, or there are hampering conditions on the *jus sanguinis* nationality transmission (such as the mother not transmitting it, or withdrawal of nationality after certain time living abroad), then this child will be stateless herself³⁶⁵.

Another disturbing issue is the case of unaccompanied or separated children. The reasons why a child can be found unaccompanied can be summarized as amounting to “separation from their family while seeking asylum across borders, displacement in war zones, abandonment for social or economic reasons, or because of their parent’s deportation due to an irregular immigration status”³⁶⁶.

Human trafficking is also responsible for many children circulating across borders unaccompanied. There are serious concerns about the raising figures of children arriving without their parents in developed countries. In Europe alone, in 2015 the numbers amount to 104,195 unaccompanied minors who have applied for asylum. There was an increase of 350 per cent on that kind of arrivals compared to 2014 (23,150), while this number fell in 2016 to around 65,000³⁶⁷, possibly reflecting the media attention and responses of European authorities to what was called the “refugee crises”.

These children are obviously in a situation of serious threat to their lives and welfare, and absolute disregard for their special needs. They are also subject to losing their documentation in the way, or having it destroyed by traffickers, what would leave them without “proof of age, lineage, or nationality, and thus face the possibility to becoming stateless without an identity or familial link”³⁶⁸.

³⁶⁵ VAN WAAS, Laura. *Nationality Matters...* op. cit., p. 170.

³⁶⁶ NONNENMACHER, S.; CHOLEWINSKI, R. The nexus between statelessness and migration... op. cit., p. 259.

³⁶⁷ EUROPEAN UNION. Eurostat. **Asylum applicants considered to be unaccompanied minors by citizenship, age and sex Annual data (rounded)**. Last update 03 May 2017. Available at: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyunaa&lang=en Accessed on 22 May 2017.

³⁶⁸ NONNENMACHER, S.; CHOLEWINSKI, R. The nexus between statelessness and migration... op. cit., p. 259.

A research conducted recently found a clear nexus between human trafficking and statelessness in Thailand. One of the conclusions is that there are overlapping factors for both, mainly, poverty, lack of access to education, lack of job opportunities and discrimination³⁶⁹.

Stateless migrants in general have a serious problem with documentation. Travel documents are a necessary condition to travel internationally almost anywhere in the globe³⁷⁰. The most used document for this purpose is the passport, which identifies the individual and provides the country of origin of the traveler or migrant. Without travel documents, the person is likely to suffer restrictions in her ability to move internationally, and stateless persons can be denied a passport exactly because they do not have nationality.

Migrants can be without identity for many reasons. Some stateless people may never have had any identification documents, when for instance their birth was not appropriately registered, as seen in the cases of stateless children above. Since by not having travel documents, stateless people will not be able to travel abroad, some of them may obtain fraudulent passports and visas, what can increase their vulnerability, bringing other problems such as detention or abuses by smugglers³⁷¹. Other migrants can destroy their documents on purpose, “in an attempt to gain entry to a country through an unsubstantiated claim for asylum or false identification as a vulnerable migrant, such as a victim of trafficking”³⁷².

If, by one side, the stateless situation can be a cause of migration, it can also be that statelessness becomes a consequence migration. Being a migrant can cause the change of the nationality of origin, and even make the individual lose his nationality. For instance, in Myanmar, migrating irregularly may be punished with the loss of nationality³⁷³. Another constrain is that for naturalization to be accessible, migrants usually are ought to accomplish a certain period of time in the country concerned, and this period in ought to be of lawful residence³⁷⁴, what preclude for irregular migrants accessing naturalization.

Therefore, as this thesis intends to demonstrate, nationality in the way it was shaped in the nineteenth and twentieth centuries is becoming more and more outdated, incapable to

³⁶⁹ WAAS, Laura; RIJKEN, Conny; GRAMATIKOV, Martin; BRENNAN, Deirdre. **Researching the nexus between statelessness and human trafficking**. Oisterwijk: Wolf Legal Publishers, 2015. p. 162.

³⁷⁰ There are some exceptions, such as the Schengen Area under the European Union law, which allows EU nationals traveling inside the Schengen Area without carrying a passport or identity card.

³⁷¹ “Stateless persons and undocumented migrants (including minors) in some Southeast Asian countries (such as Myanmar and Thailand) are at a disproportionate risk of trafficking”. NONNENMACHER, S.; CHOLEWINSKI, R. *The nexus between statelessness and migration...* op. cit., p. 255.

³⁷² *Ibid.*, p. 254.

³⁷³ *Ibid.*, p. 257.

³⁷⁴ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 168.

respond to the human needs of a world of growing human mobility. Marriages between nationals of different states; children that are born from parents who do not hold the nationality of the country of residence; and incompatibilities between the nationality law of the country of origin, and naturalization regulations of the country of destination; are all factors which are likely to grow in importance, increasing the difficulties regarding citizenship status, and remaining a cause for statelessness³⁷⁵. If migration alone is already capable to create stateless persons, this risk is even greater in the case of irregular migration, victims of human trafficking and refugees.

The regulation of migration is gaining attention, since states, specially develop ones, are tightening border controls, trying to make more difficult to immigrate irregularly, but also in many cases making it difficult to immigrate also through legal channels³⁷⁶. That fact is paradoxical, since migrating is an old, ever present and unstoppable phenomenon, thus prohibiting or making it more difficult without regard to its causes, can be a way of involuntarily stimulating irregular channels, increasing the market for smugglers and the vulnerability of the people concerned.

2.3.8. Stateless and refugees

It is very important to distinguish stateless persons from refugees. While refugees are roughly those protected by being persecuted or fleeing from conflicts or human rights abuses, stateless persons are those who do not have any nationality. However, a person can be both stateless and a refugee. When this happens, it is necessary that “each claim is assessed and that both statelessness and refugee status are explicitly recognized”³⁷⁷.

Although many countries nowadays have national refugee laws, which coincide or not with the principles set up in the 1951 Convention and the 1967 Protocol, some do not, and in these cases, asylum seekers can be seen simply as “irregular migrants”. In certain countries, the presence of asylum seekers, although officially unlawful, is tolerated in the grounds of humanitarian concerns³⁷⁸.

Another question concerns the asylum seekers status itself. Since someone who asks for asylum in the state concern is not technically an immigrant, but a person who fled by

³⁷⁵ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 163.

³⁷⁶ NONNENMACHER, S.; CHOLEWINSKI, R. The nexus between statelessness and migration... op. cit., p. 256.

³⁷⁷ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Handbook on Protection of Stateless Persons...** op. cit.

³⁷⁸ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 179.

being persecuted, or in some cases, suffered serious human rights violations, she may not be eligible to accede to the legal residence timeframe, required for acceding to naturalization³⁷⁹, given her “special” migratory condition. The same can happen in case they have children in the host country, because sometimes the law will exclude access for *jus soli* nationality attribution on grounds of their status as refugees³⁸⁰. In case for acceding to naturalization, it is necessary to give up of the prior nationality, refugees clearly stand in a difficult situation, since they would have to ask renunciation of their citizenship for the same state authority which may be persecuting them.

In the same strand, refugees which had to flee from armed conflicts or persecutions, may not have been able to bring with them their full documentation, since the documents can be left behind, destroyed, stolen or lost³⁸¹. The lack of the appropriate documents can make it hard to prove nationality and the ties of the individual with his country, increasing the risk of *de facto* statelessness. That is, even if the individual orally confirms his nationality, the lack of adequate proofs of the connection with a given state can lead the host state to considered him stateless, even if *de jure* they are not. Ultimately, this can also affect his children born in the host country, since it could be impossible to register the children³⁸².

A refugee can lose his nationality while outside of his home country. According to the UNHCR framework on durable solutions, if voluntary repatriation to the country of origin is not possible, local integration becomes an option. For those who are or became stateless during their period abroad, especially when they status as refugees is prolonged on time, facilitating acquisition of local citizenship could be an adequate policy. Although many countries do not allow refugees to be naturalized, some do. A remarkable example happened in Tanzania in 2014, when the government of this state decided to grant Tanzanian citizenship to 162,156 Burundian refugees, including the children of some refugees who fled from Burundi since the 1972 ethnic conflicts.³⁸³

³⁷⁹ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 179.

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*, p. 180.

³⁸² *Ibid.*

³⁸³ MARKUS, Francis. Tanzania grants citizenship to 162,000 Burundian refugees in historic decision. **UN HIGH COMMISSIONER FOR REFUGEES (UNHCR)**, 17 Oct. 2014. Available at: <http://www.unhcr.org/afr/news/latest/2014/10/5441246f6/tanzania-grants-citizenship-162000-burundian-refugees-historic-decision.html> Accessed on: 02 jun. 2017.

2.3.9. Statelessness and environmental displacements

Environmental protection is increasingly in the global agenda, as natural disasters and problems related to unsustainable use of natural resources have been affecting the well-being of the populations, affecting the economy, international politics and the law. Climate change is one of the main preoccupations today, considering its potential of affecting negatively human life in the future.

For what concerns this study, climate change can lead to low-lying island states to disappear, due to the rise of the sea level. Nationals of Tuvalu, Kiribati, Maldives and the Marshall Islands may be forced to leave their country, since the existence of their country as such may be threatened. The entire populations of those countries may become stateless³⁸⁴.

The question, therefore, is related to statehood. If a state ceases to exist, since it would not have any territory left, will citizenship to that state disappear with it? Even if it seems unlikely that those countries are submerged before the end of the century, when that happens, there would be no longer a permanent population and a government in control of a state, at least not in the same territory.

The issue is more complex than it looks like. It is expected the multiplication of extreme climate events, such as hurricanes, flooding and the contamination of drinkable water by sea infiltration, factors that represent serious threats to the population of the coastal areas, where most of the population of the world is concentrated. According to the Intergovernmental Panel on Climate Change (IPCC), “rapid sea-level rise that inundates islands and coastal settlements is likely to limit adaptation possibilities, with potential options being limited to migration”³⁸⁵.

In an unprecedented way, should the statehood cease in small low-lying islands for those reasons, the whole population of those countries would be rendered stateless, and the government would be in permanent exile. The international community could accept that the former states become another entity with international legal personality, however, that does not change the fact that, if the state ceases to exist, the same occurs with its nationality. The population would have to migrate to the territory of another state, and they would be

³⁸⁴ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Climate Change and Statelessness: An Overview**. 15 May 2009. Available at: <http://www.refworld.org/docid/4a2d189d3.html> Accessed on: 24 Oct. 2017.

³⁸⁵ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). **Climate Change 2007**. Fourth Assessment Report. Report of the International Working Group II Report “Impacts, Adaptation and Vulnerability”, p. 733, Available at: <http://www.ipcc.ch/ipccreports/ar4-wg2.htm> Accessed on: 20 Sep. 2017.

considered stateless under the 1954 Convention definition³⁸⁶. Nevertheless, waiting for those populations to become stateless is not desirable, since that would be a late response.

The best course of action seems trying to avoid statelessness to occur in advance, also because the principle of preventing statelessness, as seen, is considered nowadays a corollary of the right to nationality. A first option would be the cession of territory by another state, where the affected population would move to, although “relocation *en masse*, while theoretically a means of maintaining cultural integrity [...] risks being seen as a top-down ‘solution’ that strips individuals and communities of agency”³⁸⁷.

Another possibility would be a new kind of “union” or special agreement with another state. In this case, a certain level of self-governance within another state could preserve some autonomy to the emigrated community. A third option would be the acquisition of nationality of other states, provided a specific international arrangement is built in this sense. In this case, a period of transition may be required, with the use of dual nationality as a bridge towards a permanent situation³⁸⁸.

In effect, migrating to third countries is seen by McAdam as the preferred option, considering it would allow people to decide when to move, making it possible that gradually exiled communities start to form abroad along the time. It would also be better for the host countries, so they can prepare in advance for the inward-movement and establish cultural and social adaptation policies. The only danger, if no adequate planning is adopted, is that with the early exit of the bulk of population from the islands, the economic base declines to such a level that effectiveness of the government could be affected³⁸⁹.

In any case, the situation above would require a careful legal construction, in order to guarantee for the persons and families facing this challenge, uninterrupted and proper access to rights and services, such as residence, work, health and education, social assistance and social security benefits. In addition, the displacement of the population shall be planned in a sustainable manner, with the consideration of the principle of family reunification, and the guarantee that the affected populations will be able to preserve their history, culture,

³⁸⁶ For McAdam, while this would finally bring those displaced within an existing legal category, it is far from adequate as a means of addressing potential displacement from small island States. It is reactive, rather than proactive; requires people to leave their homes and be present in the territory of a State party to the Convention in order to claim its benefits; and in the absence of any status determination procedure for stateless persons, there is no clear means by which those benefits could be accessed. MCADAM, Jane. **Disappearing States, Statelessness and the Boundaries of International Law**. UNSW Law Research Paper No. 2010-2, 2010. Available at: <https://ssrn.com/abstract=1539766> Accessed on: 10 Nov. 2017.

³⁸⁷ *Ibid.*

³⁸⁸ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Climate Change and Statelessness...** op. cit.

³⁸⁹ MCADAM, Jane. **Disappearing States...** op. cit.

language and traditions. All the process should evolve, moreover, with full participation of the collectivities concerned. The UNHCR, considering its mandate to prevent statelessness, is entitled to devise appropriate solutions, in partnership with other organizations and governments³⁹⁰.

By another perspective, in the case of people already stateless and the impact of environmental issues in their lives, Connell considers that, although not enough research has been made on the topic, stateless persons and irregular migrants are more vulnerable to environmental impacts³⁹¹. In his opinion, they are more vulnerable to development-induced and environmental displacements, due to “their tenuous legal standing and the ease with which they can be ‘moved on’ without compensation or support”³⁹². In addition, “there is also evidence to suggest that being stateless or residing as a migrant (legally or illegally) in places affected by environmental disasters, makes it difficult to access support services”³⁹³. In addition, there is no kind of prioritization on the recovery support for stateless persons in case of environmental disasters. Moreover, development cooperation for climate change comes usually through governments, what can make citizenship a condition to eligibility for receiving any kind of support³⁹⁴.

Finally, it is worth mentioning the efforts to adopt a regional agreement on environmental displacement in South America, which has been object of discussion in different forums, such as the Common Market of the South - MERCOSUR, the Union of South American Nations - UNASUR and the South American Conference on Migration - CSM. Such an agreement, or a specific protocol on the matter within an existing regional legal framework, is advocated as a way of establishing minimum protective standards, as well as “enable better coordination between migration, disaster risk reduction and climate change policies in the region”³⁹⁵.

³⁹⁰ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Climate Change and Statelessness...** op. cit.

³⁹¹ CONNELL, Jessie. Statelessness and environmental displacement. **Forced Migration Review**, n. 49, p. 46-47, 2015. p. 46.

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ Ibid.

³⁹⁵ PIRES RAMOS, Erika et al. Towards a regional agreement on environmental displacement? **Forced Migration Review**, n. 56, p. 65-66, 2017.

2.4 Consequences of statelessness

Statelessness is likely to have a critical impact on any person's life. By making the individual legally invisible, it will interfere in an essential way his capacity of developing and having a dignified life. Although it is not largely known as a problem, it is important to recognize that statelessness is not a minor procedural issue, but rather a concrete, substantial question of denial of a bundle of rights, affecting many aspects of the individual membership to the national and local community.

As Arendt eloquently affirms in her seminal work, there are many losses involved when a person becomes stateless:

The first loss is the loss of their homes, and this meant the loss of the entire social texture into which they were born and in which they established for themselves a distinct place in the world. The second was the loss of any government protection; the stateless person was "out of legality altogether". The calamity was that the stateless "do not belong to any community whatsoever". They are reduced to the abstract nakedness of being nothing but human³⁹⁶.

People without nationality, in a world where every human being still depends on the link to a nation-state to exercise most rights, will face severe consequences on their daily lives. Their stateless condition, first of all, means that they are not recognized as citizens by any country. Thus, they are likely to have no birth registration document, or if they do, that document does not give them access to the right to a nationality. In this situation, they cannot get travel documents, as a passport, what will restrict their ability to travel abroad. Stateless people also have problems in getting married and raising their children. Moreover, they normally have a critical issue with identity and sense of belonging, since they are citizens of nowhere, what can affect even their psychological and social wellbeing. It is indeed a situation that can lead to negatives impacts on mental health of the people affected³⁹⁷.

Stateless people face lack of access to formal education, what precludes their human development; find barriers to receive adequate health care, since documents are normally required to register in a health service and receive medical care; have many difficulties to access the labor market, with consequences for their livelihood and family life; have increased chances of being explored and suffer abuses, such as human trafficking and forced

³⁹⁶ ARENDT, Hannah. **As origins...** op. cit., p.

³⁹⁷ According to the UNHCR, statelessness can even "lead to depression, alcoholism, (domestic) violence and suicide". UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Self-Study Module on Statelessness**, 1 October 2012. Available at: <http://www.refworld.org/docid/50b899602.html> Accessed on: 13 Oct. 2017.

labour; face restrictions in order to register the birth of their children, involuntary condemning them to the same hardships of their parents; have trouble in acquiring, maintaining and negotiating property rights, and even opening a simple bank account or getting a driver's license; are often denied access to social assistance, social security and retirement; have affected their ability to move freely, sometimes inside their country of residence, but especially to go to any other country; stateless people, in addition, will not be able to participate in the government, by voting or standing for elections, and will not be authorized to work in public service in general; they can be victims of mass expulsions and arbitrary detention; they can be persecuted on the basis of having denied access to nationality, being marginalized and facing insecurity and violence, what can lead to forced displacement. And the list could go on, since almost every aspect of the political, legal and social life of a stateless person can potentially be affected by their limbo condition.

Although international human rights law should apply to all, citizens and non-citizens, there is a big distance from the theory and the practice. In this context, all the specific stateless protection framework which will be studied below gains relevance, since there is a distance between the declaration of rights by human rights treaties, which were conceived by the states to confer rights mainly to their nationals, and the stateless people, whose plight falls into the cracks of national legal systems.

From the time they do not have a place in which they are legally welcome, considering they are "non-nationals" everywhere, stateless people in context of migration are particularly vulnerable to arbitrary detention. To put stateless people in custody can be a way that the state concerned respond to the indefinite migration status of the stateless person. They can either be considered simply irregular migrants, subject to criminalization for this fact alone, or the state can put them in administrative imprisonment until they manage to establish the person's identity. And even when the country of origin is confirmed, being stateless will make impossible for the person deprived of liberty to be sent back to "his country", since technically there is no country where to go back, or at least, with the obligation to accept him under its own law.

Statelessness has a drastic impact on children. Apart from their initial lack of legal personality, which can cause since the beginning of life, insecurity regarding their citizenship status, and thus a troublesome relation with personal identity and belonging, stateless children can also be prevented to access education and child protection health programs. Moreover, stateless children "are particularly vulnerable to exploitation and abuse, including

being trafficked, forced into hazardous labour and sexual exploitation, locked up alongside adults and deported”.³⁹⁸

Stateless women also suffer particular hazards with their absence of nationality, since there is still today much gender-based discrimination across nationality laws, as seen above. They may “discriminate against women when it comes to the ability of women to acquire, change or retain their nationality (typically upon marriage to a foreigner) or in relation to conferral of their nationality upon their children”³⁹⁹. With several countries having gender-discriminatory nationality provisions, many women pay the price of an unequal legal situation when it comes to access and exercise their citizenship. The biggest consequence of this for women is to remain stateless, even when men in the same situation are not. If the woman marries with a stateless man, in countries such as Brunei, Burundi, Iran, Nepal, Qatar, Somalia, Sudan and Swaziland, her children would be automatically stateless, since just the father passes on the nationality. The same situation can occur in relation to births out of marriage, when the women are not entitled by law to pass nationality alone, and the father do not recognize the child as yours.

Statelessness affects not only the concern person herself, with all the consequences stated above. It also affects the family of origin, which in many cases have to pass together through the pain of seeing a beloved person’s plight for belonging. It affects negatively also the local, regional and national societies where stateless people are inserted. Groups of stateless are often marginalized, stigmatized and isolated, what can cause the raise of conflicts, violence and human insecurity⁴⁰⁰.

And finally, statelessness can affect the relations between actors of the international system, as diplomatic disagreements over conflicts of nationality and issues relating to migrant stateless mobility and permanence, what ultimately can have consequences for international peace and security in a regional scale. Therefore, certainly statelessness is and should be a concern of the international community as a whole⁴⁰¹, since it is a global issue, being better addressed in a coordinated manner, and profit of the sharing of good practices by the states and other actors.

³⁹⁸ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Under the Radar and Under Protected**. The urgent need to address stateless children’s rights. UNHCR, 2012.

³⁹⁹ RHADA, Govil; EDWARDS, Alice. **Women, nationality and statelessness...** op. cit., p. 168.

⁴⁰⁰ Such as the Rohingya people in Myanmar, which have been suffering systematic violence at least since 2012, with many thousands forced to flee for neighboring countries, constituting one of the most serious cases of displaced stateless people in the world nowadays.

⁴⁰¹ See the discussion about the meaning of international community in the topic about human rights, in the third chapter of this thesis.

At this point, it is clear that stateless is an undesirable anomaly in international law. Deepening the analyses of its consequences, Gibney distinguishes three levels of undesirability of statelessness. First, at inter-state level, second for the individual state concerned, and last, for stateless persons themselves. Regarding the first level, the question of statelessness is bad for the international state system because it can be a source of tension and disorder. People without nationality can be easily considered unwanted people, as they can find themselves displaced in another country, especially in the case of intended mass denationalizations, which was the case with the Russian revolution in the 1920s and the Nazi Germany in the 1930s⁴⁰². Both situations created a large number of “floating populations of unwanted foreigners that states were unwilling to integrate but could not expel”⁴⁰³. So that has the potential of creating a problem of (dis)coordination among States, which ultimately could create disagreement and even violent conflicts.

Individual states, part of the system, have in statelessness a problem because those are persons which the state cannot exercise any control, and in addition, they are unable to be expelled, since no country would accept them. For instance, the United Kingdom criminalized the action of asylum seekers destroying their own passports, since some would pretend to be stateless, in an attempt not to be deported by British authorities⁴⁰⁴. Moreover, for the state concerned, stateless persons can be considered dangerous by not upholding loyalty to the state, as far as legally they do not enjoy citizen’s rights, and so they also would not have obligations in face of the state.

That is a different form to look at the question of statelessness, as the mere possibility of choosing to become stateless, for escaping state persecution, being it legal, for instance in case of criminal offence or other forms of legal liability; or as a way of escaping the arbitrary power of a dictatorial regime, could put the stateless condition in evidence in the future⁴⁰⁵.

In any case, stateless persons themselves are clearly the most affected by their legal condition, considering the precarious and vulnerable situation they are exposed to. Commenting on Hannah Arendt’s analysis on the matter, Gibney explains that the contemporary situation is much different from the one viewed by her on the inter-war period, which was

⁴⁰² GIBNEY, Matthew. Statelessness and citizenship in ethical and political perspective. In: EDWARDS, A; WAAS, L. V. (Ed.) **Nationality and Statelessness under international law**. Cambridge: Cambridge University Press, 2014, p. 64-87.

⁴⁰³ *Ibid.*, p. 49.

⁴⁰⁴ *Ibid.*, p. 50.

⁴⁰⁵ That are already science fiction pieces which considerate a dystopic future where to be invisible in face of the power of the states would be an asset. One could think for instance about “1984”, written by George Orwell, where the protagonist manages to escape from the Big Brother lens in order to build a personal insurrection.

based on mass denationalization and expulsion of people from their homes. Nowadays the problem of the stateless is that many of them were not expelled from their countries, but face lack of recognition of their citizenship by the government of the state where they live⁴⁰⁶.

The insecure atmosphere, connected to the uncertain legal situation which most of stateless are subject, is one of the hardest faces of being a stateless. These people can then turn into “deportable” individuals, even though in some cases not even deportation is possible, due to lack of travel documentation. It might then be the case of worse forms of territorial exclusion, such as the confinement “in detention centers, off-shore islands and even mass extermination camp [which] can make deportation look civilized”⁴⁰⁷.

Finally, by not having formal citizenship, stateless persons are not able to participate in the public life of a country, for example by voting or being voted, but also to express freely one’s opinion, or being able to have a stake and influence somehow the direction of society. Indeed, not being able to participate anyway in the public sphere is a way of dehumanizing stateless persons, because what counts is not *who* they are – products of their thoughts and words – but rather *what* they are – their race, ethnicity or migratory status⁴⁰⁸.

The objectification of stateless people led to the most terrifying consequences in the twentieth century, and although mass deprivation of nationality is not a main concern nowadays, many causes of statelessness remain operating. Therefore, an international joint effort is necessary to eradicate statelessness, as will be seen below.

2.5 International law answers to statelessness

Since the issue of statelessness was identified, concerted international efforts start to address the problem. As a legal anomaly and human drama that grew exponentially during the period between wars, it was then and shortly after the World War II that the main initiatives of recognition and protection of stateless persons emerged.

The UN Study on Statelessness of 1949, after examining the various challenges faced by stateless people which should be taken into consideration by the member states, concluded that “it is necessary to abolish statelessness and, until such time as this has been achieved, to improve the status of stateless persons”⁴⁰⁹. It also considered that stateless

⁴⁰⁶ GIBNEY, Matthew. Statelessness and citizenship in ethical and political perspective... op. cit., p. 51.

⁴⁰⁷ GIBNEY, Matthew. Statelessness and citizenship in ethical and political perspective... op. cit., p. 52.

⁴⁰⁸ Ibid.

⁴⁰⁹ UN AD HOC COMMITTEE ON REFUGEES AND STATELESS PERSONS. **A Study of Statelessness...** op. cit.

persons should be: “(a) Granted an international legal status guaranteeing them the enjoyment of fundamental human rights, and (b) Assured of the protection of an international organ of an intergovernmental character”⁴¹⁰, and finally, that the ECOSOC “recognize the necessity of a convention, based on the agreements now in force, determining the legal status of stateless persons as such”⁴¹¹. That led to the later adoption of the 1954 UN Convention relating to the Status of Stateless Persons.

In the 1949 Study, the Secretary General recommended to the ECOSOC “the necessity of providing at an appropriate time permanent international machinery for ensuring the protection of stateless persons”⁴¹², which was followed by the UN General Assembly decision, in the same year, to establish a High Commissioner's Office for Refugees⁴¹³. On 14 December 1950, the UN General Assembly, by the Resolution 428 (V), adopted the Statute of the Office of the United Nations High Commissioner for Refugees – UNHCR.

2.5.1 The UNHCR’s mandate and role on the statelessness issue

The Statute of the UNHCR adopted in 1950 established the initial mandate of the new organization, mostly to protect those who were considered refugees under previous agreements⁴¹⁴, and

any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country⁴¹⁵.

Stateless people were subject to protection by the UNHCR, but just if they were also refugees⁴¹⁶, what is clear in the second part of the provision:

⁴¹⁰ UN AD HOC COMMITTEE ON REFUGEES AND STATELESS PERSONS. *A Study of Statelessness...* op. cit.

⁴¹¹ Ibid.

⁴¹² UN AD HOC COMMITTEE ON REFUGEES AND STATELESS PERSONS. *A Study of Statelessness...* op. cit.

⁴¹³ UN GENERAL ASSEMBLY. **Refugees and stateless persons**, 3 December 1949. Available at: <http://www.refworld.org/docid/3b00f1ed34.html> Accessed on: 15 Jun. 2017.

⁴¹⁴ See Article 6, A, (i), of the Statute. UN GENERAL ASSEMBLY. **Statute of the Office of the United Nations High Commissioner for Refugees**. 14 December 1950. Available at: <http://www.refworld.org/docid/3ae6b3628.html> Accessed on: 15 Jun. 2017.

⁴¹⁵ Article 6, A, (ii), of the Statute. UN GENERAL ASSEMBLY. **Statute of the Office of the United Nations High Commissioner for Refugees...** op. cit.

⁴¹⁶ MANLY, Mark. UNHCR’s mandate and activities to address statelessness. In: EDWARDS, Alice; VAN WAAS, Laura. (Eds.). **Nationality and Statelessness under International law**. Cambridge: Cambridge University Press, 2014, p. 88-114. p. 89.

or who, *not having a nationality* and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it⁴¹⁷.

The 1951 Convention Relating to the Status of Refugees, which as seen was though in a moment where both refugee and stateless protection were seen as part of essentially the same problem, basically repeated the concept of stateless refugee of the Statute, adding the wording “as a result of such events”⁴¹⁸, that is, the events occurred in Europe before 1951. Interesting to note that there is another difference between both concepts: the Statute provides a wider protection to stateless refugees, by considering the fear of persecution, “or for reasons other than personal convenience”⁴¹⁹. That means that by the UNHCR Statute, the organization would protect any person who was without nationality and outside the country of former residence, who was unable to return or unwilling to do so because of fear of persecution; *or for any other reason not amounting to simple personal choice*. Therefore, that represents an early concept of statelessness according to international law. Nonetheless, being the concepts adopted by the Statute all-encompassing, specific distinctions between refugees and stateless were elaborated soon after in the 1951 and 1954 Conventions.

The 1951 Convention on refugees initially applied only to the “events occurring before 1 January 1951”, but that provision was superseded for the states which ratified the 1967 Protocol relating to the Status of Refugees, thus the definition of refugees and stateless refugees in that case applies irrespectively of dateline. In any case, the 1951 dateline never applied to the UNHCR⁴²⁰, since the Statute provides that the competence of the UNHCR extends to “any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence”⁴²¹ and is unable or unwilling to return, without any mention to the events occurred until 1951.

Even though the UNHCR Statute and the 1951 Convention created the new born Agency a competence to deal with stateless people which were also refugees, the concept

⁴¹⁷ UN GENERAL ASSEMBLY. **Statute of the Office of the United Nations High Commissioner for Refugees...**, Article 6, A, (ii), op. cit.

⁴¹⁸ UN GENERAL ASSEMBLY. Convention Relating to the Status of Refugees, 28 July 1951. UNITED NATIONS. **Treaty Series**, New York, v. 189, p. 137, 1954. Available at: <http://www.refworld.org/docid/3be01b964.html> Accessed on: 4 Sep. 2017.

⁴¹⁹ UN GENERAL ASSEMBLY. **Statute of the Office of the United Nations High Commissioner for Refugees...** op. cit.

⁴²⁰ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Expert Meeting - The Concept of Stateless...** op. cit. "Prato Conclusions".

⁴²¹ UN GENERAL ASSEMBLY. **Statute of the Office of the United Nations High Commissioner for Refugees...**, Article 6, B, op. cit.

and specific protection for stateless were created just three years later, with the adoption of the 1954 Convention relating to the status of Stateless Persons.

The 1954 Convention relating to the status of Stateless Persons assigned a general supervisory regime to the United Nations, providing that “the Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention”⁴²². This role has been undertaken by the UNHCR. That reduced scope initially shows how limited was the international governance on the question of statelessness, left basically to states action.

With the adoption of the 1961 Convention on the Reduction of Statelessness, the UNHCR gained a more prominent role, since the UN General Assembly designated the UNHCR for the function of supervising the application of the Convention in 1974⁴²³, although “the agency did not actively pursue this element of its mandate, as refugee work continued to monopolize its time and resources”⁴²⁴.

Indeed, the question of statelessness after the 1960’s practically disappeared from international agenda. The active leadership of the UNHCR in this area started just after the dissolution in the 1990’s of the Soviet Union, Czechoslovakia and Yugoslavia, cases of state successions which caused millions of people to become stateless⁴²⁵.

The Executive Committee of the UNHCR’s Programme⁴²⁶ adopted in October 1995 a Conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless persons, which puts the question back in the agenda. Shortly after, in December 1995, the General Assembly adopts a Resolution that clarifies the global mandate for the UNHCR⁴²⁷. This resolution, apart from recognizing that statelessness can be a cause of forced displacement, requests the UNHCR to “actively promote accession to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the reduction of statelessness”⁴²⁸. The Resolution also asks the UNHCR to provide technical and advisory services to the states on nationality legislation, and thus from this moment “the focus on

⁴²² UN GENERAL ASSEMBLY. Convention Relating to the Status of Stateless Persons... op. cit.

⁴²³ UNITED NATIONS. **Resolution. 3274**. Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply. 10 December 1974.

⁴²⁴ VAN WAAS, Laura. The UN stateless conventions... op. cit., p. 78.

⁴²⁵ MANLY, Mark. UNHCR’s mandate and activities to address statelessness... op. cit., p. 88-89.

⁴²⁶ The United Nation’s Economic and Social Council (ECOSOC) established the Executive Committee of the Programme of the United Nations High Commissioner for Refugees in 1958 (Res. 672). It functions as a subsidiary organ of the General Assembly and its main functions is to advise the High Commissioner in the exercise of its functions and review, approve or authorize funds, appeals and budgets.

⁴²⁷ UN GENERAL ASSEMBLY. **Resolution 50/152**, 9 February of 1996.

⁴²⁸ Ibid. par. 15.

accessions to the conventions and technical advice on nationality legislation became a central part of the UNHCR's activities over the following decade"⁴²⁹.

In 2006 another major Executive Committee's Conclusion on Statelessness took place. It was considered a big step for the organization, since this document has twenty-four paragraphs detailing the UNHCR response to the question, including important updates and new tasks, such as performing

studies to identify statelessness in regions there are information gaps, support to states in undertaking citizenship campaigns, support for states to disseminate information on nationality procedures and establishing programmes to protect and assist stateless persons including through legal aid⁴³⁰.

In 2011, the Secretary General issued a Guidance Note on the UN and Statelessness, which apart from reasserting the mandate of the UNHCR in relation to identification, prevention, reduction and protection of stateless people, affirms that all the UN system should increase their efforts to address statelessness, tackling it as a "key priority within the Organization's broader efforts to strengthen the rule of law"⁴³¹.

Therefore, statelessness became a more visible problem, at least at the level of specialized efforts deployed by the UNHCR and the UN as a whole. The mandate of the UN Refugee Agency was clearly established and the dual role on both the Stateless Conventions made it become the central entity of the global governance on the issue. Indeed, the mandate has grown over time in terms of breadth and depth. In breadth by expanding "from accession to the conventions and reform of nationality laws to a range of technical, operational and awareness-raising responses"⁴³², and in depth by providing more "effective technical advice to government on appropriate operational responses, specific aspects of nationality legislation and determination [identification] procedures"⁴³³.

However, the very fact of states being the ones who decide in an unopposable way, by force of sovereignty, whom to give nationality, can be seen as a sharp limitation to any international effort to combat the persistence of the problem. That take us to the broader question of the unchallenged role of nationality in including and excluding people from legal and political membership, what will be problematized in the next chapter of this work.

⁴²⁹ MANLY, Mark. UNHCR's mandate and activities to address statelessness... op. cit., p. 89.

⁴³⁰ MANLY, Mark. UNHCR's mandate and activities to address statelessness... op. cit., p. 90.

⁴³¹ UN SECRETARY-GENERAL (UNSG). **Guidance Note of the Secretary General: The United Nations and Statelessness**, June 2011. Available at: <http://www.refworld.org/docid/4e11d5092.html>. Accessed on: 20 Jun. 2017.

⁴³² MANLY, Mark. UNHCR's mandate and activities to address statelessness... op. cit., p. 93.

⁴³³ Ibid.

In any case, the UNHCR succeeded to elevate significantly the matter at a global level, mostly in the past ten years, through the setting, promotion and implementation of legal and policy standards; the awareness raising through public relations campaigns; and also developing means to cooperate with states in the four core areas of its mandate: identification of stateless people worldwide, prevention of new cases of statelessness, reduction of the existing ones, and protection of stateless people, all over the world.

2.5.2. 1954 Convention relating to the Status of Stateless Persons

In 1930, it was adopted the Convention on Certain Questions relating to the Conflict of Nationality Laws, by The Hague Conference for the Codification of International Law. The Convention included provisions in regard of certain cases of statelessness⁴³⁴. The Hague Conference also adopted a Special Protocol concerning Statelessness, but this protocol never entered into force, since it did not receive the required minimum ten ratifications⁴³⁵.

The ECOSOC created in 1949 an *Ad Hoc* Committee on Statelessness and Related Problems, with the task of considering the desirability of preparing a consolidated convention, in relation to the international status of refugees and stateless persons. But the Committee recommended instead a draft convention relating only to the status of refugees, with a separate protocol in regard to the status of stateless persons⁴³⁶. The Conference of Plenipotentiaries, ended by adopting only a Convention relating to the Status of Refugees. That led to the adoption in 1951 of the Convention Relating to the Status of Refugees. By this first Convention, which was seen as more urgent at the time⁴³⁷, the refugee can hold or not a nationality, but the central element is the fear of persecution. Since there is a well-founded fear of persecution on discriminatory basis⁴³⁸, the stateless refugee qualifies for international protection. Non-refugees stateless remained at this point still unprotected.

⁴³⁴ Such as Article 1: "In a State whose nationality is not conferred by the mere fact of birth in its territory, a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of the said State".

⁴³⁵ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Expert Meeting - The Concept of Stateless...** op. cit. "Prato Conclusions".

⁴³⁶ MASSEY, H. **UNHCR and de facto Statelessness...** op. cit.

⁴³⁷ BATCHELOR, Carol. **Stateless persons...** op. cit.

⁴³⁸ Article 1, A, (2) of the 1951 Convention on Refugees reads: "As a result of events occurring before 1 January 1951 and owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it". UNITED NATIONS. **1951 Convention...** op. cit.

In a second UN Conference of Plenipotentiaries in 1954, it was decided to adopt, instead of a Protocol to the 1951 Refugee Convention, a separate convention dedicated just to statelessness. The idea was to give more autonomy to the new legal instrument, in a way that states did not depend on ratifying the 1951 Convention before adhering to a dependent protocol. But in the end, the 1951 Convention attracted many immediate signatures and ratifications, while the 1954 Convention relating to the Status of Stateless Persons had much fewer parties and “continues to lag behind its sister convention in accessions”⁴³⁹.

The 1954 Convention sets in its first Article the definition of a stateless person: “the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law”⁴⁴⁰. Since it is the only international law source which conceptualize what is statelessness, this definition is “the basis for interpreting any reference to statelessness found elsewhere in treaty, legislation or soft law texts”⁴⁴¹.

The 1954 Convention provides a set of civil, economic, social and cultural rights which those recognized as stateless shall enjoy in the territory of a state party. One of its main features is defining which rights are ought to be guaranteed in each case on the basis of the attachment of the stateless person with the state in which she is. A general non-discrimination rule applies in the absence of more favorable conditions contained in the treaty, referring to at least “the same treatment as is accorded to aliens generally”⁴⁴². Yet, some rights are conceded to stateless persons irrespectively of their guarantee or not for nationals of the state, such as protection from expulsion and access to courts. But many rights are offered only for those who are lawfully present or are a habitual resident of the contracting state. Examples are the right to earn a wage while working, the protection of artistic and intellectual property rights and to the right to receive public relief⁴⁴³. The problem with those different standards is that it makes the implementation a complex task.

An important difficulty of the treaty is that it did not provide any compliance mechanism. The role of UNHCR here is very limited, differently from the Refugee Convention, which gave a clear role to the UNHCR in order to supervise, implement and interpret the legal instrument⁴⁴⁴. Nevertheless, with the expansion of the UNHCR mandate, as seen above, this gap was partially solved. What also changed lately was the multiplication of

⁴³⁹ UNITED NATIONS. **1951 Convention...** op. cit.

⁴⁴⁰ UN GENERAL ASSEMBLY. Convention Relating to the Status of Stateless Persons... op. cit.

⁴⁴¹ VAN WAAS, Laura. The UN stateless conventions... op. cit., p. 72.

⁴⁴² UN GENERAL ASSEMBLY. Convention Relating to the Status of Stateless Persons... op. cit.

⁴⁴³ Articles 17, 14 and 23 of the 1954 Convention, as quoted by VAN WAAS, Laura. The UN stateless conventions... op. cit., p. 73.

⁴⁴⁴ Article 35. UNITED NATIONS. **1951 Convention...** op. cit.

policy-oriented guidelines by the UNHCR, which are helping the states and competent public authorities to improve the application of the 1954 Convention.

There is some criticism on the fact that the stateless definition brought by the Convention would be too narrow, since it would exclude who has an ineffective nationality, what is called *de facto* stateless. However,

now that the 1954 Convention's protection scope has been clarified and states are exploring how best to implement this in their national systems, the international community will be better placed to have a focused and informed discussion on the extent to which the UN framework needs to be supplemented⁴⁴⁵.

Finally, it should be noted that, even if imperfections exist, the 1954 Convention is the only international instrument which provide a specific framework of rights to stateless persons, bringing important remedies, such requiring the state parties to provide identity and travel documents to stateless, promoting their facilitated naturalization, as well as guaranteeing fundamental rights which can and are supplemented by other existing international human rights diplomas⁴⁴⁶. Moreover, the 1954 Convention was followed years later by another Convention dedicated to treat the causes of statelessness.

Nevertheless, it is interesting to see how the question of absence of nationality was dealt with by the international community. The states, who are the main actors of the international system, preferred to protect their discretion to decide freely about nationality attribution, even if a human right of nationality for the individual was already in place. The solution found was to create a new category, the stateless, giving them temporary essential rights. That way, a response was given to the humanitarian post-war crisis, easing consciences, and at the same time, nothing had to change in the nationality attribution scheme attached to the Westphalian architecture.

2.5.3. 1961 Convention on the Reduction of Statelessness

The first attempt to eliminate future cases of statelessness occurred in 1930 with the adoption of The Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, which ruled about some aspects regarding nationality laws in which states should be careful not to give cause to new cases of statelessness. An additional protocol was adopted in the same occasion, with the aim of preventing statelessness of children born to a stateless

⁴⁴⁵ VAN WAAS, Laura. The UN stateless conventions... op. cit., p. 81.

⁴⁴⁶ Ibid.

father, with the mother being a national of the state⁴⁴⁷. Although the treaty and its protocol dealt with some possibilities of avoiding statelessness, mostly by protecting women from becoming without nationality by marrying a non-national, and advancing some safeguards to avoid childhood statelessness, the Convention did not have many signatory states, and ended with only a dozen ratifications⁴⁴⁸.

Years after the adoption of the 1954 Convention, which gave a legal status to stateless people, the UN General Assembly asked the International Law Commission to prepare a draft Convention on the elimination of statelessness. It prepared a Draft on the *Elimination of Future Statelessness* and a Draft on the *Reduction of Future Statelessness*. The first was seen as “a step too far when government representatives met in 1959 to discuss the texts”⁴⁴⁹, and so the negotiations were based on the lighter version. After a long negotiation, the text adopted in a second meeting resulted in the 1961 Convention on the Reduction of Statelessness. For Van Waas, the version adopted “seen to strike a better balance between state’s sovereign interests in the realm of nationality and the common interest of agreeing some restrictions on this discretion with a view to avoiding statelessness”⁴⁵⁰.

The 1961 Convention is an instrument with a fairly technical approach, which looks forward to previewing a series of scenarios in which statelessness would result, providing to each of those situations, which state is responsible of avoiding statelessness to occur.

In its ten substantive articles, it sets out safeguards for the avoidance of statelessness in three broad contexts: acquisition of an original nationality at birth, including by foundlings (Articles 1 to 4); loss, deprivation or renunciation of nationality in later life (Articles 5 to 9; and in respect of succession of states (Article 10)⁴⁵¹.

As recurrent, the Convention does not seek to deter in anyway states’ autonomy to legislate about nationality, but instead to create useful legal tools that can be transported to national law, in order to guarantee that the outcome of conflictual rules do not result in statelessness. A stronger duty is only set in regard to prohibiting the deprivation of nationality on racial, ethnic, religious or political grounds⁴⁵², even though deprivation of nationality itself

⁴⁴⁷ LEAGUE OF NATIONS. **Protocol Relating to a Certain Case of Statelessness**, n. 4138. 179 LNTS 115, 12 Apr. 1930. Available at: <http://www.refworld.org/docid/3ae6b39520.html> Accessed on: 24 June 2017.

⁴⁴⁸ SPIRO, Peter J. A New International Law of Citizenship. **The American Journal of International Law**, v. 105, n. 4, p. 694–746, 2011.

⁴⁴⁹ VAN WAAS, Laura. The UN stateless conventions... op. cit., p. 71.

⁴⁵⁰ Ibid.

⁴⁵¹ VAN WAAS, Laura. The UN stateless conventions... op. cit., p. 75.

⁴⁵² UN General Assembly. Convention on the Reduction of Statelessness... op. cit. Article 9.

is allowed in some cases⁴⁵³, with the convention setting a general rule that the deprivation of nationality, when is the case, should not render anyone stateless⁴⁵⁴.

The structure of the Convention is based on its Article 1, which sets as general rule: “A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless”⁴⁵⁵. Then the sub-paragraphs assert that the state can choose to attribute nationality either automatically at birth, or later through an application procedure. In this case, under paragraph two, the state can adopt four conditions, such as imposing a deadline for the procedure to take place, requiring a minimum residence period, not having an undesirable criminal record, or if the person has always been a stateless⁴⁵⁶.

Interesting to note that all this margin of discretion for the state would not exist if the final text adopted was that of the Draft on *elimination* of statelessness, since Article 1 would say simply: “A person who would otherwise be stateless shall acquire at birth the nationality of the Party in whose territory he is born”⁴⁵⁷. But as seen, it was decided to adopt the draft on *reduction* of statelessness, with a general rule and a handful of conditions, and by doing so it was clear the “reluctance of states to surrender too much of their freedom to regulate access to nationality”⁴⁵⁸.

In fact, with the text adopted, there are exceptional circumstances which allow the states to render someone stateless, such as depriving a naturalized citizen of nationality when he lives a long period abroad [Article 7 (4)], or when naturalization was achieved by fraud [Article 8 (2) (b)], or as a consequence of not registering or not residing in the state if he was born abroad [Article 7 (5)]⁴⁵⁹.

One additional exception draws attention by referring to “loyalty to the State” [Article 8(3)]. It provides that the state can “retain” the person’s right of nationality if she renders services to, or receive emoluments from another state, as well as if the state considers the person to act “in a manner seriously prejudicial to the vital interests of the state”, and also,

⁴⁵³ See the previous discussion about arbitrary deprivation of nationality in the section “Discriminatory or arbitrary deprivation of nationality”.

⁴⁵⁴ “Article 8 (1). A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless”. There are a series of exceptions in the same article, such as the maintenance of the right of the state to deprive someone of its nationality “where the nationality has been obtained by misrepresentation or fraud” (Article 8, 2, b), for instance. UN General Assembly. *Convention on the Reduction of Statelessness*... op. cit.

⁴⁵⁵ *Ibid.* Article 1 (1).

⁴⁵⁶ *Ibid.*

⁴⁵⁷ INTERNATIONAL LAW COMMISSION. **Yearbook of the International Law Commission of 1954**. UNITED NATIONS, New York, 1960. v. II Documents of the sixth session including the report of the Commission to the General Assembly

⁴⁵⁸ VAN WAAS, Laura. *The UN stateless conventions*... op. cit., p. 76.

⁴⁵⁹ UN GENERAL ASSEMBLY. **Convention on the Reduction of Statelessness**... op. cit. Article 8 (3).

if the person “has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State”⁴⁶⁰.

The categories of “loyalty” and “allegiance” of the person to the state is revealing of the mistrust, by the time of the adoption of the Convention, and for some states still today, that prevails in the relations between states regarding nationality attribution. If by one side, security concerns could be in exceptional cases a legitimate reason, from the perspective of the individual’s human right of nationality, it can become problematic to rely upon the state authorities evaluation of what would be considered a lack of loyalty or a breach of allegiance, since that could depend on the level of rule of law and democratic standards followed by the state in question, and also on the situation of the bilateral relations between the government of the state concerned and its counterpart.

In sum, the 1961 Convention represents a big step forward, creating specific obligations to be followed by the state parties. In the opinion of Van Waas, “there is no other universal treaty which such detailed, comprehensive and readily implementable safeguards for the avoidance of statelessness”⁴⁶¹. The Convention build upon existing practices of the states, compiling practical steps to follow when thinking about nationality attribution. That is why its impact goes beyond the states which formally ratified it, since it is used as a technical reference when states design their own nationality legislation⁴⁶². Even though it does not have many state parties (68 states), with only 5 original signatures, the number of accessions and ratifications has been growing rapidly since the 1990s⁴⁶³.

Nevertheless, the text contains some problems. It adopted many conditions, which were set by the states to guarantee their full control over nationality, but most importantly, it “undercuts its primarily objective by admitting that some people will be rendered or left stateless without this amounting to a violation of the Convention’s terms”⁴⁶⁴.

Another critical question is the absence of a real supervisory mechanism, since Article 11 refers to “a body to which a person claiming the benefit of this Convention may apply

⁴⁶⁰ UN GENERAL ASSEMBLY. **Convention on the Reduction of Statelessness...** op. cit.

⁴⁶¹ VAN WAAS, Laura. *The UN stateless conventions...* op. cit., p. 83.

⁴⁶² Laura Van Waas mentions that many states in Africa, Europe and the ASEAN region apply in their legislative solutions provided by the 1961 Convention, even if many of them did not ratify it. VAN WAAS, Laura. *The UN stateless conventions...* op. cit.

⁴⁶³ The treaty counts with 68 state parties to date (2017), and although its entry into force occurred in 1975, more than 50 states have acceded or ratified after the 1990 decade. UNITED NATIONS. *Refugees and Stateless Persons*, 13 December 1975. In: UNITED NATIONS, **Treaty Series**, New York, v. 989, p. 175, 1985. Available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=_en Accessed on 27 June 2017.

⁴⁶⁴ VAN WAAS, Laura. *The UN stateless conventions...* op. cit., p. 77.

for the examination of his claim and for assistance in presenting it to the appropriate authority". This body came to be the UNHCR, which advises individuals entitled to any of the solutions set in the Convention, even though nothing can really be done by the individual nor the UNHCR in case of non-compliance by the state. There is only a hypothetical resource to the International Court of Justice in case of dispute between Contracting States (Article 14), but the open question is why would a state contend on behalf of a stateless person, if what the person does not have is exactly the tie of nationality and thus, the protection of a state. Probably that is why no case has arrived to the ICJ to date about the subject.

The treaty does not deal adequately with the problems arising from state succession, considering that Article 10, devoted to this area, is generic and thus, insufficient⁴⁶⁵. The ILC has identified this and published the Articles on Nationality of Natural Persons in Relation to the Succession of States, but it is not a binding legal instrument.

Finally, the Convention fails by not dealing with gender equality, since it does not prohibit explicitly nationality deprivation on that basis, what for Van Waas is a signal of the Convention age, which makes it incapable to deal with more recent developments of international law and contemporary challenges, including the questions possibly arising in the future over reproductive technology^{466, 467}.

Therefore, it is clear that statelessness was not completely solved by the 1961 Convention. It still lacks a greater number of state parties, since ratifications would create a legal ground for obliging the states to comply with the standards set.

In any case, it is interesting to note how, by not touching in the criteria of nationality attribution, and state discretion to deal with it, both the 1954 and 1961 Stateless Conventions maintain and sustain the old framework of nationality based exclusively on state sovereignty. Many people remain stateless by isolated actions or omissions carried out by the states, and depend on whether they ratify and apply the Conventions solutions. That is also telling about the obstacles still to overcome, in order to make the human right to a nationality for all something really achievable, and not only a rhetorical exercise.

⁴⁶⁵ VAN WAAS, Laura. The UN stateless conventions... op. cit., p. 84.

⁴⁶⁶ Ibid., p. 85.

⁴⁶⁷ For instance, international surrogacy can create impacts on the child's right to nationality. For a complete analysis of this question, see ACHMAD, Claire. Securing every child's right to a nationality in a changing world: The nationality implications of international surrogacy. IN: KHANNA, Melanie J.; VAN WAAS, Laura. **Solving Statelessness**. Oisterwijk: Wolf Legal Publishers, 2013.

2.5.4. Actions and campaigns to address statelessness

Considering states are the most relevant actors for ending or reducing statelessness, an essential role of UNHCR is to promote the states' accession to both the 1954 and 1961 Conventions on statelessness. Since the mid-1990's the Agency started to campaign for the goal of increasing the state parties to the Conventions, and another push was given in 2011⁴⁶⁸ "leading to seventeen accessions to the 1954 Convention and twenty-two to the 1961 Convention between mid-2011 and July 2014"⁴⁶⁹.

Another important action of UNHCR is helping to clarify the international standards about statelessness, since the concept is complex, and the Conventions have some tricky technicalities, which can lead to incomprehension of nuances and as a matter of fact, lack of adequate knowledge by politicians and public officials about the solutions and responses already provided by the international law.

In this sense, UNHCR engaged in consultations with external experts, such as academics, government officials, members of NGO's, legal practitioners and UNHCR staff. The first outcome was issued in May 2010, after the Expert Meeting in Prato, Italy, about the Concept of Stateless Persons under International Law, which became known as the "Prato Conclusions"⁴⁷⁰. The document discussed the different understandings about the definition of *de facto* statelessness, marking the difference between this broad, open-ended concept, from *de juris* stateless, which count with a specific international treaty based regime⁴⁷¹. A second expert meeting has held in Geneva in December 2010, treating about the statelessness determination procedures and the status of stateless persons under national law, known as "Geneva Conclusions"⁴⁷². In 2012, three UNHCR Guidelines were published, about the definition of a stateless person; the procedures for determination of statelessness; and the status of stateless persons under national law⁴⁷³. Those three Guidelines were then united and

⁴⁶⁸ By the occasion of the fiftieth anniversary of the 1961 Convention on the Reduction of Statelessness.

⁴⁶⁹ MANLY, Mark. UNHCR's mandate and activities to address statelessness... op. cit., p. 94.

⁴⁷⁰ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Expert Meeting** - The Concept of Stateless... op. cit. "Prato Conclusions".

⁴⁷¹ See the discussion about the differences between *de facto* and *de juris* stateless in the section 2.2.1.

⁴⁷² UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Statelessness Determination Procedures and the Status of Stateless Persons**... op. cit.

⁴⁷³ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Guidelines on Statelessness No. 1**: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, 20 February 2012. Available at: <http://www.refworld.org/docid/4f4371b82.html>, accessed on 14 Aug. 2017; UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Guidelines on Statelessness No. 2**: Procedures for Determining whether an Individual is a Stateless Person, 5 April 2012. Available at: <http://www.refworld.org/docid/4f7dafb52.html> Accessed on 14 Aug. 2017; and UN HIGH COMMISSIONER FOR

superseded by the publication of the 2014 “Handbook on Protection of Stateless Persons under the 1954 Convention”, which today serves as a fundamental document for the practice of UNHCR operations and official understanding on the field⁴⁷⁴.

Apart from its specific technical advice role and standard settings, the UNHCR has acted as a pivot institution for raising awareness on the problem of statelessness. It has launched mediatic campaigns which placed the question in the center of its advocacy role, as well as called states’ attention at a high level.

The landmark was 2011, when it was celebrated the 50th anniversary of the 1961 Convention. The media campaign launched by UNHCR that year “led to hundreds of reports in television, radio, print and electronic media on all continents”⁴⁷⁵. The organization itself promoted a concentrated effort to raise the theme in its offices and partners all over the world, organizing workshops, roundtables, country-level and regional meetings, as well as intensifying bilateral contacts with governments to emphasize the priorities, such as acceding to the 1954 and 1961 Conventions, reforming nationality laws, establishing stateless determination procedures, putting in place measures to guarantee children birth registration and issuing other nationality proofs to avoid statelessness⁴⁷⁶.

That activism led in December of the same year to the highest-level meeting about statelessness ever occurred, with 155 states represented, 72 with ministerial presence. The most important outcome was that several states pledged to accede to both treaties, as well as reforming their national laws and improving identification and determination procedures. The extent to which states accomplished those promises is unclear⁴⁷⁷, but it was nevertheless an unprecedented raise of statelessness to the top of governments agenda, and certainly a successful UNHCR initiative.

REFUGEES (UNHCR). **Guidelines on Statelessness No. 3:** The Status of Stateless Persons at the National Level, 17 July 2012. Available at: <http://www.refworld.org/docid/5005520f2.html> accessed on 14 Aug. 2017.

⁴⁷⁴ A fourth UNHCR Guidelines was published in 2012, about the right of every child to acquire a nationality under the 1961 Convention on the Reduction of Statelessness. See UN HIGH COMMISSIONER FOR REFUGEES (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, 21 December 2012. Available at: <http://www.refworld.org/docid/50d460c72.html> Accessed on: 20 Jun. 2017.

⁴⁷⁵ MANLY, Mark. UNHCR’s mandate and activities to address statelessness... op. cit., p. 100.

⁴⁷⁶ Ibid.

⁴⁷⁷ A compilation of the states pledges during the event was published by the UNHCR’s Division of International Protection, facilitating close follow up. See: UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons.** UNHCR Ministerial Meeting to Commemorate the 60th Anniversary of the 1951 Convention Relating to the Status of Refugees and the 50th Anniversary of the 1961. Geneva, Palais des Nations, 7-8 December 2011, UNHCR, October 2012. Available at: <http://www.unhcr.org/commemorations/Pledges2011-preview-compilation-analysis.pdf> Accessed on: 20 June 2017.

In November 2014, it was launched a Global Campaign to End Statelessness. The campaign most important document is a Global Action Plan to End Statelessness from 2014 to 2024, published by the UNHCR, in which ten specific actions are set and detailed, giving instructions on how to address the wide range of stateless causes⁴⁷⁸. The ten actions proposed by the document are the following:

Action 1: Resolve existing major situations of statelessness. Action 2: Ensure that no child is born stateless. Action 3: Remove gender discrimination from nationality laws. Action 4: Prevent denial, loss or deprivation of nationality on discriminatory grounds. Action 5: Prevent statelessness in cases of State succession. Action 6: Grant protection status to stateless migrants and facilitate their naturalization. Action 7: Ensure birth registration for the prevention of statelessness. Action 8: Issue nationality documentation to those with entitlement to it. Action 9: Accede to the UN Statelessness Conventions. Action 10: Improve quantitative and qualitative data on stateless populations⁴⁷⁹.

Although the Plan does not bring any substantive news, it can be considered a powerful instrument for action, since it summarizes in a much clearer, objective and practical way, what should be done, mainly by the states, to solve statelessness.

The UNHCR also published a Special Report called “Ending Statelessness”, a twelve pages document plenty of photos, maps, timelines and graphics, where along with basic facts and figures, the purpose of the campaign is explained, covering the impact of statelessness on everyday life of children and families, and pointing some general solutions⁴⁸⁰. In the case of childhood statelessness, since ever a priority, yet another easy access document published in 2015 as part of the campaign is entitled “I Am Here, I Belong: The Urgent Need to End Childhood Statelessness”, where related questions are presented⁴⁸¹. During the same year, a series of “Good Practice” Papers were published by UNHCR on some of the actions of the Global Plan⁴⁸². This is an interesting kind of giving effective

⁴⁷⁸ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Global Action Plan to End Statelessness**, 4 November 2014. Available at: <http://www.refworld.org/docid/545b47d64.html> Accessed on: 20 Jun. 2017.

⁴⁷⁹ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Global Action Plan to End Statelessness...** op. cit.

⁴⁸⁰ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Special Report – Ending Statelessness**, 4 November 2014. Available at: <http://www.refworld.org/docid/572062254.html>. Accessed on: 20 Jun. 2017.

⁴⁸¹ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **I Am Here, I Belong: The Urgent Need to End Childhood Statelessness**, 3 November 2015. Available at: <http://www.refworld.org/docid/563368b34.html> Accessed on: 20 Jun. 2017.

⁴⁸² To date (2017), the Papers cover Actions 1: Resolving Existing Major Situations of Statelessness, 2: Ensuring that no child is born stateless, 3: Removing Gender Discrimination from Nationality Laws, 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons and 9: Acceding to the UN Statelessness Conventions. Available at: <http://www.refworld.org/statelessness.html> Accessed on: 20 Jun. 2017.

examples and comparative tools for relevant stakeholders, helping them to better deal with the daily local challenges of statelessness.

The campaign's website includes the publication of an Open Letter, signed by the former UN High Commissioner for Refugees António Guterres (now UN Secretary-General) and around thirty politicians and celebrities, including the UNHCR Special Envoy Angelina Jolie, who for years have been increasing awareness on refugees globally, calling for world action to end statelessness definitively⁴⁸³. Finally, many videos were produced with real stateless persons, from different parts of the world, what in our era of information technology has a great potential of stimulating alterity and reaching specially the newer generations⁴⁸⁴.

In sum, the campaign undoubtedly managed to bring the question to a much broader public opinion, turning the question of statelessness a more visible problem, what can have positive impacts in terms of revealing the human face of something that can be seen essentially as a legal matter, possibly generating empathy and evoking solidarity, and thus mobilizing people and organizations to require law and policy changes, increasing public funds and donations, and in some cases, providing stateless persons awareness about their own situation and the possibility of taking action or asking for help.

In Brazil, the campaign of the UNCHR gained the support of Maha Mamo. Daughter of Syrian parents, her father is Christian, and the mother is Muslim, and considering interreligious marriages are not allowed in Syria, they went to Lebanon, where Maha was born. The problem is Lebanon does not apply *jus soli* as a rule, and thus she could not have Lebanese nationality, nor the Syrian one. Maha faced many difficulties to study, since many universities did not accept her for being stateless, but she managed to finish a university degree. After twenty years she and her sister started to search for information about their condition and fight for a better life, writing to the embassies of many countries asking for help⁴⁸⁵. The only one who gave a positive response was the Brazilian, since by that time the Brazilian government had an "open doors" policy towards Syrian refugees. She was allowed to come to Brazil with her family, and became a stateless refugee in the country. With an enthusiastic character, she started to raise her voice for the cause, and being interviewed by newspapers and television channels, until the UNHCR decided to support her to speak as a

⁴⁸³ Any person can "sign" the letter in the campaign's website, a public relations strategy to keep people informed of the UNHCR efforts on the area (through periodic emails). Available at: <http://www.unhcr.org/ibelong/> Accessed on 20 Jun. 2017.

⁴⁸⁴ Available at: <http://www.unhcr.org/ibelong/> Accessed on 20 June 2017.

⁴⁸⁵ UNHCR. **Maha Mamo, a stateless refugee in Brazil, talks about the challenges of a life without nationality**. Available at: <http://www.acnur.org/portugues/noticias/noticia/maha-mamo-refugiada-apatrida-no-brasil-fala-sobre-os-desafios-de-uma-vida-sem-nacionalidade/> Accessed on 20 Jun. 2017.

stateless person on workshops and international events around the world⁴⁸⁶. She has been helping to disseminate the hardships of being a stateless, and asking public support to help other stateless persons around the world. In her own words, “being stateless hurts much more when you know you are capable of doing so much”⁴⁸⁷.

The UNHCR campaign is producing interesting results, since it sparked a series of governmental, regional and international initiatives⁴⁸⁸. For instance, more than 20,000 people received nationality documents in Thailand over the last four years, in an initiative from the government to identify large stateless groups living in remote areas and students across the country, providing them a legal status (citizenship or legal residence)⁴⁸⁹.

Moreover, it was created by UNHCR and UNICEF a Coalition on Every Child’s Right to a Nationality, whose aim is to ensure that no child is born stateless, through actions implemented in partnership with several civil society organizations⁴⁹⁰. In March 2017, the UNHCR and the Organization for Security and Co-operation in Europe (OSCE) launched a “Handbook on Statelessness in the OSCE Area: International Standards and Good Practices”, in which many legal instruments and policy tools are made available to help fight statelessness among member states⁴⁹¹.

In the meantime, dozens of debates, roundtables, seminars and public hearings about the subject are being held, led by UNHCR in its regional and country offices, in cooperation with local actors, helping to increase awareness. In addition, UN human rights mechanisms are progressively addressing statelessness, such as in the human rights treaty bodies, through recommendations on the Universal Periodic Review, and resolutions from the Human Rights Council⁴⁹². Finally, the global campaign is being succeeded in attracting more states to accede and ratify one or both the 1954 and 1961 Conventions on statelessness, as

⁴⁸⁶ UNHCR. **Maha Mamo, a stateless refugee...** op. cit.

⁴⁸⁷ Ibid.

⁴⁸⁸ For more information, see <http://www.refworld.org/statelessness.html>. Accessed on 20 June 2017.

⁴⁸⁹ JEDSADACHAIYUT Nantanee; AL-JASEM, Nadia. Overcoming statelessness in Thailand one case at a time. **UN HIGH COMMISSIONER FOR REFUGEES**, 24 Nov. 2016. Available at: <http://www.unhcr.org/news/latest/2016/11/5836af624/overcoming-statelessness-thailand-case-time.html> Accessed on 22 June 2017.

⁴⁹⁰ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Coalition on Every Child’s Right to a Nationality**. Available at <http://www.unhcr.org/ibelong/unicef-unhcr-coalition-child-right-nationality/> Accessed on 22 Jun. 2017.

⁴⁹¹ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Handbook on Statelessness in the OSCE Area: International Standards and Good Practices**, 28 February 2017. Available at: <http://www.refworld.org/docid/58b81c404.html>. Accessed on: 22 Jun. 2017.

⁴⁹² KHANNA, Melanie J.; BRETT, Peggy. Making effective use of UN human rights mechanisms to solve statelessness. In: KHANNA, Melanie J.; VAN WAAS, Laura. **Solving Statelessness**. Oisterwijk: Wolf Legal Publishers, 2013.

Georgia, Gambia, Belgium, Guinea, Colombia, Mozambique, Niger, Argentina, Peru (2014); El Salvador, Turkey, Belize, Italy (2015); Sierra Leone, Mali, Guine-Bissau (2016).

Nevertheless, it should be noted that improved awareness about the question and signature of legal documents will not alone get to eradicate statelessness around the world, since many legislative gaps, discriminations and inaction from governments are still in place, but also because while the question of nationality is controlled historically by the states, as the only way to recognize individuals' membership, and citizenship is seen only by the lenses of the national experience, there would continue to exist those persons or groups who are left behind.

2.6 Challenges for eradicating statelessness

2.6.1. The question of identification

The exact number of stateless persons in the world nowadays is uncertain, due to the lack of reliable data, which is ought to be provided by the states. Not all states though categorize correctly stateless persons, with some registering them as of “unknown nationality” or simply “non-citizens”⁴⁹³. Other reasons why it might be very hard to measure the extension of the problem in a worldwide perspective is because states might have chosen to ignore the problem on purpose, either by not publicizing the available data, or even eventually manipulating the numbers considering hidden agendas⁴⁹⁴.

In any case, although having in its official statistics the number of 3,242,207 stateless persons globally by the end of 2016⁴⁹⁵, the UNHCR estimates the total number of stateless persons around the world in at least 10 million people, of which one third are children⁴⁹⁶. A more detailed analysis on the challenges of mapping statelessness, and more precise figures are draw in the 2014 report “The Word’s Stateless”⁴⁹⁷.

This document importantly analyses the case of the Palestinian stateless, probably the most well-known stateless people in the world. In principle, they would deserve

⁴⁹³ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Handbook on Statelessness in the OSCE Area...** op. cit.

⁴⁹⁴ Ibid.

⁴⁹⁵ UNHCR Statistics refer to persons who fall under the agency’s statelessness mandate because they are stateless according to the international definition of the 1954 Convention, but data provided by some states include persons with “undetermined nationality”. Available at: http://popstats.unhcr.org/en/overview#_ga=2.248678919.1201103862.1512913925-857508333.1495032656 Accessed on: 10 December 2017.

⁴⁹⁶ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Statelessness Around the World**. Available at: <http://www.unhcr.org/statelessness-around-the-world.html> Accessed on: 10 Oct. 2017.

⁴⁹⁷ INSTITUTE ON STATELESSNESS AND INCLUSION. **The World’s Stateless**. Oisterwijk: Wolf Legal Publishers, 2014. Available at: <http://www.institutesi.org/worldsstateless.pdf> Accessed on: 10 Oct. 2017.

international law protection, since they are not nationals of any state. But the question is complex, exactly because the uncertainty over the statehood of Palestine⁴⁹⁸, and considering the Palestinian nationality policy⁴⁹⁹. The report divides the Palestinians in three groups: those who are refugees, and fall under the mandate of the UNRWA, in the five countries where the Agency operates: Lebanon, Jordan, Syria, the West Bank and the Gaza Strip; the Palestinian refugees who live outside those five countries, and thus are under the UNHCR mandate; and the stateless Palestinians who are not refugees, most of them living in the West Bank and Gaza, but whose nationality status is still undetermined. Even if many of Palestinians may have acquired the nationality of other countries, as it is the case of many living in Jordan, some Arab countries like Lebanon, Syria and Egypt apply a policy of non-naturalization for Palestinians⁵⁰⁰, what maintain them in an indefinite condition of statelessness, until an overall agreement for the Palestinian question is reached. In conclusion, although “it is not possible, at this time, to clearly ascertain who is and who is not ‘considered as a national [...] under the operation of’ the law of Palestine”⁵⁰¹, the study estimates the number of Palestinian stateless, or whose nationality is uncertain, in more than 5 million people, what elevates the total number of stateless persons worldwide to at least 15 million⁵⁰².

In the cases where nationality cannot be determined for any reason, or there is dispute between two states regarding someone’s nationality, the matter becomes to identify properly whether the person is, or is not stateless. Here the question of proving someone’s nationality is at stake. For Paul Weis, as nationality is ruled by national law of the States, any proof of nationality should be searched in relation to the States in which the individual has previous links. A strong evidence of nationality would be a document associating the person with the state, issued by a legal qualified authority of the country in question⁵⁰³.

⁴⁹⁸ “In 2011, Palestine was admitted to UNESCO and in November 2012, the UN General Assembly passed a resolution which accorded Palestine the status of “non-member observer state” of the United Nations. In 2014, Palestine acceded to numerous multilateral treaties which are open to accession by States, including treaties relating to diplomatic and consular relations. While a majority of the world’s governments had recognized Palestine as a state prior to these latest developments, the denial of Palestinian statehood is now evidently increasingly untenable”. INSTITUTE ON STATELESSNESS AND INCLUSION. **The World’s Stateless...**

⁴⁹⁹ The recognition of Palestine as a state has not yet translated into the resolution of issues regarding nationality. There is currently no single authoritative source on the rules relating to acquisition or loss of Palestinian nationality, nor is it clear which persons of Palestinian origin are deemed eligible to be recognized as nationals of the state of Palestine”. INSTITUTE ON STATELESSNESS AND INCLUSION. **The World’s Stateless...**

⁵⁰⁰ This is due to the signature of the “Castablanca Protocol”, adopted by the League of Arab States in 1965, which demanded that the host Arab states conceded citizenship rights for Palestinian refugees, while not naturalizing them. Issuing for these persons a Refugee Travel Document, became a way of maintaining their status as refugees, with the aim of keeping alive the Palestinian displacement from the 1948 and 1967 wars with Israel. SHIBLAK, Abbas. *Stateless Palestinians. Forced Migration Review*, v. 26, n. 2006, p. 8-9, 2006.

⁵⁰¹ INSTITUTE ON STATELESSNESS AND INCLUSION. **The World’s Stateless...** op. cit.

⁵⁰² Ibid.

⁵⁰³ WEIS, Paul. **Nationality...** op. cit., p. 205.

However, in the lack of a proof of nationality, statelessness itself can be hard to prove. In effect, to be considered stateless under international law, the person must prove she is not national of any state under the operation of its law. Clearly, if the individual could get a document issued by each State to which she could have an effective connection, certifying she is *not* a national there, things would be easy. But as Batchelor points out, “such documentary evidence will not always be available, in part precisely because States will not readily feel accountable for indicating which persons do not have a legal bond of nationality”⁵⁰⁴.

When a State denies the person, the enjoyment of rights reserved for its citizens, that can be a proof that the State does not consider her as its national, for example by not allowing the exercise of the right to vote or to assume public office. In other words, “the clear denial of such privileges without further justification could be taken as evidence of the lack of the bond of nationality”⁵⁰⁵. Another way of evidencing that someone is or became stateless is when the person that is outside her country of habitual residence is refused consular or diplomatic protection by her State of nationality⁵⁰⁶, although this can amount to a case of *de facto* statelessness, not protected by international law, as studied above.

Identifying who is stateless and who is not is an activity for which little guidance was provided by the legal framework on statelessness. The 1954 Convention does not prescribe any specific mechanism in this regard. Indeed, some people fail to have guaranteed the application of back up clauses to avoid statelessness, to which later is revealed she had the right to accede. Thus, a major challenge is to face, at national level, the inability of the concerned actors to identify the applicable norms against statelessness⁵⁰⁷.

Finally, it is important to identify if the stateless person is in a migratory context or in her “own country”, since for the stateless *in situ*, determining the stateless condition could be undesirable, comparing to the more appropriate solution of conceding nationality. In most cases, the best way to identify stateless persons is by establishing stateless determination procedures.

⁵⁰⁴ BATCHELOR, Carol. The 1954 Convention relating to the status of stateless persons: Implementation within the European Union Member States and Recommendations for Harmonization. 2004, p. 14-15, as quoted by VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 26.

⁵⁰⁵ VAN WAAS, Laura. **Nationality Matters...** op. cit., p. 26.

⁵⁰⁶ *Ibid.*, p. 27.

⁵⁰⁷ *Ibid.*, p. 424.

2.6.2. Lack of procedures for determination of statelessness

A persistent problem is caused by the lack of procedures for determination of statelessness in most states of the world. That is considered a serious obstacle for the protection of stateless people, since they are ought to be considered stateless by a state party to the 1954 Convention, in order to have guaranteed the rights provided therein⁵⁰⁸. The absence of municipal legal paths, for the concerned persons to have their status of stateless recognized, is likely to maintain their invisibility, and in the worst cases, turn them to be considered simply as irregular migrants, and even ending in detention⁵⁰⁹. In addition, the lack of a state procedure to determine statelessness can deny the individual the possibility to take advantage of a more favorable naturalization, as previewed in the article 32 of the 1954 Convention⁵¹⁰.

Indeed, not many states have statelessness status determination procedures, but it already exists in countries such as Spain, Hungary, Moldova and Philippines⁵¹¹. In 2010, an Expert Meeting convened by UNHCR was held in Geneva to tackle this question. Some essential recommendation came out, the most important ones being: the necessity that States provide personal stateless determination procedures; the differentiation which should be made between stateless people *in situ* and those in migratory context⁵¹²; the special care ought to be made in relation to stateless people who are also refugees (victims of persecution or human rights violations), including the confidentiality for their own protection; and finally, the need to provide specialized training for the officials in charge of the determination procedure. The UNHCR in this document also offers technical assistance to countries which have no capacity or resources for conducting the determination themselves⁵¹³.

Another source of relevant information is the publication “Stateless Determination and Protection Status of Stateless Persons”, issued by the European Network on

⁵⁰⁸ VAN WAAS, Laura; EDWARDS, Alice. Statelessness. FIDDIAN-QASMIYEH, Elena et al. (Eds.). **The Oxford Handbook of Refugee and Forced Migration Studies**. Oxford: Oxford University Press, 2014, p. 296.

⁵⁰⁹ *Ibid.*, p. 296.

⁵¹⁰ UN GENERAL ASSEMBLY. Convention Relating to the Status of Stateless Persons... *op. cit.*

⁵¹¹ GYULAI, Gábor. The determination of statelessness and the establishment of a statelessness-specific protection regime. In: EDWARDS, Alice; VAN WAAS, Laura. (Eds.). **Nationality and Statelessness under International law**. Cambridge: Cambridge University Press, 2014, p. 116-143, p. 122.

⁵¹² Since while the solution for those who are in their “own country” will generally be the acquisition of nationality. Examples of stateless populations to whom this solution would be more adequate are the Rohingyas in Myanmar, the Kurds in Syria and the Nubians in Kenya. For these cases the UNHCR recommends that targeted nationality campaigns are implemented. GYULAI, Gábor. The determination of statelessness and the establishment of a statelessness-specific protection regime... *op. cit.*

⁵¹³ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Statelessness Determination Procedures and the Status of Stateless Persons...** *op. cit.*

Statelessness (2013)⁵¹⁴, which consists in “a summary guide of good practices and factors to consider when designing national determination and protection mechanisms”⁵¹⁵.

As seen, identifying stateless people is not an easy task. States have discretion on how designing and operating their own statelessness determination procedures, since the 1954 Convention is silent on the matter⁵¹⁶. They may choose, for instance, between a centralized procedure or one conducted by local authorities. However, a centralized procedure is more indicated, since it allows to unite and develop the necessary expertise among officials dealing with the question⁵¹⁷. In addition, in implementing the statelessness determination procedure, authorities should take into consideration the need of adequate administrative capacity, comprehending recruitment of statelessness experts. The costs involved should be balanced with the savings made on other administrative sectors which stateless persons would have to recur, if the adequate procedure did not exist⁵¹⁸. In case the procedure of statelessness determination is combined with another practice, such as for recognition of refugees, the definition of statelessness should be clearly separate and well understood, being applied in a manner to guarantee the adequate procedural safeguards for the applicant.

As some stateless can be also refugees, it is important to abide by the confidentiality requirements for asylum seekers and refugees during and after the procedure⁵¹⁹. Moreover, the access to the determination procedures should be guaranteed in a fair and efficient manner. There is no basis in international law for the applicants to be required to be lawfully in the state where they intend to apply for statelessness determination⁵²⁰, and time-limits are ought not to be required, since it may exclude long-term stateless to accede to the protection.

The most important procedural guarantees recommended by the UNHCR during the procedure are the following: formalization of the statelessness determination process in law;

⁵¹⁴ GYULAI, Gábor. **Stateless Determination and Protection Status of Stateless Persons**. European Network on Statelessness, 2013. Accessed on 28 June 2017. Available at: <https://tinyurl.com/jvbh3uk>

⁵¹⁵ This document sets a detailed road map for lawmakers and government officials, advancing for instance: the need of making the determination procedure accessible (where and how to apply); the applicants status during the procedure; the need of clear and realistic deadlines, free of charge translation and interpretation and access to legal assistance when needed; the supervisory role of UNHCR; the mandatory interview; questions related to the assessment and burden of proof; the right to appeal; as well as possibilities related to the status of stateless itself (access to public services, labour market and facilitated naturalization).

⁵¹⁶ For a detailed analyzes on how identifying statelessness, including the remaining challenges on this task, as well as to see examples of states with existing determination procedures, see: GYULAI, Gábor. *The determination of statelessness and the establishment of a statelessness-specific protection regime...* op. cit.

⁵¹⁷ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Handbook on Protection of Stateless Persons...** op. cit.

⁵¹⁸ Ibid.

⁵¹⁹ Ibid.

⁵²⁰ According to the UNHCR, “Such a requirement is particularly inequitable given that lack of nationality denies many stateless persons the very documentation that is necessary to enter or reside in any State lawfully”. Ibid.

the respect for the due process, with respect for the related set of legal safeguards⁵²¹; the right to individual interview, as well as assistance with translation and interpretation, seen as essential for the applicants to have the chance to explain their situation properly, revealing the facts and eventual ambiguities relevant to the case; that the determination procedure lasts no longer than 6 months, or 12 months in exceptional circumstances; that an effective right to appeal is provided, as well as access to legal counsel, and free legal assistance, for applicants without financial means. And finally, states should allow judicial review of the case if needed, to discuss legal related issues⁵²².

The fact that some State authorities do not know, chose to ignore, or do not give the necessary attention for the problem of statelessness is a complicating factor. Indeed, one of the main difficulties of stateless people is exactly the legal limbo they face, being subject many times to a *Kafkaesque* quest, among unclear or absent national rules and procedures, aiming to find a way to be legally recognized, and exercise their rights as any other person. After the compilation of the recommendations above by the UNHCR, it would not be by lack of available information, that states would choose not taking action for tackling statelessness in their territories.

2.6.3. The discretion of states on nationality attribution

As seen so far, there is only one entity able to confer nationality for individuals, which is the State. That is anchored on state sovereignty, and included in the so called reserved domain of the state. However, as demonstrated in the decision of the Permanent Court of International Justice of 1923, in the case *Tunis and Morocco Nationality Decrees*, this aspect of reserved domain is not eternal. Indeed, the Court asserted that whether or not something is in the exclusive domestic jurisdiction of the states, it depends on the current development of international law⁵²³. And in fact, international law has been progressively limiting the states' discretion on nationality matters, at least in the forms summarized below.

In the case of *Nottebohm* at the ICJ, the Court understood that diplomatic protection could not be exercised in relation to a national that was found not having a *genuine link* with the state in question. The discretion of the states in conceding nationality here was not

⁵²¹ See a list of safeguards suggested in UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Handbook on Protection of Stateless Persons...** op. cit., p. 29.

⁵²² Ibid.

⁵²³ PERMANENT COURT OF INTERNATIONAL JUSTICE (PCIJ). **Advisory Opinion n. 4...** op. cit., emphasis added.

affected, but it was made clear that this freedom cannot affect negatively the interests of other states. Thus, the genuine link rule was built not as a matter of right for the individual, but to prevent conflicts among the states.

In what concerns multiple nationality, although some states still do not allow their nationals to have recognized a second citizenship, it is observed a trend on increasing acceptance of multiple nationality⁵²⁴. A deeper exam of the role of this kind of multiple attachments, by the importance it represents, is present in the end of the third chapter.

Moreover, increasing obligations are set by international law regarding the state discretionary power on nationality attribution. The prohibition of arbitrary deprivation of nationality is one of them. In addition, non-discrimination norms in regard to nationality are a cornerstone of the international legal framework of the question. This affect even naturalization, since if on the one hand, the state is allowed to choose its own criteria for turning someone a citizen, on the other, preferring some national, ethnical or religious backgrounds in detriment of others, cannot be sustained against the paradigm of universal human rights currently in force.

But even more evident are the attempts to limit the states discretion for avoiding statelessness. The 1961 Convention for Reducing Statelessness tried to do so, providing guidance for the choice of rules which would minimize the occurrence of the problem. Yet, as the ILC draft for *elimination* of statelessness was not the chosen one, the Convention kept the door open for the possibility of states to allow or create stateless persons in their territories. Succession of states is one of the areas in which more constrains were created, with the aim to avoid large groups of people to become stateless, following dissolution of states and other related situations. That is based on the experience cumulated, above all in Europe, with the dissolution of Yugoslavia, Czechoslovakia and the USSR. Also, important restrictions are drawn in respect of children, which should to be given a nationality, if otherwise becoming stateless; on the imperative of gender equality, for women to accede to nationality always in the same manner as men; and against racial discrimination, for obvious reasons.

Limitations on the substantial aspect of nationality law have been also emerging. And here is where the system of nationality attribution, in its aspect of defining who belongs and who does not deserve protection, begins to be at stake.

For instance, the ILC's Draft Articles on Diplomatic Protection provides that the state can exercise diplomatic protection on behalf of recognized *refugees and stateless persons*,

⁵²⁴ BOLL, Alfred M. **Multiple...** op. cit., p. 195.

if they are habitual residents and are lawfully present in the country, at the date of the injury and of the official presentation of the claim⁵²⁵. If adopted in the future, that norm represents a real possibility to overcome the established distinction citizen/non-citizen, opening space for the states to protect non-citizens, provided they have interest of acting in case of harm suffered by resident refugees and stateless persons. In the same direction, human rights mechanisms have been advancing the possibility of reentrance, typically previewed to nationals only, also for long-term non-citizen residents, which can include stateless persons⁵²⁶.

Moreover, the criteria of birthright citizenship have been gradually softened, with states of *jus sanguinis* tradition conceding citizenship rights to children of lawful residents, especially to those parents born themselves in the state's territory⁵²⁷. This is a critical change, which is ought to be stimulated worldwide, allowing people to be recognized as members of the local community where they were born and are raised, ending a clear exclusionary policy.

2.6.4. The interest of the states on controlling citizenship

As seen, the state discretion on nationality is a main obstacle for eradicating statelessness. But since this institutional architecture is unlikely to change, the work should go on searching for responses on why statelessness, which is not new, however persists.

In fact, none of the changes mentioned in the last section, although important findings for the first part of this study, touch in a captivating question, which actually precedes the nationality attribution: the legitimacy of the international state-system for dealing with the question of nationality the way it does, allowing statelessness to keep alive. To put it from another perspective: since statelessness is an undesirable anomaly, as it was called, how come the world, being in practice entirely divided into nation-states as it is, cannot provide immediately for every human person to have its place as a member of, at least, one of the colored pieces of the world map?

Part of the answer can be related not only to the individual lack of formal nationality, as seen until this point, but with the more complex question of the entitlements brought by

⁵²⁵ UNITED NATIONS, Draft Articles on Diplomatic Protection with commentaries... op. cit.

⁵²⁶ As seen in the discussion on the topic "Limitations in international law to state discretion on nationality" above. See mainly: UN HUMAN RIGHTS COMMITTEE (HRC). **CCPR General Comment No. 27**: Article 12 (Freedom of Movement). Adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999. Available at: <http://www.refworld.org/docid/45139c394.html> Accessed on: 8 Aug. 2017.

⁵²⁷ An example is the 1999 German reform on nationality law, which expanded the possibilities of *jus soli* nationality acquisition, since before many second or third generation of immigrant origin remained without German nationality by birth.

citizenship⁵²⁸. In the words of Gibney, “statelessness brings to our attention not only the dangers of not possessing citizenship, but also the profound problems posed by the international order of states in which the status of citizenship is nested”⁵²⁹.

The undesirability of statelessness was already explored, when its negative consequences for the international community, for the state, and for the individual were revealed⁵³⁰. Statelessness is in certain cases considered byproduct of the unintentional action of states, as for conflicting, badly designed or outdated nationality laws, state dissolution, or bureaucratic incompetence, which provide grounds for its incidence.

It might be true that some poor or fragile states can be unable to provide adequate responses to the problem, especially the ones torn by armed conflicts or natural disasters. But a second look reveal that in some cases, maintaining people stateless can be in the political interest of certain governments. Gibney canvass four reasons why that could take place. First, stateless people are clearly disempowered, since they do not have political rights and voice, and thus, controlling such groups may be easier for political elites. An example would be the Haitians in Dominican Republic, which provide cheap labour force, mainly for the sugar cane and building industries⁵³¹. Preventing their children to access citizenship can make these families captive of a system which perpetuates precarious working conditions, avoiding social mobility and competition with Dominicans.

Second, there would be a perception that some groups are socially or politically dangerous, thus it would be better to prevent them of accessing citizenship. That is motivated by “fear and distrust” towards groups seen as having foreign loyalties or allegiances, making them a threat to the state. For example, some states strip the citizenship of persons accused or condemned of terrorism⁵³². But a policy like that can also occur in the case of entire groups, such as the Bihari in Bangladesh, excluded from citizenship until recently for being considered as an ethnic group whose loyalty laid towards Pakistan, instead of Bangladesh.

Third, the history shows that quite a few groups were labelled in the past of being “unworthy” of full citizenship, since they would not belong to the “right” race or ethnicity,

⁵²⁸ At this point, we remind the reader of the distinction made between the terms nationality and citizenship (topic 1.1.4), since departing from the present section, the politically deeper notion of citizenship will come into question, complementing the analysis made so far by the research, from a more political and ethical perspective.

⁵²⁹ GIBNEY, Matthew. *Statelessness and citizenship in ethical and political perspective...* op. cit.

⁵³⁰ See the section 2.4 on the consequences of statelessness, for a discussion on the undesirability of the question at various levels.

⁵³¹ GIBNEY, Matthew. *Statelessness and citizenship in ethical and political perspective...* op. cit.

⁵³² See a brief analysis of the matter in the section “Discriminatory or arbitrary deprivation of nationality” in the second chapter of this thesis.

or were considered incapable of integrating nationally. The typical examples are the Jews under the Third Reich, but also the blacks in the United States until the 1960s, the Roma population in Europe, especially after the dissolution of Czechoslovakia⁵³³, and indigenous people, in different periods and many parts of the world.

Finally, in some countries a clear process of “people building” may occur. That process is more likely to take place during new born states resulting from conquest or break down, and also in states forged by war. Creating a national identity for the included community, by contrast with the ones to be excluded, and formulating a distinctive collective character, is a “timeless feature of political rule”⁵³⁴. That is a problem for the Arab citizens of Israel, for instance. According to Shachar, although having the formal status of citizens, “Palestinian Arab Israeli citizens [...] are subject to various overt and covert discriminatory governmental policies”⁵³⁵.

A different question relates to the normative way statelessness is treated by international law. Stateless people are seen as victims of an injustice inflicted by the international society of states. But as their human right to nationality is destined to this broad worldwide community, at the same time the only entity capable of rectifying this injustice is a *particular state*, since each one controls its own nationality. That is why the human right to a nationality begs the question: where, which state has the particular responsibility of fulfilling this right? Gibney answers by elucidating different manners which could be adopted by the states for distributing this responsibility. Stateless persons could be “spread” in numerical equality among the countries, using some form of proportional criteria which would take into account the capability of each host state to receive them, as economic conditions or demographic density. A second possibility would make states responsible by the stateless who are present in their territory, in a proximity principle analogous to the *non-refoulement* of refugee law. Thirdly, the distribution could be based on birth, turning states responsible for conferring nationality for every stateless who is born in its territory⁵³⁶. That would be a kind of subsidiary *jus soli* principle, although it would not alone solve all the cases of statelessness⁵³⁷.

⁵³³ GIBNEY, Matthew. Statelessness and citizenship in ethical and political perspective... op. cit.

⁵³⁴ Ibid.

⁵³⁵ SHACHAR, Ayelet. Citizenship and membership in the Israeli polity. In: ALENIKOFF, T. Alexander; KLUSMEYER, Douglas (Eds.). **From migrants to citizens: Membership in a changing world**. Brookings Institution Press, 2013. p. 386-433. p. 428. See also BEN-PORAT, Guy; TURNER, Bryan S. (Ed.). **The contradictions of Israeli citizenship: land, religion and state**. London: Routledge, 2011.

⁵³⁶ GIBNEY, Matthew. Statelessness and citizenship in ethical and political perspective... op. cit.

⁵³⁷ BECKER, Charline. **Jus soli: a miraculous solution to prevent statelessness?** European Network on Statelessness, London, 9 Apr. 2015. Available at: <https://www.statelessness.eu/blog/jus-soli-miraculous-solution-prevent-statelessness> Accessed on: 09 Nov 2017.

The solutions above can appear disturbing, since they coldly consider stateless persons “distributable”, as if the stateless were rootless people, for whom “any” state membership would be satisfactory. Instead, in the real world these “unrecognized citizens” are in most cases, part of a particular local society. “The primary injustice they experience, then, is not that they cannot find *any* state to grant them citizenship, but that the state that really should grant them citizenship will not, for various reasons, do so”⁵³⁸.

This is a turning point in the way we look to statelessness. Although there is no doubt about the undesirability of this condition, which prevents people from exercising their rights, and on the necessity of the efforts currently in place to prevent and reduce statelessness, and to protect stateless persons, the normative doubt refers to whether they should be treated as *stateless as such*, that is, people without any nationality, or also, and in many cases with more effectivity, as *unrecognized citizens* of particular states⁵³⁹, to whom a recognition of their membership would be more inclusive and useful, than simply declaring them stateless.

It is in this sense that this research goes from now on, looking to the additional layer of citizenship, as source of rights and participation, and arguing that some essential factors seem to be denationalizing citizenship, such as globalization, transnationality, human rights law, regional integration and international human mobility. This denationalization does not mean, however, to neglect the importance of personal attachment to a national community, which can provide a sense of identity and cultural belonging.

The idea is rather to look beyond the traditional form of national citizenship, unveiling that multiple types of political memberships are already taking place, for instance, with the increasing acceptance of multiple nationalities; or the appearance of a regional, communitarian citizenship, especially in Europe; and ultimately, what some authors call the emergence of a post-national or global citizenship⁵⁴⁰, from the perspective of a deterritorialized access to rights, based more on the personhood brought by the adoption of universal human rights, than in national citizenship, although this latter maintains, in any case, its role related to the need of implementing those rights at the level of the national state.

⁵³⁸ GIBNEY, Matthew. Statelessness and citizenship in ethical and political perspective... op. cit., p. 58.

⁵³⁹ Ibid. The author does not treat the question in the exactly same manner, confronting the recognition of “stateless as such” or “unrecognized citizen”, while we believe one way of treatment does not precludes the other. In certain cases, the recognition as stateless could be a first step for a later claim for recognition of membership as citizen.

⁵⁴⁰ See the discussion on the terms and novelty of this approach in the section “Global, transnational or post-national citizenship”, in the third chapter of this thesis.

3 TRANSFORMING NATIONALITY AND CITIZENSHIP

In this chapter, the research will focus first, on the ways nationality has been evolving, in face of the political and social changes at international level during the last three decades. In its second part, the analysis concentrates in the shifting role of citizenship, confronting it with the increasing issues related to international human mobility. A more specific view of citizenship, in contrast with the presence of the non-national other, is then examined. Finally, it is shed light in the current multiplication of memberships and the evolution of citizenship from a global perspective.

3.1 Changes in nations and nationalities in contemporaneity

3.1.1 Globalization and its impact on nationalities

Understanding globalization is important for revealing the changes through which nationality and citizenship have been subject lately. Although “globalization” is a wide topic, considering its importance in the realm of political science and international relations, briefly studying its appearance seems indispensable to to understand the new conceptions of citizenship that will be explored in this chapter.

Keohane and Nye consider that globalization turned into a vague concept which, as happened with their “interdependence” notion draw in the 1970s, “expresses a poorly understood but widespread feeling that the very nature of world politics is changing”⁵⁴¹. They advert that globalization, that is, the relatively recent increase of globalism (a phenomenon with ancient roots), can assume multiple dimensions: one can talk about economic, military, environmental or social and cultural globalization⁵⁴².

Indeed, common usages of globalization can loosely refer to the acceleration of international trade dynamics; the incremental use of new technologies which help to shorten distances; the growing number and influence of intergovernmental organizations, like UN agencies, and regional ones as the European Union; the multiplication of identities and allegiances of the individual with different entities; the enhanced collaboration among policy makers, researchers and other professionals through cross-national networks; the increased

⁵⁴¹ KEOHANE, Robert O.; NYE, Joseph S.; Globalization: What's New? What's Not? (And so what?). In: HELD, David; MCGREW, Anthony. **The Global Transformations Reader**. An Introduction to the Globalization Debate. Cambridge: Polity, 2003.

⁵⁴² Ibid.

international cooperation in the fields of development, environmental protection, humanitarian matters, security and human rights; the ascension in number and impact of international non-governmental organizations (NGO's) and other global social movements; and the expansion of private international regulations which work in parallel to state rules and institutions⁵⁴³.

Therefore, a comprehensive, sufficiently complex concept of globalization is brought by David Held, which contends that globalization would be

a process (or set of processes) which embodies a transformation in the spatial organization of social relations and transactions - assessed in terms of their extensity, intensity, velocity and impact - generating transcontinental or interregional flows and networks of activity, interaction, and the exercise of power⁵⁴⁴.

This concept, however, does not bring explicitly the human component of globalization, which is more appropriately brought by the study of the international migrations. Although the latter is not the specific object of this study, it will permeate the research, since the circulation of people across the nations have been one of the main factors of challenge to the traditional view of nationality for the international law, and for citizenship when considered the local interactions of individuals with the state. What will be analyzed below are the specific consequences of globalization for the nation and for the nationality principle in contemporaneity.

3.1.1.1 Denationalization of the nation-state

Saskia Sassen explores the denationalization of what has been historically national in the state, caused by globalization. Instead of dwelling on the already traditional vision that the state has been coopted by private actors, through deregulation and privatization, she goes further by analyzing the role of the state in such a globalized economy. Her intention is to refine the dualized view by which national and global, as well as state and non-state actors, are mutually exclusive⁵⁴⁵.

⁵⁴³ LEGOMSKY, Stephen. The last bastions of state sovereignty. Immigration and nationality go global. In: SOBEL, Andrew C. **Challenges of Globalization: Immigration, social welfare, global governance**. New York: Routledge, 2009.

⁵⁴⁴ HELD, David; et al. Rethinking Globalization. In: HELD, David; McGREW, Anthony (Eds.). **The Global Transformations Reader**. An Introduction to the Globalization Debate. Cambridge: Polity, 2003, p. 67-74.

⁵⁴⁵ SASSEN, Saskia. The State and Globalization: Denationalized Participation. **Michigan Journal of International Law**. v. 25, n. 4, p. 1141-1158, 2004. Available at: <http://repository.law.umich.edu/mjil/vol25/iss4/18> Accessed on 09 Sept. 2017.

Normally, globalization is seen as something happening externally to the state or from above. It would be caused by the emergence of economic international institutions, such as the World Trade Organization, the formation of global financial markets, the creation of international tribunals, as well as other organizations and dynamics at global scale. Sassen argues however that, in addition to these dynamics, there are also globalizing processes which occur inside the state, like subnational interactions; relationships between states, as in supranational regionalism; and also, globalization which occurs within national states' structures, represented in this case by what she calls internationalization of state work.

This latter means the denationalization of structures of the state which were typically national, under the influence of the engagement of states in international negotiations, commitments and agreements. Two are the domains in which this occur inside the national state. First, the design and implementation of highly specialized financial, monetary and fiscal policies, aimed to participate and integrate into global markets, for instance, with the objective of augmenting exportations. No doubt, to compete internationally, most states had to incorporate and invest in qualification of their human resources, considering the high complexity and risks brought by international trade negotiations⁵⁴⁶. Second, the state incorporation of cross-border struggles, part of a global agenda, in the realm of human rights and environmental concerns. Human rights, in particular, are increasingly present in the daily activities of national states, since they have adhered to international instruments and tribunals, which to be effective, had be incorporated into part of their national legal framework.

So, instead of looking to the shift from public domain to private domain, that is, on the "size" of the nation-state⁵⁴⁷, Sassen emphasizes how the global is embedded in state practices, through incorporation of global agendas and specific norm-making capacities, particularly by those responsible for implementing cross-border regimes at national level⁵⁴⁸. Sassen aim is "to blur some longstanding dualities in state scholarship, notably, those

⁵⁴⁶ This author talked personally to a Brazilian diplomat serving at the WTO, who corroborated this vision of a highly demanding and ultra-specialized performance required from representatives of the states to deal with international trade negotiations and contentious cases. No need to point that the success of each country in those negotiations therefore depend also on the size, capacity and prioritization of its diplomatic missions dedicated to those issues.

⁵⁴⁷ For Sassen, one important question to be made is whether global processes affecting the state are necessarily bound to reduce its authority, what can be summarized by the expression "less government" suggested by the terms deregulation and privatization, or instead those processes can also lead to the production of new types of regulations, rules and court decisions composing "new legalities" that do not replace, but "work alongside older well-established forms of state authority". SASSEN, Saskia. **The State and Globalization**... op. cit.

⁵⁴⁸ The multimedia exposure to other cultures and life styles, the enhanced facility of traveling and the possibility of studying or working abroad, or simply the individualist desire to buy cheaper products wherever they cost less, seem to be part of the imaginary of a growing number of people, including public actors, what can ideally affect their willingness towards rethinking global human mobility constrains.

concerning the distinctive spheres of influence of respectively the national and the global, of state and non-state actors, of the private and the public”⁵⁴⁹, by “recognizing and deciphering conditions or components that do not fit in this dual structure”⁵⁵⁰. Her main argument is that “the mix of processes we describe as globalization is indeed producing, deep inside the national state, a very partial but significant form of authority, a hybrid that is neither fully private nor fully public, neither fully national nor fully global”.

Dani Rodrik is of also of the view that markets and governments are not exclusionary, but complementary. He builds an “alternative narrative”, arguing that the criticism on the economic globalization is justified by the aim to “create new institutions and compensation mechanisms – at home or internationally – that will render globalization more effective, more fair [sic], and more sustainable”⁵⁵¹. He explains that, although globalization brought prosperity on unprecedented levels, it has been in trouble since

There is no global antitrust authority, no global lender of last resort, no global regulator, no global safety net, and, of course, no global democracy. In other words, global markets suffer from weak governance, and are therefore prone to instability, inefficiency, and weak popular legitimacy⁵⁵².

By defending that there should be a balance between governmental regulation and market freedom, considering neither one in absolute terms can sustain the economy alone, the author calls for a *smart globalization*, which “discard the idea that markets work best when they are left to their own devices. Markets necessarily require sound governmental institutions in order to function, [since] they supply the ‘rules of the game’”⁵⁵³. At the same time, the existence of governmental institutions regulating the economy “begs the question of how they are designed and whose interests they serve”⁵⁵⁴, which means it is necessary to assess the quality of the concerned governmental institutions, and how effectively democratic they are.

This denationalization of the state coming not from above, but from within, is subject to transform also the realm of nationality and citizenship, since the agents which represent the state and design those policies are embedded in this globalizing trend. For instance, the refugee “crisis” have been continuously in the news, and it becomes evident a public malaise

⁵⁴⁹ SASSEN, Saskia. *The State and Globalization...* op. cit.

⁵⁵⁰ Ibid.

⁵⁵¹ RODRIK, Dani. **The Globalization Paradox: Democracy and the Future of the World Economy**. New York: W.W. Norton & Company, 2011.

⁵⁵² Ibid.

⁵⁵³ Ibid.

⁵⁵⁴ Ibid.

towards the states' indifference or lack of appropriate mechanisms to deal with those situations, which are more and more turning into humanitarian catastrophes. "Denationalization is, thus, multivalent: it endogenizes global agendas of many different types of actors, not only corporate firms and financial markets, but also human rights objectives"⁵⁵⁵.

Therefore, what Sassen brings as novelty is that globalization entails denationalization of state practices, including the denationalization from within, as the globalization of the states' daily activities, what portrays a broader picture, in which denationalization of citizenship is ought to become part of the painting, as it will be demonstrated below.

3.1.1.2 The decline of national sovereignty

Although central for the actual interstate system, sovereignty is being slow but constantly challenged. David Held argues that after the Second World War, it was born a new kind of sovereignty, which started to change from the basic Westphalian premises. This classic sovereignty had some important corollaries, namely: (a) an international law in form of interstate law, which conferred to the head of states or governments the capacity to firm agreements with other states, regardless of the national legal framework; (b) this interstate law was indifferent to the kind of national political organization the states adopted, considering authoritarian regimes or liberal democratic states all legitimate polities; (c) a disjunction between the organizing principles of national and international affairs, which means states had no problems in being democratic and concerned with its citizens rights inside its territory, while pursuing maximal political advantage abroad with any worry about international accountability; (d) the delegitimation of any non-state actors which aimed to contest the state's territorial integrity, on the basis of the doctrine of effective control⁵⁵⁶.

After 1945, sovereignty was transformed, since with the new world order which emerged, there was an attempt to "transform the meaning of legitimate political authority from effective control, to the maintenance of basic standards and values that no political agent [...] should, in principle, be able to derogate"⁵⁵⁷. That fundamental transformation is

⁵⁵⁵ SASSEN, Saskia. *The State and Globalization*: op. cit.

⁵⁵⁶ HELD, David. The changing structure of international law: sovereignty transformed? In: HELD, David; MCGREW, Anthony (Eds.). **The Global Transformations Reader**. An Introduction to the Globalization Debate. Cambridge: Polity, 2003, p. 162-176. p. 163.

⁵⁵⁷ HELD, David. The changing structure of international law... op. cit., p. 164.

driven by the lift of self-determination, democracy and human rights as “the proper basis of sovereignty”⁵⁵⁸.

The legal transformations which took place in this changing structure of sovereignty, from its international perspective, were the crystallization of rules of warfare and weaponry, known as international humanitarian law; the delimitation of war crimes, crimes against humanity and genocide as punishable internationally; the emergence of global, regional and national regimes of human rights protection, marked by the adoption of agreements and creation of dedicated institutions, including for the protection of minorities; the tendency, by this new international law, “to entrench the notion that a legitimate state must be a state that upholds certain core democratic values”⁵⁵⁹, as timidly appear in some of the human rights conventions; and the development of an international environmental law, which governs wildlife and the rational use of natural resources⁵⁶⁰.

Since then, however, the world has passed for other transformations. In this sense, Held brings factors which point to another necessary switch on sovereignty power, since globalization started. First, there would be an increasingly clearer *border spillover* effects of the policies adopted by the states, which transcend boundaries of their territory. The example mentioned is the decision of President George W. Bush not to ratify the Kyoto Protocol, with potentially harmful consequences for the entire planet⁵⁶¹. In other words, “governments by no means simply determine what is right or appropriate for their own citizens, and national communities by no means exclusively ‘program’ the actions and policies of their own governments”⁵⁶².

Secondly, while democracy is still confined to national states, “contemporary regional and global forces disrupt any simple correspondence between national territory, sovereignty, political space, and the democratic political community”⁵⁶³. That is a fundamental assertion, which contributes decisively with our thesis, since it puts in question the sufficiency of the citizenship attached simply to the sovereign nation-state, when the world is happening in a much more dynamic, complex and interconnected webs and networks of relations and institutions, which cannot be delimited by the closed category of the *national*, and its human corollary, the *nationality*.

⁵⁵⁸ HELD, David. The changing structure of international law... op. cit., p. 164.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid., p. 164-172.

⁵⁶¹ We can compare this fact with the similar attitude taken by the current President Donald Trump, to announce the intention to withdraw from the Paris Agreement on Climate Change, signed on 22 April 2016.

⁵⁶² Ibid., p. 174.

⁵⁶³ Ibid.

On Held's opinion, intergovernmental organizations⁵⁶⁴, in the way they stand, have been insufficient to solve this democratic deficit, since some are accused of lacking legitimacy, considering specific geo-economic interests, like the WTO and IMF; and others still suffer from problems of transparency, accountability and democracy⁵⁶⁵, although some authors have been defending the reform of those organizations. In any case, the intergovernmental organizations were created and are still controlled by their members, the national states. Indeed, one of the main challenges they face is on their main decision-making processes, which have to be voted by the states, and therefore are conditioned by singular national interests, as well as alliances and coalitions formed by the states⁵⁶⁶.

Rubenstein and Adler have written about the consequences of the globalization challenge in face of state sovereignty, and by consequence, its impact on state-driven nationality. They explain that nowadays there would be a global civil society, which is active in a worldwide scale, markedly on issues which congregate activists on public causes, like the protection of the environment. The advancement of information technology is also pointed as a landmark on the dissemination of knowledge, which brings with it a gradual "compression of the world", motivated by a consciousness of the global⁵⁶⁷.

Sovereignty has been altered by the global interdependence on the economy, as well as by the opening of regional markets through free trade agreements. Moreover, the development of global institutions, like the WTO, to "regulate matters beyond the control of any single government", has inevitably undermined state sovereignty⁵⁶⁸.

A first conclusion draw by the authors is that nationality has already moved, with the changes on the structure of the global political economy, from a necessary attachment to the allegiance from the individual with the state, for a more flexible approach, where dual nationality is not only accepted nowadays, but has the potential of being completely embraced in the future⁵⁶⁹.

⁵⁶⁴ Although the work of these organizations is of much interest for the author of this thesis, I chose to leave the broad discussion about global governance aside, since it would deviate from the research scope proposed in the work. The main reason if that, apart from the consistent work of the UNHCR on combating statelessness, no international institutions has to date dealt in a relevant manner with the question of national or "postnational" citizenship, being a question inherent to the states, so far.

⁵⁶⁵ HELD, David. *The changing structure of international law...* op. cit., p. 174.

⁵⁶⁶ Not to mention the fact that the "chains of delegation" which link the states to those multilateral organizations are sometimes too long, weak or even obscure. In this respect, see KEOHANE; Robert O. *International institutions: Can interdependence work?* **Foreign Policy**, Washington, n. 110, p. 82-96, Spring 1998.

⁵⁶⁷ RUBENSTEIN, Kim; ADLER, Daniel. *International Citizenship: The future of nationality in a globalized world.* **Indiana Journal of Global Legal Studies** v. 7, n. 2, 2000. Available at <https://ssrn.com/abstract=231675> Accessed on: 01 Oct. 2017.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ RUBENSTEIN, Kim; ADLER, Daniel. *International Citizenship...* op. cit.

When the ICJ, in its 1955 ruling on the *Nottebohm* case, brought the idea of *effective nationality*, it meant that multiple nationality was considered an anomaly, since a test of allegiance would be necessary to decide whether the individual was “more closely connected to the population of the State conferring nationality than with that of any other state”⁵⁷⁰. However, with the changes occurred in the world since that distant judgment, diplomatic protection should be expanded, since

in a world where links to more than one nation are increasingly common [...] an alternative to so restricting the cause of action is to expand it, allowing states to intervene on behalf of *anyone* who has significant link to that country, be it by birth, blood, or later association⁵⁷¹.

This argument is reinforced by the assumption that the development of international human rights law, in the second half of the twentieth century, has already moved the understanding that sovereignty should be protected at any cost. An example is the case *Beljoudi v. France*, judged in 1992 by the European Court of Human Rights. From Algerian parents, Beljoudi was born and educated in France, and married a French woman. He was a stranger in Algeria, since he had never lived there, did not speak Arabic and neither professed the Islamism. Nevertheless, for bureaucratic reasons he did not attained French citizenship. After a series of criminal convictions, the government issued a deportation order, which was challenged in face of article 8 of the European Convention on Human Rights, regarding the right to family life⁵⁷². The Court understood that, although the applicant could be deported, by not being formally a citizen of the state, and being eligible for such measure by the crimes committed, the measure would severely disrupt his family life, making deportation unjustified in the case⁵⁷³. Thus, the case treats incidentally about effective nationality, since it was a case of “genuine connection”, a social fact of attachment to a nation. Therefore,

⁵⁷⁰ INTERNATIONAL COURT OF JUSTICE (ICJ). *Nottebohm Case...* op. cit.

⁵⁷¹ RUBENSTEIN, Kim; ADLER, Daniel. *International Citizenship...* op. cit.

⁵⁷² *In verbis*: “Article 8: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and 11 is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. COUNCIL OF EUROPE. **European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14**, 4 November 1950. Available at: <http://www.refworld.org/docid/3ae6b3b04.html>. Accessed on: 16 Oct. 2017.

⁵⁷³ COUNCIL OF EUROPE, European Court of Human Rights. Case **Beldjoudi v. France**, 55/1990/246/317, 12083/86, 26 February 1992. Available at: <http://www.refworld.org/cases,ECHR,4029f4bc4.html> Accessed on: 16 Oct. 2017.

if effective nationality represents a shift from nationality based on formal admission to a state to nationality acknowledged on the social facts of an individual's participation in the life of a community, it is arguable that *any distinction between formal citizens and fully effective citizens is artificial*⁵⁷⁴.

We would not go that far, since nationality is still composing the basis of the personal statute of the person in international law, determining for instance who is subject to which national law. Additionally, citizenship to one or other state largely determines where one can stay, work and live, being the case above an exception moved by grounds of humanity, as adequately protected by the regional human rights convention. However, it seems valid the authors assumption that “the concept of effective nationality facilitates a theoretical (if not yet practical) entry point for the circumstances of our participation in a given national, supranational, regional, or even nonterritorial communities”⁵⁷⁵.

Since the nation-state has been losing prominence on the global framework, considering the accession of non-state actors, it seems likely that its diminishing value on the international governance will affect nationality, by decreasing its relevance⁵⁷⁶. Nationality, in its sociological meaning, concerning the sense of belonging to one (or more) political communities, will keep having its cultural, identity role. But citizenship, understood not only as a legal tie, but as participation and access to rights, as it will be further developed, is being increasingly denationalized. There is in fact a flexibilization of citizenship, since it would be taking a multifaceted form, with the formal link individual-state only one of the factors to be taken into consideration nowadays.

Legomsky affirms that the power of the state to decide who are its own nationals; and which foreign nationals are conceded physical access to its territory, are the *last bastions* of the national sovereignty. He then analyses how those two paradigms of the nation-state, directly connected to the concept of sovereignty, are changing in the face of globalization and other internationalization processes, such as the human rights protection at a global level⁵⁷⁷.

Moreover, international law has been limiting the states' discretionary power to model nationality attribution, by different means, such as the adoption of progressive conventions dealing with non-discrimination, especially in a gender-sensitive fashion, the prohibition of arbitrary nationality deprivation, as well as with multiple nationality and

⁵⁷⁴ RUBENSTEIN, Kim; ADLER, Daniel. International Citizenship... op. cit.

⁵⁷⁵ Ibid.

⁵⁷⁶ Ibid.

⁵⁷⁷ LEGOMSKY, Stephen. The last bastions of state sovereignty... op. cit., p. 44.

statelessness⁵⁷⁸. Although those specific limitations were already analyzed in the first chapter, they mark the fact that the intensity of state sovereignty in this regard has been switching, to accommodate commitments made by the states themselves, in response to changing realities, including the increased international human mobility.

The fact is that exclusive territoriality, which characterizes the modern state, has been undermined by the rapid changes brought by economic globalization⁵⁷⁹. In addition to the declining power of sovereignty, which has been redistributed among supranational entities, international human rights agreements which limit state autonomy, and the emergence of a transnational private legal regimes, led to a gradual redefinition of the sovereignty of the state, and by consequence, has moved the classical conception of national citizenship.

Susan Strange talks about the declining authority of states, as a consequence of technology development and the globalization of financial markets. Since the latter was already mentioned, it is indeed relevant to look to the role of technology nowadays. The pace of technological changes became notoriously fast⁵⁸⁰. From the nuclear bomb and other military advancements, which changed considerably geopolitics, to civilian technological solutions, like medical advancements, the advent of internet, smart phones, and social media, every piece of most peoples' lives are dependent today of some kind of technology. From the economic perspective, it is clear that "competition for world market shares has replaced competition for territory, or for control over the natural resources of territory"⁵⁸¹.

But what calls our attention, regarding the relation of the individual with the state, is that the intense connectivity among people and between people and institutions in general, mainly via social media and applications (*apps*), seems to represent a challenge for the state, in the sense of capturing the citizen's attention for its activities. Of course, that depends on the awareness and priority each government, at national, regional or local level, gives to modernizing its channels of communication with the public. In any case, although most influential political figures have embarked on strategies of direct interaction with their

⁵⁷⁸ LEGOMSKY, Stephen. The last bastions of state sovereignty... op. cit., p. 44.

⁵⁷⁹ SASSEN, Saskia. **Losing Control?** Sovereignty in the Age of Globalization. New York: Columbia University Press, 1996.

⁵⁸⁰ STRANGE, Susan. The declining authority of states. In: HELD, David; MCGREW, Anthony. **The Global Transformations Reader: An Introduction to the Globalization Debate**. Second edition. Cambridge: Polity Press, 2003, p. 127-135. p. 131.

⁵⁸¹ Ibid.

“followers”⁵⁸², governmental institutions are still trying to catch up the new trends on digital marketing and online interactions with their citizens⁵⁸³.

In any case, Strange argues that “the authority of the governments of all states, large and small, strong and weak, has been weakened as a result of technological and financial change”⁵⁸⁴, what in her opinion has produced a kind of vacuum of governance, not yet filled by intergovernmental institutions, neither any other hegemonic power acting on behalf of the common interest⁵⁸⁵.

Michael Mann studied what consequences globalization has caused to the Westphalian nation-state. He was interested in understanding to what extent the nation-state has been transforming, considering local, national, international, transnational and global networks. His first argument is that capitalism has spread thorough the globe, pushed mainly by two major events: the decolonization process, which dismantled the divisions of the world in separate imperial zones; and the collapse of the Soviet Union, opening most of Eurasia to capitalism, with a few exceptions (Iran, China and other smaller communist countries)⁵⁸⁶. He concludes that capitalism is not completely global, since the bulk of capitalist activity is concentrated in three regions: Europe, North America and East Asia, which cover around 85 per cent of the world trade, and where the headquarters of almost all the biggest multinationals are located. Considering the North is mainly rich, the South mainly poor, and “both are locked together in a global network of interaction”, capitalism retains a geo-economic order dominated by the Northern countries. Moreover, the global fashion of capitalism would be undercut by uneven functions of different nation-states, human and social particularisms, and several regional integration processes, being therefore more composed of transnational and international dynamics, than exactly global ones⁵⁸⁷.

⁵⁸² The most famous example of “doing politics by twitter” today is the US President Donald Trump, involved in a series of polemics regarding his declarations on the social media.

⁵⁸³ One curious example comes from Curitiba, Brazil. The Municipal Administration led by the Mayor Gustavo Fruet (2013-2016) decided to create an official Facebook profile of the Municipality of Curitiba. The news is that to manage the page, the administration hired a team of specialists in digital media, who counted with creativity freedom. That liberty translated into the publication of “civic jokes”, *memes* and photomontages of the city’s mascots, like the famous “Capivara” (*Hydrochoerus*). The team used to interact with the users in an informal way (what was called “responsible informality”), as part of the strategy to have a closer relation with the population, specially the younger citizens. Although that use was not consensual, the *fanpage* increased by 408 per cent the number of followers, and by 320 per cent its *posts*’ weekly reach. A news report about this experience is available at <http://www.gazetadopovo.com.br/vida-publica/pelo-menos-sete-capitais-copiam-o-perfil-despojado-da-prefs-de-curitiba-no-face-1o03pfe6he0p3bqpnhwnxyy> Accessed on 26 Oct 2017.

⁵⁸⁴ STRANGE, Susan. **The declining authority of states...** op. cit., p. 133.

⁵⁸⁵ *Ibid.*

⁵⁸⁶ MANN, Michael. **Has globalization ended the rise and rise of the nation-state?** In: HELD, David; MCGREW, Anthony. *The Global Transformations Reader: An Introduction to the Globalization Debate*. Second edition. Cambridge: Polity Press, 2003, p. 135-146. p. 138.

⁵⁸⁷ MANN, Michael. **Has globalization ended the rise and rise of the nation-state?...** op. cit., p. 142.

The second form of globalism found by Mann, which the nation-state cannot deal with alone, is the environmental globalism, composed by wide spread concerns over “population growth, soil and plant erosion, water shortages, atmospheric pollution and climate change [making] humanity together faces severe risks”⁵⁸⁸. By recognizing that the nation-state venture, as well as capitalism, state socialism, fascism and “virtually all modern institutions” have contributed to the environment destruction, he acknowledges that many local-transnational organizations, like NGOs and scientific networks (most originally from the North, but quickly spreading globally), have already take the lead to face this challenge. The environmental issues would stimulate two kinds of networks, one local/transnational composed of organization and activists from the civil society; and other in the form of international cooperation, represented by the increase presence of intergovernmental organizations⁵⁸⁹.

Another development would be the post-militarist submission and the quest for a “new world order”. Mann is skeptic about this possibility, considering the many conflicts in course in the world, global threats like nuclear weapons, ethnic separatisms, the instability of Russia, the permanence of military regimes, and so on⁵⁹⁰. We could add an additional layer of skepticism in our days, considering the USA-North Korea relation, and insoluble wars in Africa. Mann concludes that, although “soft geopolitics” has gained importance, there is substantial place for “hard geopolitics” yet to date. Global interactions networks have been strengthened and transnationalism has gained track, originated both by the capitalism spread, as well as by human and environmental protection networks, but it would be hard to talk about a “global society”, since the human interactions at macro level are much multiple, variable and deeply uneven⁵⁹¹.

3.1.2 Transnationality and the role of the non-state actors

In addition to the nation-states and their diplomatic relations, it is noteworthy the existence of other forms of organizations and dynamics which easily overcome today state borders, and therefore contribute to the blurring boundaries of citizenship. It is the complex networks of multinational, intergovernmental and non-governmental agents that have a strong presence in the most varied areas of human activity, and which often act with variable

⁵⁸⁸ MANN, Michael. **Has globalization ended the rise and rise of the nation-state?**... op. cit., p. 142.

⁵⁸⁹ *Ibid.*, p. 143.

⁵⁹⁰ *Ibid.*, p. 144.

⁵⁹¹ *Ibid.*, p. 145.

autonomy in relation to the states. For Dani Rodrik, “transnational networks have undermined the traditional model of governance based on nation states”⁵⁹².

The notion of the transnational in international politics was already studied in the 1970s by Nye and Keohane, when they stated:

States are by no means the only actors in world politics. (...) a host of other non-state entities are able on the occasion to affect the course on international events. When this happens, these entities become actors in the international arena and competitors of the nation-state. (...) men identify themselves and their interests with corporate bodies other than the nation-state⁵⁹³.

Samuel Huntington has demonstrated in turn how rapid it was in the post-war world, the proliferation and expansion of organizations of various natures, whether public or private, national or international, business or non-profit, civil, military or religious⁵⁹⁴.

According to Amaral Júnior,

the emergence of themes that relate to the indivisibility of the globe and the new cosmopolitanism present in interest groups that are branching out on a transnational scale are revealing indications that civil society is now structured without the limits imposed by national borders⁵⁹⁵.

Philip Jessup was one of the first to refer to the emergence of a “transnational law”, which concerns facts and norms that transcend national boundaries, involving relations between States, international and non-governmental organizations, transnational corporations, and even between individuals⁵⁹⁶. For Gregory Shaffer, “transnational law consists of legal norms that are exported and imported across borders and that involves transnational networks and international and regional institutions that help to construct and convey them”⁵⁹⁷.

From the economic perspective, it is settled that globalization in the last three decades has led to a great expansion of the international presence of large companies, mainly from developed countries. Many industries moved towards countries where the cost of production was lower, not rarely by a combination of abundance of raw materials, low labor costs, and

⁵⁹² RODRIK, Dani. **The Globalization Paradox: Democracy and the Future of the World Economy**. New York: W.W. Norton & Company, 2011.

⁵⁹³ NYE, Joseph; KEOHANE, Robert. Transnational relations and world politics: an introduction. **International Organization**, v. 25, n. 3, p. 329-349. The MIT Press: 1971.

⁵⁹⁴ HUNTINGTON, Samuel P. Transnational organizations in world politics. **World Politics**. 1973. v. 25, n. 3, p. 334-368.

⁵⁹⁵ AMARAL JUNIOR, Alberto do. **Manual do candidato: noções de direito e direito internacional**. 4. ed. Brasília: FUNAG, 2012, p. 50.

⁵⁹⁶ Ibid.

⁵⁹⁷ SHAFFER, Gregory, **Transnational Legal Process and State Change**. New York: Law and Society Inquiry, 2012. p. 3.

few regulatory, including environmental, requirements. The transnational presence of large corporations has an impact not only on the economy, but also to international law. One of the novelties is that some of these companies, in view of their size, reach and penetration, began to elaborate their own norms. In fact, there is a growing field of studies that refers to the normativity of the conducts carried out by transnational corporations, enacted by their autonomous regulatory bodies, which are applied independently of the position of states and their legal systems⁵⁹⁸.

Nevertheless, since the 1970s, the UN has been pushing for the adoption of rules for the accountability of transnational corporations in relation to human rights violations. In 2011, the UN Guiding Principles on Business and Human Rights were finally adopted by the UN Human Rights Council. The document is based on three pillars: the duty of the state to protect; the responsibility of companies to respect; and the responsibility of the state and companies to provide access and the means to prevent and remedy breaches⁵⁹⁹. However, those are just “principles”, and therefore they have not an enforceable character.

In any case, the phenomenon of transnationalization is not just about private companies. Non-profit civil society organizations, with philanthropic, humanitarian, human rights or environmental protection objectives, have been playing a key role to mitigate the suffering caused by natural disasters, armed conflicts and areas devastated by poverty and hunger. Despite the existence of a multitude of local NGOs, which, by raising donations and gathering volunteers, often produce significant results, some transnational NGOs have achieved notoriety through the professionalism and impact of their work. We could mention Greenpeace or Amnesty International, among the most well-known in the field of environmental protection and human rights, respectively. But given the complexity of social relations today, it can be said that there are transnational non-profit organizations for almost every cause imaginable.

The origin of the term Non-Governmental Organizations (NGO) dates back from the system of representations adopted in the work of the United Nations, who called that way the international organizations which, although did not represent their countries, had a constant presence in the meetings and a sound performance on speaking up about the issues in

⁵⁹⁸ AMARAL JUNIOR, Alberto do. **Manual do candidato...** op. cit., p. 51.

⁵⁹⁹ UNITED NATIONS. **Guiding principles on business and human rights**: implementing the United Nations "Protect, Respect and Remedy" framework. 2011. Available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf Accessed on 11 Nov. 2017.

discussion⁶⁰⁰. In the 1960s and 1970s, international cooperation NGOs emerged in the context of the decolonization of African and Asian countries, as well as in the public recognition of a “right to development”⁶⁰¹. This way, a socio-economic division between “developed” North and “developing” South was clearly set.

Other NGOs have emerged in the same period, with the struggle for the recognition and guarantee of certain rights, such as the feminist movement in relation to gender equality and the quest for equal civil rights among whites and blacks in the United States. Moreover, pacifists organized big demonstrations against international wars and nuclear weapons, and environmental movements have been multiplied with the growing public concerns about the sustainability of the human presence on the planet, after the publication of alarming scientific reports⁶⁰². Already in the context of globalization, as seen the notion of “global civil society” emerged in the 1990s, meaning a dynamic non-governmental system of interconnected socioeconomic institutions⁶⁰³.

Those movements were responsible by serious questionings over economic globalization, and managed to bring to the public debate some inconsistencies of the financial and free trade project, which were in their view overlapping local development and not addressing the reduction of global inequality⁶⁰⁴. Those transboundary networks articulate and connect multiple local and national actors and processes, which even if composed by “non-cosmopolitan forms of global politics and imaginaries that remain deeply attached to or focused on localized issues and struggles, yet are part of global lateral networks containing multiple other such localized efforts”⁶⁰⁵.

For Jeffrey Juris, many of those organizations emerged in the end of 1990s and compose “movements for global justice”, which have challenged global inequalities and have

⁶⁰⁰ ALBUQUERQUE, Antônio Carlos Carneiro de. **Terceiro setor: história e gestão de organizações**. São Paulo: Summus, 2006.

⁶⁰¹ First recognized in 1981 in Article 22 of the African Charter on Human and Peoples' Rights, and then proclaimed by the United Nations in 1986 in the “Declaration on the Right to Development” (UNGA Res. 41/128).

⁶⁰² Such as “The Limits to Growth”, commissioned by the Club of Rome and published in 1972 by Donella H. Meadows, Dennis L. Meadows, Jørgen Randers, and William W. Behrens III; and “Our Common Future”, released by the World Commission on Environment and Development and chaired by former Norwegian Prime Minister Gro Harlem Brundtland.

⁶⁰³ KEANE, John. Global Civil Society? In: ANHEIER, Helmut; GLASIUS, Marlies; and KALDOR, Mary (Eds.). **Global Civil Society**. Oxford: Oxford University Press, 2001. Chapter 2, p. 23-47. p. 28.

⁶⁰⁴ See in this respect the seminal work of Joseph Stiglitz, which declaredly changed his mind after been for years senior economist at the World Bank. STIGLITZ, Joseph E. **Globalization and Its Discontents**. New York: W.W. Norton, 2002.

⁶⁰⁵ SASSEN, Saskia. *The State and Globalization...* op. cit.

⁶⁰⁵ Ibid. See also the interesting work of Sassen about the “global cities”: SASSEN, Saskia. **The Global City**: New York, London, Tokyo. Princeton, N.J.: Princeton University Press, 1991.

been ever since articulating on broad networks of local and transnational initiatives. Those networks started to be built on protests organized in meetings of the World Trade Organization⁶⁰⁶ and International Monetary Fund, in the USA and Europe. Apart from being organized mainly through the internet, they were followed by the creation of alternative information channels, like the Independent Media Center⁶⁰⁷.

One crucial event in this sense was the first World Social Forum (WSF), held in Porto Alegre in 2001, simultaneously to the World Economic Forum which happens in Davos, Switzerland. The event “represented an important turning point, as movements for global justice began to more clearly emphasize alternatives to corporate globalization”⁶⁰⁸. The conference gathered representatives of social movements and NGOs from the whole world, and was followed by other two annual editions with 70,000 and 100,000 people respectively, having in the subsequent years spread to other continents and becoming a dynamic process of permanent exchange of experiences, information and common struggles, by transnational, regional and local movements and organizations, which discovered that their impact could be stronger together.

For Juris, this is an example of a broader “cultural logic of networking”, which entails horizontal ties and connections among autonomous elements; free and open circulation of information; decentralized coordination and directly democratic decision-making; and self-managed networking⁶⁰⁹. For the author, grassroots activists and movements of that sort compose a “new way of doing politics”, which would be close to anarchism in a way, although they are loosely coordinated by horizontal elements, in a “autopoietic” self-produced network, which ultimately has the potential to become in some places an “emerging political ideal”, and “laboratories for democracy”⁶¹⁰.

Interestingly, since Manuel Castells wrote his seminal work on the Information Age⁶¹¹, being one of the first authors dedicated to the rise of the digital social networks

⁶⁰⁶ The first big demonstration engaging activists from all over the world happened in the meeting of the WTO in Seattle, USA, on November 30, 1999, and given the clash with the police, became known as the “Battle of Seattle”.

⁶⁰⁷ SURIS, Jeffrey S. Networked social movements: global movements for global justice. In: CASTELLS, Manuel. **The network society: a cross-cultural perspective**. Cheltenham: Edward Elgar, 2004, p. 343.

⁶⁰⁸ SURIS, Jeffrey S. Networked social movements... op. cit., p. 344.

⁶⁰⁹ Ibid.

⁶¹⁰ Ibid. Suris refers to his own experience of field research among Catalans and Spanish activists in Barcelona. The author of this thesis personally testified *in loco* this wide spread culture of grassroots activism, when living in Barcelona in the year 2005.

⁶¹¹ CASTELLS, Manuel. **The Information Age: Economy, Society and Culture**. Cambridge (USA), Oxford (UK): Blackwell, 1996. v. I: The Rise of the Network Society; CASTELLS, Manuel. **The Information Age: Economy, Society and Culture**. Cambridge (USA), Oxford (UK): Blackwell, 1997. v. II: The Power of Identity;

studied above, many other popular uprisings took place, based on the same premises. Against the economic crisis and its inequality, and fighting for “real democracy”, movements like *Occupy Wall Street* in New York (September 2011), and *Los indignados* or “15-M” in Madrid (October 2011), have raised the voice of thousands of young activists for months, and spread to other countries with the slogan “we are the 99%”, in opposition to the management of the economic crisis by the governments and international financial institutions, as well as against political corruption. Between 2010 and 2012, a wave of popular protests and huge demonstrations took place in Tunisia, Lybia, Egypt, Yemen, Bahrein and Syria, among other countries of North Africa and the Middle East, leading to the fall of authoritarian regimes, in what remained known as “The Arab Spring”. Those movements and events were widely organized with the support of social media⁶¹², attesting the influence of digital technologies for civic engagement and social activism⁶¹³.

Also in the field of governmental relations, there are increasing possibilities for relations between subnational entities that seek to exchange information, sharing experiences of public policies, in order to promote cooperation between them. A phenomenon also called decentralized cooperation or paradiplomacy, these interconnections between cities, provinces and federal states have great potential for expansion, overcoming nationalities to promote direct relations based on common interests, even more with the current facilities to communicate and exchange data and information. That way, solutions to the challenges that are sometimes very similar in different locations around the globe can be more easily shared, without the formalism of diplomatic relations linked to the national state.

In other cases, international organizations act as agents of triangulation, connecting governmental entities among them, as well as these and academia, NGOs and private sector. An example is UNESCO's project “From Potential Conflict to the Cooperation Potential”, which seeks to facilitate dialogue and cooperation between the various international actors for the shared and sustainable management of transboundary groundwater, like rivers, lakes and aquifers that cross borders⁶¹⁴.

CASTELLS, Manuel. **The Information Age: Economy, Society and Culture**. Cambridge (USA), Oxford (UK): Blackwell 1998. v. III: End of Millennium.

⁶¹² As demonstrated by different reports, like DEWEY, Taylor et al. **The Impact of Social Media on Social Unrest in the Arab Spring**. Defense Intelligence Agency, 2012. Available at <https://publicpolicy.stanford.edu/publications/impact-social-media-social-unrest-arab-spring> Accessed on: 25 Oct. 2017.

⁶¹³ As widely known, a similar dynamic happened during the civil society protests organized diffusely in Brazil in June 2013.

⁶¹⁴ This author had the privilege to work briefly in this interesting project at UNESCO Headquarters. More information available at <http://www.unesco.org/new/en/pccp> Accessed on 21 Oct. 2017.

In fact, the work of intergovernmental organizations is one of the most interesting facets of transnationalism. The organizations linked to the United Nations play a leading role in some areas, providing expertise and often serving as a global reference for certain issues. Take the example of WHO - World Health Organization, whose mission is to coordinate efforts and establish parameters in the fight against global epidemics and other pressing health issues; or the IPCC - Intergovernmental Panel on Climate Change, linked to the World Meteorological Organization, which brings together leading experts to produce reports that have been instrumental in planning for adaptation and mitigation of global warming.

It can be said that for every major problem at global level, there is nowadays such an organization. These international organizations act in causes that truly transcend nations, with objectives that are in practice, independent of the territorial divisions between states. They bring together highly qualified human resources from all over the world to act in situations of common interest to humanity, overcoming the states logics of the narrow “national interests”, instead aiming to promote effective transnational cooperation focused on solutions and result-oriented outcomes.

In short, from 1970 on, especially since the rise of economic globalization and the flourishing of multilateralism after 1990, it has been developing a complex web of relations at different levels, which relativizes the centrality of the national states, considering transnational businesses, NGOs and intergovernmental organizations have gathered human activity that cross political borders, and in many cases are built in a relatively autonomous way, independent of the direct intervention of the national states, what comparatively decreased their preeminence at international level.

3.1.3 Human rights and the rise of the individual as subject of international law

Certainly, one of the most broadly discussed branch of the legal culture has been the theory of human rights. That is a result of the fact that the origins of human rights are somehow a plot of the human saga across the history, gathering an endless number of facts and events happening in different times and parts of the world, which contributed to the gradual political construction of principles and rules aimed at protecting fundamental human values, mainly the liberty, equality and human dignity⁶¹⁵.

⁶¹⁵ This is the reason why this work will avoid the discussion on the fundamentals of the human rights, and also to describe its history, with reference for instance to the generations of rights, as well as the internationalization of the human rights, and the construction of the post-war legal protection instruments and mechanisms, topics

The origins of the contemporary conception of human rights is closely imbricated with the question of statelessness. Arendt demonstrated how the stateless persons and national minorities were, in the inter-war period, stripped perversely of all and any rights⁶¹⁶, since they were peoples without states, and denationalization became a weapon in the hands of the totalitarian regimes⁶¹⁷. The philosopher's disbelief in the human rights the way they stood at the time (1949), was based in the impossibility to confer rights to people who were not citizens of any state⁶¹⁸. In her words,

the rights of man, after all, had been defined as 'inalienable' because they were supposed to be independent of all governments; but when human beings ceased to have a government of their own, there was no authority left to protect them⁶¹⁹.

Therefore, after the terrifying experience of the Second World War and the appalling Nazi-fascist rule, which led to the genocide of millions of Jews and other minorities, the world had to be politically rebuilt, and the value of the human person urgently recovered. The centrality of the principle of human dignity was revived, to promote an axiological re-encounter of the law, since the legal formalism was used as instrument to the commitment of the most atrocious experiences⁶²⁰. That is why Lafer, based on the thought of Hannah Arendt, talks about the post-war "reconstruction of the human rights"⁶²¹.

In this sense, the contemporary regime of human rights law is inaugurated with the creation of the United Nations in 1945, and three years later, with the adoption of the Universal Declaration of Human Rights. The constitution of an organization of global scope to guarantee peace, international cooperation and the respect for human rights⁶²², and the adoption of the Universal Declaration, with a list of thirty essential rights to be globally

which are already well documented in the doctrine. The effort will be to attain to the aspects relevant for the object of research.

⁶¹⁶ See the concept of "banality of evil" in ARENDT, Hannah. **Eichmann in Jerusalem**. Penguin, 1963.

⁶¹⁷ ARENDT, Hannah. **As origens...** op. cit., p. 371-372.

⁶¹⁸ *Ibid.*, p. 399.

⁶¹⁹ *Ibid.*, p. 397.

⁶²⁰ FACHIN, Melina Girardi. **Direitos humanos e desenvolvimento**. Rio de Janeiro: Renovar, 2015, p. 20.

⁶²¹ LAFER, Celso. **A reconstrução...** op. cit.

⁶²² For Fachin, "the United Nations reflects, in its ways and eventual deviations, the international political system in all its complexity". FACHIN, Melina Girardi. **Direitos humanos...** op. cit., p. 23.

pursued⁶²³, represented a turning point in international law, since they overcome its traditional position of regulating only relations between sovereign states⁶²⁴.

In effect, after 1945 it becomes clear that the protection of human rights cannot remain limited to the reserved domain of the states⁶²⁵, being instead a legitimate concern of the international community⁶²⁶. For Alberto do Amaral Júnior, “community” in international law means the ensemble of states when is used in treaties or judicial decisions, and the totality of human beings, when it acquires a universal meaning⁶²⁷. The view that the states have certain obligations regarding the “international community as whole”⁶²⁸, beyond the inter-state relations, was developed in the ICJ case *Barcelona Traction (Belgium v. Spain, 1970)*⁶²⁹. According to the ICJ,

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the *basic rights of the human person*, including protection from slavery and racial discrimination⁶³⁰.

⁶²³ According to Celso Lafer, the Universal Declaration represent the adoption of a Kantian axiology of the human rights, critic therefore of the Machiavelli-Hobbesian tradition. The UN Charter, in its turn, “admitted the possibility of the operative insertion of a comprehensive reason for humanity which could, in time, contain the discretionary *raison-d’État* of the sovereignties impeding the international legal protection of the human person”. LAFER, Celso. **Comércio, desarmamento, direitos humanos: reflexões sobre uma experiência diplomática**. São Paulo: Paz e Terra, 1999.

⁶²⁴ AMARAL JÚNIOR, Alberto do. **Curso...** op. cit., p. 681.

⁶²⁵ Cançado Trindade argues that “the so-called ‘reserved domain of the states’ (or exclusive national competence), particularization of the old dogma of state sovereignty, was superseded by the practice of international organizations that uncovered its inadequacy to the plane of international relations”. CANÇADO TRINDADE, Antônio Augusto Cançado. **Direito das organizações internacionais**. Editora del Rey, 2003.

⁶²⁶ PIOVESAN, Flávia. **Direitos humanos e o direito constitucional internacional**. São Paulo: Max Limonad, 2012, p. 185.

⁶²⁷ AMARAL JÚNIOR, Alberto do. **Curso...** op. cit., p. 683.

⁶²⁸ Although the “international community as a whole” is a sort of abstraction, not a legal entity with proper personality, James Crawford shows that the notion keeps being usefully evoked, as in the Case Concerning East Timor (Portugal v. Australia, 1995), where the principle of self-determination was considered to have an *erga omnes* character. It also ended in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001. CRAWFORD, James R. Responsibility to the International Community as a Whole. **Indiana Journal of Global Legal Studies**. v. 8, n. 2, Spring 2001. Available at: <http://www.repository.law.indiana.edu/ijgls/vol8/iss2/2> Accessed on 16 Aug. 2017.

⁶²⁹ “An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”. INTERNATIONAL COURT OF JUSTICE (ICJ). Case **Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase**, 5 February 1970. Available at: <http://www.refworld.org/cases,ICJ,4040aec74.html>. Accessed on 5 Nov. 2017.

⁶³⁰ Ibid.

The Universal Declaration of Human Rights was approved by consensus at the General Assembly of the UN in 1948⁶³¹. For Bobbio, the unanimity in the adoption of the Declaration can be taken as a *consensus omnium gentium* regarding a system of values⁶³². In the words of Jack Donnelly, the human rights started to represent “an international overlapping consensus”⁶³³. According to Amaral Jr., a real consensus over human values is still incipient, and the moral unity of the human gender remains and element of faith⁶³⁴. However, as there was general agreement on fundamental principles enshrined in the Declaration, the international community managed to arrive to a “minimum ethical”, denoting an axiological preference for the protection of the human beings, independent of nationality⁶³⁵.

The rights gathered in the Declaration reunited both civil and political rights, more in line with the liberal tradition, as economic, social and cultural rights, claimed by the socialist tradition. Although this represents the unification of the two legacies, after 1948 some differences on the application of international human rights instruments revealed the practical unbalance on the guarantee of the two set of rights⁶³⁶.

From the cultural point of view, it should be acknowledged the concerns about a Western bias on the construction of the human rights law. This debate was addressed in the 1993 Vienna Conference on Human Rights, when some states, such as China, Iran, Malaysia and Indonesia referred to the need to allow different interpretations of the human rights in non-Western countries. There are moreover, different currents of thoughts which talk about the cultural relativism⁶³⁷, and Amartya Sen analyses the quest for “Asian values”⁶³⁸.

⁶³¹ From the 58 member-states of the UN at the time, none voted against, two were not present and eight abstained: Saudi Arabia, Belarus, URSS, Poland, Czechoslovakia, Ukraine, South Africa and Yugoslavia. José Augusto Lindgren highlights the divergences in the redaction of the UDHR, caused mainly by the disagreement of the URSS on the emphasis given to the civil and political rights, defended by the Western countries. ALVES, José Augusto. **Os direitos humanos como tema global**. Perspectiva; Fundação Alexandre Gusmão, 1994, apud FACHIN, Melina Girardi. **Direitos humanos...** op. cit., p. 25.

⁶³² BOBBIO, Norberto. **A era dos direitos**. Rio de Janeiro: Campus, 1992.

⁶³³ DONNELLY, Jack. **Universal human rights in theory and practice**. Cornell Univ. Press, 2013, p. 41.

⁶³⁴ AMARAL JÚNIOR, Alberto do. **Curso...** op. cit., p. 683.

⁶³⁵ *Ibid.*, p. 684. For Fachin, the fundament of the contemporary human rights is contained in the idea of human dignity, a value shared by each and every person. The author refers, therefore, to a “shared axiological code”, related to the human condition. FACHIN, Melina Girardi. **Direitos humanos...** op. cit., p. 32-33.

⁶³⁶ We refer to the historical differences on the monitoring mechanisms of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted in 1966. For more on the subject, see PIOVESAN, Flávia. **Direitos humanos...** op. cit.; and FACHIN, Melina Girardi. **Direitos humanos...** op. cit.

⁶³⁷ André de Carvalho Ramos divide the relativist thinking in arguments: the philosophic; the lack of adhesion by the states; the geopolitical; the cultural; and the one referring to development. CARVALHO RAMOS, André de. **Teoria geral dos direitos humanos na ordem internacional**. Rio de Janeiro: Renovar, 2005.

⁶³⁸ His conclusion is that Asia is too big and diverse to have common cultural values, and the allegations which try to deny the universality of human rights are often brought by authoritarian governments in the Eastern part of Asia, to avoid compromise with their guarantee. Moreover, the supposition that the values that gave raise to human rights come exclusively from the West is also questioned, as the author demonstrates recurring to the

Nevertheless, we filiate to the current of thought that considers this debate exhausted. After intense international debates, the Vienna Declaration and Programme of Action (1993) affirmed the indivisibility, interdependence and universality of the human rights. It declares that while considering the “national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights”. According to Melina Fachin, the 1993 Declaration moves away from an abstract individualist discourse, to recognize the individual and cultural particularities inherent to the human diversity, and at the same time reaffirms the human dignity as fundament of the legal protection inaugurated by the Universal Declaration⁶³⁹. In addition, as contends Carvalho Ramos,

the cultural argument of relativization to the universality of human rights can only be accepted as a safeguard clause for those who wish to exercise their rights of choice, but never to coerce others to submit to certain behaviors only because it is a "traditional practice"⁶⁴⁰.

The international protection of human rights, together with the protection of the environment worldwide, constitutes what Alberto do Amaral Junior called “international law of solidarity”, in addition to the international law of coexistence, and international law of cooperation, drawn previously by Wolfgang Friedmann⁶⁴¹. This legal solidarity would manifest when the human life is at stake, as well as when there are common interests and responsibilities which bound a group, a nation or the humanity as whole, in a way the concerned actors feel a moral obligation to support each other⁶⁴².

Another concept which demonstrates the importance of the international human rights protection, beyond the state consent⁶⁴³, is the legal construction of *jus cogens*, much

lessons of Confucius, Ashoka, Kautilya and Akbar. SEN, Amartya. **Development as freedom**. Oxford Paperbacks, 2001, p. 292-317.

⁶³⁹ FACHIN, Melina Girardi. **Direitos humanos...** op. cit., p. 41-42.

⁶⁴⁰ CARVALHO RAMOS, André de. **Teoria geral...** op. cit., our translation.

⁶⁴¹ AMARAL JÚNIOR, Alberto do. **Curso...** op. cit., p. 685.

⁶⁴² Ibid.

⁶⁴³ “As regards human rights, it has been contended that their coming into being as general rules of international law would not occur through the medium of customary law-making and its reliance on state practice but rather by general principles”. BIANCHI, Andrea. Human Rights and the Magic of Jus Cogens. **The European Journal of International Law**, v. 19, n. 3, o. 491-508, 2008. For Cançado Trindade, “Such [general] principles guide all legal norms, including those endowed with a peremptory character, [...] standing above the will of States and of other subjects of International Law. Emanating, in my view, from human conscience, they rescue International Law from the pitfalls of State voluntarism and unilateralism, incompatible with the foundations of a true international legal order. CANÇADO TRINDADE, Antonio Augusto. **Jus Cogens: The Determination and the Gradual Expansion of its Material Content in Contemporary International Case-Law**. XXXV

discussed in the doctrine lately⁶⁴⁴. The Art. 53 of the Vienna Convention on the Law of Treaties defined a peremptory norm of general international law as a norm accepted and recognized by the international community of States as a whole, from which no derogation is permitted and can only be modified by a subsequent norm of the same nature⁶⁴⁵. Since then, the case law has added to the catalogue of *jus cogens* human rights related provisions, such as the prohibition of genocide, crimes against humanity, war crimes, apartheid, slavery and torture⁶⁴⁶. For Bianchi, “there is an almost intrinsic relationship between *jus cogens* and human rights”⁶⁴⁷. With no intention to discuss here the topic with the complexity required, it is enough to realize that the human rights have been lifted to a category of principles which enjoy a special status in international law, informing, therefore, all international legal relations and institutes, including nationality and migration law.

The human rights are today undoubtedly at the core of the law, but its role on the ascension of the individual as subject of international is what has been producing an important impact on state sovereignty, and by consequence, on nationality and citizenship. As seen, the states do not have the monopoly of rights granting anymore. Since the international human rights protection systems emerged, a clear tension between the protection of human rights and state sovereignty has taken place. But it is important to remember that the human rights law does not come from “outside”, since it was created by the states themselves. Moreover, those protection systems depend on the national states for their implementation.

In any case, as human rights are independent of nationality, they overcome the distinction between citizens and non-citizens⁶⁴⁸, contesting then, to a certain extent, the state

Course of International Law, organized by the OAS Inter-American Juridical Committee, Rio de Janeiro, Brazil, 3–29 Aug. 2008.

⁶⁴⁴ For an early overview of the subject in Brazil, see FRIEDRICH, Tatyana Scheila. **As Normas Imperativas de Direito Internacional Público - Jus Cogens**. Belo Horizonte: Fórum, 2004.

⁶⁴⁵ UNITED NATIONS. Vienna Convention on the Law of Treaties, 23 May 1969. UNITED NATIONS, **Treaty Series**, New York, v. 1155, p. 331, 1986. Available at: <http://www.refworld.org/docid/3ae6b3a10.html>. Accessed on: 5 Nov. 2017.

⁶⁴⁶ See the following ICJ judgments: INTERNATIONAL COURT OF JUSTICE (ICJ). **Legality of the Threat or Use of Nuclear Weapons**, Advisory Opinion 1996, Rep 266, at para. 79; INTERNATIONAL COURT OF JUSTICE (ICJ). **Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories**, Advisory Opinion, 2004, ICJ Rep 200, at para. 159; INTERNATIONAL COURT OF JUSTICE (ICJ). **Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)**, Jurisdiction and Admissibility, 2006, ICJ Rep 1, at paras 64 and 125.

⁶⁴⁷ According to the author, “If a detailed inventory of the contents of the box is difficult to draw, it is nevertheless hard to deny that human rights are contained within it. There is an almost intrinsic relationship between peremptory norms and human rights. Most of the case law in which the concept of *jus cogens* has been invoked is taken up with human rights”. BIANCHI, Andrea. Human Rights and the Magic of Jus Cogens... op. cit.

⁶⁴⁸ In the words of Gilberto Rodrigues and Mariana Fernandes, “human rights recognized universally are inherent on the condition of human being, regardless of legal fictions created only for organize societies”, our translation. RODRIGUES, Gilberto; FERNANDES, Mariana. O regime jurídico internacional da apatridia: a América Latina e o Caribe. **Inter-Relações**. Faculdade Santa Marcelina, n. 36, 2012.

sovereignty, and arguably, the own indispensability of citizenship to a national state⁶⁴⁹. The regional conventions on human rights refer to “persons” rather than citizens, what is backed by regional human rights courts, responsible for adjudicating when violations to the international agreements occur. National institutions have no option other than implement those rulings, which result after due process, with the states defending themselves but in many cases incapable to overcome truly serious human rights abuses carried out by their agents.

The development of international human rights systems, including the possibility of non-state actors and individuals to make claims against the states, constitutes a deeper change in the classical framework of nation-states, since it contributes to a “redefinition of the bases of the legitimacy of states under the rule of law and the notion of nationality”⁶⁵⁰.

In relation to the international human mobility, Vedovato asserts that the absolute discretion of the state on the right of entry in its territory, is fading away with the advance of the human rights law. The author mentions the Advisory Opinion no. 18 of the American Court of Human Rights, which established boundaries in regard of the migratory policies to be adopted by states, since the states are free to decide only to the extent that human rights of the migrants are not violated⁶⁵¹.

This transformation brought by international human rights impacts deeply international law, since it was the first, but not the only branch of law that became embedded in a whole human rights normativity. In fact, human rights turned to a new centrality, with all aspects of the law being subordinated to its imperatives⁶⁵². This fact “can thus erode the legitimacy of the state if states fail to respect such human rights”⁶⁵³.

What is even more relevant for the present study is that, from the ascension of human rights, immigrants were empowered, considering the commitments made by most countries on rights that were recognized regardless of national affiliation, that is, to anyone within the states’ national jurisdiction. Therefore, “immigrants have diluted the meaning of citizenship and the specialness of the claims citizens can make on the state”⁶⁵⁴, since they have access to civil, economic and social rights that depend more on legal residence than in citizenship.

Some countries, like Sweden and Netherlands confer voting rights for lawful resident migrants, what can even represent lower incentive for them to seek naturalization in the

⁶⁴⁹ SASSEN, Saskia. *Losing Control?...* op. cit.

⁶⁵⁰ Ibid.

⁶⁵¹ VEDOVATO, Luís Renato; NASPOLINI, Samyra Haydée Dal Farra. State Sovereignty, International Human Mobility and Human Rights. *Revista de Direito Brasileira*, v. 12, n. 5, p. 198-226, 2015.

⁶⁵² CARVALHO RAMOS, André de. *Teoria geral...* op. cit.

⁶⁵³ Ibid., our translation.

⁶⁵⁴ SASSEN, Saskia. *Losing Control?...* op. cit.

country⁶⁵⁵. Sassen demonstrates that in the United States, Courts have had to admit the legal existence of undocumented migrants and concede them fundamental rights, previously reserved only for citizens or legal residents⁶⁵⁶.

Laura van Waas analyses to what extent nationality is still necessary for the enjoyment of rights today. First, she acknowledges that the advent of human rights law has been uncoupling nationality and the access to rights⁶⁵⁷. An example would be the case law of the European Court of Human Rights, considering

in each case, the Court opens the description of the facts by noting that the applicant is stateless. This finding has no subsequent impact on the admissibility of the claim since the Court need only determine that the violation occurred within the jurisdiction of a state party to the European Convention on Human Rights. The nationality of the applicant is not deemed relevant⁶⁵⁸.

However, the author stresses that although many rights are indeed guaranteed regardless of nationality, the denationalization of rights remain an incomplete process. The first right denied for stateless persons, regardless the human rights conventions, is the right to vote, since the Article 21 of the UDHR reads “Everyone has the right to take part in the government of *his country*”⁶⁵⁹. Considering the notion of one’s “own country” is normally understood as the country of nationality, that means stateless persons in principle are not guaranteed the right to participate politically⁶⁶⁰. A second, unsolved limitation for stateless persons is the freedom of movement, including the right to enter, remain, leave and re-enter into the territory of a state. This right is conceded in the human rights instruments only for nationals of the state in question⁶⁶¹. As already studied, the states remain free to establish the criteria for entrance, conditions for staying, and a right to expel anyone who is not national. That composes one of the main features of state sovereignty. Finally, a third obstacle is an international law provision which can leave margin for limitation of rights for migrants, refugees and statelessness. The International Covenant on Economic, Social and Cultural

⁶⁵⁵ SASSEN, Saskia. **Losing Control?**... op. cit.

⁶⁵⁶ Ibid.

⁶⁵⁷ VAN WAAS, Laura. Nationality and Rights. In: BLITZ, Brad K.; LYNCH, Maureen (Eds.). **Statelessness and the benefits of citizenship** - A comparative study. Northampton: Edward Elgar Publishers, 2011, p. 23-44, p. 24.

⁶⁵⁸ VAN WAAS, Laura. Nationality and Rights... op. cit., p. 25.

⁶⁵⁹ UN GENERAL ASSEMBLY. **Universal Declaration of Human Rights**... op. cit. emphasis added.

⁶⁶⁰ VAN WAAS, Laura. Nationality and Rights... op. cit., p. 26.

⁶⁶¹ According to the Universal Declaration of Human Rights, Article 13: “(1) Everyone has the right to freedom of movement and residence *within the borders of each state*. (2) Everyone has the right to leave any country, including his own, and to *return to his country*.” (emphasis added). UN GENERAL ASSEMBLY. **Universal Declaration of Human Rights**... op. cit. emphasis added.

Rights authorizes developing states to determine to what extent they will concede the economic rights of the Convention, taking into consideration questions related to their national economies⁶⁶².

In view of the flaws above we realize that, although it is clear that the process of denationalization of rights, brought by international standards to which the individuals have access regardless of their nationality, is unquestionably positive for citizens, migrants and refugees, which gain another level of protection outside the state, that does not solve the problems of the stateless persons, since without any nationality (a right which gives access to other rights), they will face restrictions, at least on political participation, freedom of movement, and possibly economic rights⁶⁶³. That is why the accession and implementation by the states, of the more specific 1954 and 1961 Conventions on statelessness are so important, as seen in the precedent chapter.

Not to mention that nationality still carries with it a sense of belonging related to identity and membership to a community, to which no substitute was invented. This does not preclude the additional new forms of membership, advanced in the section 3.4 of this thesis. But by studying the plight of stateless persons, it is possible to realize how in most cases, the non-recognition of their actual citizenship, usually brings with it many troubles.

The fact is that the human rights law, and its relatively new strengthening and adjudicative advancement, have been devaluating the indispensability of national citizenship in terms of access to rights, since there are other sources of rights linked to the condition of being a human person. Nevertheless, that does not make nationality itself dispensable, since *in addition* to the rights conceded at national level, citizens and non-citizens have access to rights provided at international and regional level. Therefore, what happens is a clear and constant ascension and empowerment of the individual in international law. For Saskia Sassen, “the concept of nationality is being partly displaced from a principle that reinforces state sovereignty and self-determination [...] to a concept emphasizing that the state is accountable to all its residents on the basis of international human rights law”⁶⁶⁴.

To conclude, the emergence of the human rights law, its gradual recognition, gain of importance and applicability, has shifted international law in a way to potentially blur the distinction between nationals and non-nationals, although some difficulties persist,

⁶⁶² UN GENERAL ASSEMBLY. International Covenant on Economic, Social and Cultural Rights, 16 December 1966. In: UNITED NATIONS. **Treaty Series**, v. 993, p. 3, 1983. Available at: <http://www.refworld.org/docid/3ae6b36c0.html> Accessed on: 4 Nov. 2017.

⁶⁶³ VAN WAAS, Laura. Nationality and Rights... op. cit., p. 28.

⁶⁶⁴ SASSEN, Saskia. **Losing Control?...** op. cit.

especially in regard to stateless persons. To what extent states are willing to embark in this international legal trend, especially on a phase of growing nationalism, is yet to be discovered. In any case, which human rights are exactly applicable to non-citizens, will be object of a dedicated analysis in the section 3.3.2.

3.1.4 Regional integration and supranationality

The idea of uniting countries, without merging them, is not new. Simón Bolívar was one of the first to defend the union of independent States. From his visionary impetus, in the Jamaica Charter of 1815, he defended the need of a republican confederation of the newly independent territories of the Spanish Empire, in order to strengthen the region to avoid recolonization, both by Spain and other European powers⁶⁶⁵.

The oldest and most advanced regional integration is that existing in the European continent. Eminent European thinkers and politicians have considered, in different historical moments, ideas of European unification since the XVII century. Among them are Napoleon Bonaparte, Marquis de La Fayette, Victor Hugo and Giuseppe Mazzini. After World War II, Winston Churchill made a historical speech at the University of Zurich (1946), defending the constitution of the United States of Europe, as a way of pacificate and reconstruct the European countries.

Since the creation of the Coal and Steel Community, in the post-Second World War Europe, the emergence and evolution of several regional blocs, on all continents, has been constant. Practical initiatives for grouping States within certain regions of the world, for economic and political purposes, are therefore relatively recent.

Regionalism attenuates the sovereignty of the state, since it begins to engage in processes that diminish its complete autonomy, committing itself to acting in coordination with other states. For Accioly, “a new concept of sovereignty has been overriding the traditional one, to the point that states accept to abide by and respect norms emanating from a power above them - the supranational power”⁶⁶⁶.

⁶⁶⁵ The idea was also to face the two regional powers: Brazil, which was an Empire born to the beards of the metropolis, and connected to the Holy Alliance; and the USA, because of the interventionist content of the Monroe Doctrine. SANTOS, Ricardo Soares Stersi dos. *A integração latino-americana no século XIX: antecedentes históricos do Mercosul*. **Seqüência: Estudos Jurídicos e Políticos**, Florianópolis, v. 29, n. 57, p. 177-194, set. 2010.

⁶⁶⁶ ACCIOLY, Elizabeth. **Mercosul e União Europeia**. Estrutura Jurídico-Institucional. 4. Ed. Curitiba: Juruá, 2010. p. 143.

Economic regional integration responds to a search, by the states involved, of improving economic development, by the increase of regional trade flows and expanded markets between neighboring states, what consequently, generates economies of scale and reduces costs. It also helps to improve the collective insertion of the concerned region in the international scenario⁶⁶⁷.

Different arrangements can take place for the integration at regional level to occur. Certain steps of economic integration were designed by the economist Bela Balassa, with a view on the emerging European experience. Those steps are free trade area; customs union; common market and economic and monetary union⁶⁶⁸.

But regionalization is not only economic, it can also be political, cultural and social. It can assume different forms, with formal agreements signed by initiative of governments for specific objectives, such as rebuilding relations destroyed by the war (which is the case of Europe). Agreements can also be the consequence of a spontaneous increase in the circulation of goods, services, investments and persons between two or more neighboring countries. In any case, a more elevated level of institutionalization does not guarantee the increase on the efficacy of the regionalism⁶⁶⁹.

An important phenomenon for this study, related to regionalism, is the rise of what Andrew Hurrell calls regional conscience and identity. The author explains that all the regions are subjectively defined. They are, as the nations, imagined communities which correspond to mental maps, that is, certain criteria chosen or privileged in a given historic moment⁶⁷⁰. Those criteria and the level of attachment they generated among people living in the region, is what defines the sense of membership to the region, which is added to the already existent nationalities.

This regional identity can be formed in relation to internal or external factors. Internally, it refers to similarities in culture, history and religious traditions. From the external point of view, it is built in contraposition with an Other, who can represent any kind of threat, political, economic or military. For instance, one of the elements which helped to boost the integration of the countries of Mercosur, from 2005 on, was the rejection of the proposal of

⁶⁶⁷ AMARAL JÚNIOR, Alberto do. *Curso...* op. cit., 454.

⁶⁶⁸ See BALASSA, Bela. Towards a theory of economic integration. *Kyklos*, v. 14, n. 1, p. 1-17, 1961.

⁶⁶⁹ AMARAL JÚNIOR, Alberto do. *Curso...* op. cit., p. 455.

⁶⁷⁰ HURRELL, Andrew. O ressurgimento do regionalismo na política mundial. *Contexto internacional*, v. 17, n. 1, p. 23, 1995.

creation of a Free Trade Area of the Americas (FTAA), the way it was proposed by the United States⁶⁷¹.

It can be mentioned also the allusion to a regional cultural similarity, in opposition to an external influence of an allegedly different culture, what can fall into a kind of “regional nationalism”, generally exclusionary and intolerant with the differences. When this occurs, who pay the price are usually the migrants, refugees and stateless, seen as intruders and labeled sometimes as scapegoats for internal problems. That has been occurring in many parts of Europe, at least since the 1990s, with a new wave of ultranationalist parties gaining support in the last ten years⁶⁷².

Nevertheless, regionalism can also entail constructive cooperation among participants. The need to respond to common geopolitical challenges, coordinating external positions and participating with joint positions in international forums and organizations; the benefits of cooperating technically to face collective problems and finding shared solutions; the promotion of common political values, such as democracy, human rights and the rule of law; are all reasons that make the regional integration between states desirable, explaining in part its relative development all over the world.

Regionalization and globalization, by the way, are complementary, even if they have different logics and actors. One main difference is that economic globalization occurs driven by transnational actors, mainly corporations which seek access to new markets, and regional integration is usually composed by interstate agreements, in which states accept to limit part of their autonomy, in name of influencing other partners and joining possibilities of shared management of common problems⁶⁷³.

The fact is that regionalism has been influencing the destiny of the populations living in the integrated states, by creating new levels of membership, affecting citizenship by virtue of supranational regulations, to which states previously agree to abide by. Some exclusive or shared competencies are therefore transferred to the regional level, as the monetary policy after the adoption of the Euro, as common currency, in most part of the EU since 1999.

⁶⁷¹ The landmark of the rejection of the Free Trade Area of the Americas (called ALCA in Portuguese and Spanish) occurred in 2005 at the 4th Summit of the Americas in Mar del Plata, Argentina, when a political alignment between the Presidents of Brazil (Lula da Silva), Argentina (Nestor Kirchner) and Venezuela (Hugo Chaves), with the support of other countries, managed to avoid the discussion on the ALCA, isolating the American President George W. Bush and his few allies in the region.

⁶⁷² Although nationalism is an important phenomenon of our times, the author chose to leave its analysis out from this work, since it entails a series of sociological considerations, which in our view would deviate too much the focus from the legal relation individual-state.

⁶⁷³ AMARAL JÚNIOR, Alberto do. *Curso...* op. cit., p. 456.

In the case of Europe, the landmark was a speech in 1950 of the French Chancellor Robert Schumann, known as the “Schumann Declaration”, when the European Coal and Steel Community (ECSC) was proposed⁶⁷⁴. This was the first of a series of supranational European institutions that gave rise to the current European Union. Over time, the European Economic Community (EEC) has undergone several enlargements, reaching 28 Member States today. In 1992 the Treaty of Maastricht was signed, and it was finally founded the European Union. This treaty deserves attention, since it is here that a new form of political-juridical organization begins to be drawn more clearly, placed in a different sphere from the sovereignty of the States involved.

The Maastricht Treaty creates a so-called "European citizenship". Every citizen with the nationality of a Member State of the EU became a citizen of the Union. This citizenship conferred certain rights for this population, in addition to the rights they already had in their States. For example, they are able to vote and to be elected in the European elections (for the European Parliament); as well as in the municipal elections of the country in which they reside, even if they are nationals of another Member State. They shall also be entitled to diplomatic protection and consular assistance from a Member State other than their own, in the territory of a third country. An analysis of the EU communitarian citizenship, and its reflections concerning the object of research of this work is present in the section 3.4.2.

It is at this point, therefore, that the emergence of an unprecedented supranational citizenship is evident, since citizens of any EU member state will have access to rights conferred by the legal body of this organization, as well as the right to political participation, constituting a truly regional citizenship⁶⁷⁵. Maastricht was also responsible for widening the powers of the European Parliament, which, elected by the direct vote of the population of the Member States, gains expanded powers and becomes a mandatory forum for debate and decision of the communitarian legislation, together with the Council of the EU.

The fact is that the whole process of European integration is a clear example of one of the most important changes in the configuration of the nation-state since the First World War. Regionalism was fundamental to eliminate the possibility of new armed conflicts in the continent, generating a gradual trust among the members, through the creation of supranational political bodies. Without attempting to eliminate or homogenize nationalities within states, and on the contrary, seeking at various times to reaffirm respect for differences,

⁶⁷⁴ The great architect behind the emergence of the ECSC was Frenchman Jean Monnet.

⁶⁷⁵ See HABERMAS, Jürgen; CRONIN, Ciaran. The European nation-state: On the past and future of sovereignty and citizenship. *Public Culture*, v. 10, n. 2, p. 397-416, 1998.

symbolized in its motto *in variatate concordia*, the European experience has demonstrated that despite all the adversities, it is possible to create mechanisms of governance that surpass the strict state sovereignty, without extinguishing it, but creating overlaid spaces of convergence, departing from a carefully built democratic edification. According to Habermas,

The acceptance of decisions, which each [state] must take before the other, requires the abstract kind of solidarity that was established for the first time during the nineteenth century among the citizens of the national states. The Danish must learn to see the Spanish as “one of us” and likewise the Germans to a Greek.⁶⁷⁶

It is true that it was a communion of economic interests, that managed to bring together distinct countries and even historical rivals, such as France and Germany, but the European Union ultimately offers its citizens not only advantages in the reduction of financial and logistical costs, as possibilities of interesting exchanges and cultural interrelations, combined with the sharing of experiences and social policies, for the benefit of the communitarian citizens. In the words of Accioly,

Europe, which was the scene of the greatest conflicts of our century, showed the world that, instead of war, people can unite, and that of union, cooperation, delegation of part of their sovereignty, it is possible to give citizens a dignified quality of life.⁶⁷⁷

In addition, the strength of the European integration is that it has been anchored on the defense of human rights and democracy, instead of pretending the creation of a European identity⁶⁷⁸. Indeed, the regional entity adopted in 2000 the Charter of Fundamental Rights of the EU, which was turned into a legally binding instrument by the Treaty of Lisbon in 2009; created the Fundamental Rights Agency in 2007; and has been discussing the accession of the EU to the European Convention on Human Rights.

Nevertheless, not everything goes as planned in regionalism. The fact that integration removes powers from the state and moves them to the regional sphere can generate tensions and reactions. For Bohlke, “the difficulty is in dealing with concepts that contradict recognized principles of Politics and Law, such as the indivisibility of sovereignty and political

⁶⁷⁶ HABERMAS, Jürgen. **A constelação pós-nacional: ensaios políticos**. São Paulo: Littera Mundi, 2001. p. 26, our translation.

⁶⁷⁷ ACCIOLY, Elizabeth. **Mercosul e União Europeia...** op. cit., p. 144.

⁶⁷⁸ CARVALHO, Daniel Campos de. **Déficit democrático na União Europeia**. Tese (Doutorado em Direito Internacional) - Faculdade de Direito, Universidade de São Paulo, São Paulo, 2012. In the words of the author: “in contrary to the national experiences, however, the advent of an unprecedented form of political authority, now continental in scope, does not seem to depend on the existence of a cultural identity, but on the sharing of the decision about the destinies of the collectivity”.

independence as absolute state autonomy in decision-making”⁶⁷⁹. Often, national sectors affected by regional measures that have the potential of decreasing the market share, or to impact the level of employment, oppose to the economic integration⁶⁸⁰.

In any case, despite its advanced stage, the European integration has gone through complicated times, which is related to the question of state sovereignty and the discussion about migrations and nationalities. A good example relates to the international migrations and reception of asylum seekers in Europe. With the opening of internal borders, since the Schengen Agreement, external borders have been strengthened. With the raise of the migratory demand from outside, and the stricter external border control, there was an increase in the smuggling of immigrants from Africa and the Middle East, often in insalubrious and dangerous ways, as widely reported. Thousands of people have lost their lives lately, including women and children, trying to cross the Mediterranean Sea in overcrowded boats, many of which remained adrift or have shipwrecked.

Since 2011, with the outbreak of the Civil War in Syria, to the economic motivated migrations and other asylum seekers, it was added a major contingent of families affected by the conflict, in search of refuge. The great influx of people motivated by different causes, known as “mixed flows”, has generated the biggest humanitarian crisis in Europe since the World War II. Although the Dublin Regulations provide some common rules for the granting of refugee status by EU Member States⁶⁸¹, such rules became rapidly obsolete, since their main provision, that States where applicants first arrive should handle the asylum applications, began to be disrespected, considering the practical impossibility of restraining the large contingent of people determined to reach the most advanced countries of Northern Europe.

Emergency meetings were convened by the European institutions for action to be taken, but the impossibility to reach consensus among member states remained evident. National sovereignty, even partially mitigated by regional integration, once again demonstrated its limitations. Considering that the European states are governed by the winning parties or coalitions in the national elections, the great ideological disparity among the 28 members

⁶⁷⁹ BOHLKE, Marcelo. **Integração Regional e Autonomia do Seu Ordenamento Jurídico**. Curitiba: Juruá, 2007. p. 187, our translation.

⁶⁸⁰ Ibid.

⁶⁸¹ See CHETAIL, Vincent, The Common European Asylum System: Bric-à-Brac or System? (February 14, 2015). In: **Reforming the Common European Asylum System: The New European Refugee Law**, CHETAIL, Vincent, BRUYCKER, P. de; MAIANI, F. (eds), Martinus Nijhoff, 2016, pp. 3-38; Criminal Justice, Borders and Citizenship Research Paper No. 2564990. Available at: <https://ssrn.com/abstract=2564990> Accessed on 29 Sept. 2017.

was evident in the discussions about the crisis. A measure proposed by the European Commission to redistribute refugees across the continent through a quota system, although approved by majority of the members, found strong resistance from some eastern European states, and eventually became dead letter. The so-called “migratory crisis” or “refugee crisis” is in fact a major global *humanitarian crisis*, since asylum seekers and refugees are all over the planet, in fact in much greater number in poorer countries of the South. The problem in Europe was caused by the insufficient political response and the inability of coordination between the member states, in relation to the increased number of forced displacements and consequent asylum requests in the Mediterranean area.

A second example of regional integration which interests us is the creation of Mercosur. The regional integration in South America builds on an economic recommendation in this sense made in the 1950s by the UN Economic Commission for Latin America and the Caribbean (CEPAL). In 1960 it was created The Latin American Free Trade Association, whose failure turned it, in 1980, into the Latin American Integration Association, in force until today. Most countries of the region were under military rule until the end of 1980s. Brazil and Argentina had started a tricky strategic competition for nuclear energy, which could have turned into an arms race. But overcoming the historic rivalry, a nuclear cooperation agreement was signed (1980), and the democratic transition made both countries adopt several economic cooperation accords, leading to the adoption of the Treaty of Asunción in 1991, which created the Mercosur⁶⁸². The joint economic endeavor, to which adhered Uruguay and Paraguay, has the objective of reaching a common market in the region, although to date the Mercosur keeps being an imperfect customs union. In 2012, Venezuela joined the bloc, through a decision that generated controversy, since it was taken without the consent of Paraguay, suspended at that time due to the impeachment process of President Fernando Lugo. Bolivia signed the final Protocol of adhesion to become a full member in July 2017. The bloc also includes associate members, namely Chile, Colombia, Ecuador and Peru, and more recently, Guyana and Suriname.

Mercosur is, however, an integration of *intergovernmental* character, where each member state negotiates autonomously, according to its national interests. The fact that decisions are taken by consensus guarantees, in theory, that no state will have its sovereignty

⁶⁸² With the signature of the Protocol of Ouro Preto (1994), the Mercosur gained international personality and stable institutions, and the Protocol of Olivos (2002) created the Mercosur Permanent Court of Review, for facilitating dispute settlement.

affected. Here is the main difference between the integration models of the European Union and Mercosur:

One cannot fail to emphasize Mercosur's loyalty to the classic model of intergovernmentality or cooperation (...), in contrast to the more vigorous commitment of the Community legislator to the principle of integration and the introduction of typical notes of supranationality [in the EU]. It is certainly a consequence of the greater importance that is now recognized in the South American hemisphere to the dogma of state sovereignty, as well as the lesser pressure to the unifying character of the post-war European thought and political life⁶⁸³.

In addition, decisions of the Common Market Council should not only be taken by consensus, under the Treaty of Asunción, but must be incorporated into the domestic legal order of each member, with the nature of treaty, which renders some decisions ineffective until the internalization by all members is complete.

Therefore, the decision-making process, and the very depth of the integration promoted by Mercosur, differs greatly from the supranational model in force in the European Union, where most decisions are automatically binding on all members, through of the supremacy of Community law over national legal systems. The European modus operandi ensures greater agility on the adoption of immediate binding rules for all members, but on the other hand, as seen, has the potential to generate tensions and deadlocks.

In any case, that thinner legal structure does not devalue or delegitimize the Southern cone integration, which departs from completely different premises and historic conditions. For Amaral, in addition to the political conditions attained with democratization, the cultural proximity between the population of the member states, including a similar language, facilitated the agreement and enables the regional dialogue⁶⁸⁴. Finally, the integration triggered by the Mercosur is ought to follow the so called "open regionalism", meaning that the adherence of other members is stimulated, while the bloc chooses also not to close itself to the trade with the rest of the world⁶⁸⁵.

From the perspective of the citizens, there are increasing developments and attempts to create a South American citizenship. Since 2001, the South American Conference on Migration have been promoting the free movement of people in the region, arriving in 2011 to a declaration entitled "Towards a South American Citizenship".

⁶⁸³ MOURA, Rui Manoel. **O Mercosul e a União Europeia**. Coimbra: Ed. Coimbra, 1994, Apud ACCIOLY, p. 107. Our translation.

⁶⁸⁴ AMARAL JÚNIOR, Alberto do. **Curso...** op. cit., p. 459.

⁶⁸⁵ BRAGA, Márcio Bobik. *Integração econômica regional na América Latina: uma interpretação das contribuições da CEPAL. **Indicadores Econômicos FEE***, v. 29, n. 4, p. 200-220, 2002.

Moreover, the Union of South American Nations (UNASUR)⁶⁸⁶ stated already in its constitutive agreement, signed in 2008 and in force since 2011, that one of its specific objectives is “the consolidation of a South American identity through the recognition rights of nationals of a Member State residing in another Member State, with the objective of achieving a South American citizenship”⁶⁸⁷.

In 2002 it was adopted the Mercosur Residence Agreement, which started to be implemented in 2009. It provides that any citizen of a member state can reside and work for the initial period of two years in another country part of the agreement. For that purpose, the only requirement is to be a national of a member state and to demonstrate a clean criminal record. The temporary residence can turn into permanent after two years, provided the individual demonstrates to have legitimate means of living. The residence permit, in any case, gives the right to work and to have equal access, as the nationals, to public services, such as health and education, as well as the right to family reunion. Apart from its simplified procedure, the agreement becomes a way of regularizing the situation of many immigrants which were in a vulnerable situation in the region⁶⁸⁸.

For Arcazo, “South America has clearly positioned regional citizenship on the agenda and has reached a consensus on the need to develop it”⁶⁸⁹. Nevertheless, some questions remain open, such as in relation to the access of welfare services, and if it will include the right to vote in the country of residence. Family reunification has to be clarified, to specify who are to be considered family. Moreover, the Agreement does not protect regional citizens against expulsion, as in the EU. Finally, there is a risk of fragmentation of the rights of migrants at regional level, if it is not constituted a clearer institutional framework, such as a prevision on how to settle disputes originated from the application of the instrument⁶⁹⁰. In any case, the Mercosur Residence Agreement is an important step forward, which can contribute to the gradual establishment of a truly South American citizenship, provided that other advancements take place at the political, social, economic and cultural levels.

As seen, regional integration is not a question of deliberate renunciation by the States of their sovereignty, but a coordination of policies and responsibilities that are shared, leading gradually to a reduction in the margin of maneuver for each member, through the

⁶⁸⁶ UNASUR. *Tratado Constitutivo de la Unión de Naciones Suramericanas*. Signed on 23 May 2008 in Brasília, Brasil. Quito: UNASUR, 2011.

⁶⁸⁷ Ibid. Our translation.

⁶⁸⁸ ARCARAZO, Diego Acosta. Toward a South American Citizenship? The Development of a New Post-National Form of Membership in the Region. *Journal of International Affairs*, v. 68, n. 2, p. 213, 2015.

⁶⁸⁹ Ibid.

⁶⁹⁰ Ibid.

delegation of powers to the community bodies, always in the case of adoption of a supranational model. The transfer or displacement of sovereignty becomes very attenuated by the slow and necessarily democratic process of construction that leads countries to integration, not without obstacles, and sometimes setbacks. Nevertheless, the process of regionalization of citizenship is at full swing, and is likely to be created or incremented in other regions of the world as well. The only risk is that regional citizenship becomes a new form of exclusion, in regard to those without access to its entitlements and benefits, as it is already the case of millions of “extra-communitarian” migrants, refugees and stateless persons inside Europe.

3.1.5 International human mobility: a world in the move

As seen, globalization is a reality, and it has a considerable impact on the established notions of nationality. In any case, what gains importance in today’s world is the increasing gap between the already established economic globalization, and the restrictions on international human mobility. Following the relative denationalization of state economies, as studied above, the immigration issue has been used to renationalize politics⁶⁹¹, in the sense that there is an overall trend from some political actors, to evoke national sovereignty, by claiming the state power to control migratory fluxes.

First, it is important to remember that the nation-state institutionally has the monopoly of legitimacy over migrations. With fundament on its sovereignty, the state knows no other power or organization able to decide who can enter or not in its territory⁶⁹². Indeed, the Universal Declaration of Human Rights refers to the “right to freedom of movement and residence *within the borders of each state*” and “the right to *leave* any country, including his own, and to *return* to his country”⁶⁹³. Therefore, in principle the state is not obliged to accept the entrance of anyone⁶⁹⁴, with the exception of the principle of *non-refoulement*, strictly in the case of asylum seekers whose life or freedom would be in danger in the territory of expulsion or return⁶⁹⁵. Although not everyone agrees⁶⁹⁶, there is no recognized human right

⁶⁹¹ SASSEN, Saskia. **Losing Control?**... op. cit.

⁶⁹² REIS, Rossana Rocha. **Soberania**... op. cit., p. 150.

⁶⁹³ UN GENERAL ASSEMBLY. **Universal Declaration of Human Rights**... op. cit, art. 13

⁶⁹⁴ For instance, in the case of visa or other requirements for admission in a state’s territory, it is commonly applied the notion that even if the person fulfils all the requisites, she can be denied entrance by the border authorities on its exclusive discretionary decision, based on the exercise of the state sovereignty.

⁶⁹⁵ UN GENERAL ASSEMBLY, **Convention Relating to the Status of Refugees**... op. cit.

⁶⁹⁶ WOLKMER, Antonio Carlos. Uma concepção intercultural dos direitos humanos como fundamento do direito a migrar. In: BARBOZA, Estefânia M. de Q.; PRONER, Caroline; GODOY, Gabriel G. (Eds). **Migrações: Políticas e Direitos Humanos sob as perspectivas do Brasil, Itália e Espanha**. Curitiba: Juruá, 2015.

to immigrate at this point⁶⁹⁷, what does not preclude the possibility, and even the necessity, to be considered as such in the future.

Nevertheless, the border closure is not “natural” as it might seem. Freedom of movement existed before the rise of the nation-state and its sovereignty. In the ancient Greece, archeological findings show the “presence of migrants as traders, military personnel, servants and slaves in a profoundly cosmopolitan order”⁶⁹⁸, and Rome tolerated the foreigners and facilitated naturalization in the Empire, under its *Jus Gentium*⁶⁹⁹.

Vincent Chetail demonstrates how the question was considered among the founding fathers of international law, through a debate between sovereignty and hospitality⁷⁰⁰. While Francisco de Vitoria and Hugo Grotius⁷⁰¹ defended the free movement of persons as a rule in international law, based on the right of communication among peoples, Samuel Pufendorf and Christian von Wolff argued that the state had complete discretion over the entrance in its territory, as a consequence of its sovereignty. In their account, hospitality became charity⁷⁰². Emer de Vattel represented a middle ground, defending that “the sovereign power of the state to decide upon the admission of foreigners was counterbalanced by a qualified freedom of entry based on the right of necessity”⁷⁰³.

Even with the creation of the modern states, the control of the borders was not intrinsic to its existence. The later generalization on the use of passport, symbolizing the state authority over its boundaries, was a turning point on the freedom of movement prevailing so far⁷⁰⁴. As Lafer comments, the use of passports and need of visas were not common until the First World War, and without them people were able to cross borders and remain in other countries without difficulties⁷⁰⁵.

⁶⁹⁷ REIS, Rossana Rocha. *Soberania...* op. cit., p. 159.

⁶⁹⁸ BLITZ, Brad K. *Migration and Freedom: Mobility, Citizenship and Exclusion*. Cheltenham: Edward Elgar, 2014, p. 4.

⁶⁹⁹ Ibid.

⁷⁰⁰ CHETAIL, Vincent. Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel. *The European Journal of International Law*. v. 27, n. 4, 901–922, 2016.

⁷⁰¹ Grotius account on hospitality towards asylum seekers, needed and deserving protection, represents an early basis for the latter creation of the international law of refugees. For a comprehensive review on the roots of the asylum and refugee law, see CHETAIL, Vincent. Théorie et pratique de l’asile en droit international classique: étude sur les origines conceptuelles et normatives du droit international des réfugiés. *Revue Générale de Droit International Public*, v. 115, p. 625-652, 2011.

⁷⁰² CHETAIL, Vincent. *Sovereignty and Migration...* op. cit.

⁷⁰³ Ibid.

⁷⁰⁴ BLITZ, Brad K. *Migration and Freedom...* op. cit., p. 5-8. See in this respect, the work of TORPEY, John, *The Invention of the Passport: Surveillance, Citizenship and the State*. Cambridge: Cambridge University Press, 2000.

⁷⁰⁵ LAFER, Celso. *A reconstrução...* op. cit., p. 140.

A revealing paradox refers to the fact that, in classical international law, there is no legal relation between the individual with one nationality, and the state to which corresponds another nationality⁷⁰⁶. When a state causes harm to a foreign national, the question is lifted to interstate relations, opening possibility for diplomatic protection. That means that the foreign national is, in principle, ignored by the state, being a “non-subject”⁷⁰⁷, what reflects how international law was created to regulate relations among states, not considering the individuals.

In a world divided by political borders, built during centuries of wars, conquests, invasions, colonization, agreements and territory trades, it is persistent the idea that those (imaginary) borders can be “closed”. However, what has been increasingly clear is that governments do not have the real power of totally controlling their borders, since they are very often extensive, clearly porous, and sometimes marked by intense trade and human circulation. In some places, the borders are simply “nothings”: there are no artificial barriers at all. At most, some natural barriers like mountains, rivers, forests or coasts. It is necessary to acknowledge that “the idea of borders is always assumed rather than questioned, [but] in some cases, borders are actively delegitimized or ignored”⁷⁰⁸. A good example is the frontier Mexico-USA, which is target of an intense binational circulation of people, in some points producing a symbiotic socio-economic relation between two local communities (like the cities of Ciudad Juarez and El Paso, or San Diego and Tijuana).

Therefore, the “other side”, when human motivation turns into determination, is usually accessible, on way or another. Moreover, it is important to remember that “barriers to mobility contradict the powerful forces which are leading towards greater economic and cultural interchange”⁷⁰⁹. So, one of the most important aspects of migratory studies is the demographic, large scale trends on human displacement, influenced by economic motivations. Most people migrate, after all, to escape from insecurity, poverty, lack of opportunities, in search of new professional horizons, in sum: seeking a better life.

Indeed, it seems that “the nature of state control over immigration involves a zero-sum argument: if a government closes one kind of entry category [...] numbers will increase in another”. That is the reason why the closing border policy tends to increase the human

⁷⁰⁶ This has been clearly changed by the ascension of the international human rights regimes, which protect the individual on the basis of its personhood, independent on his nationality.

⁷⁰⁷ REIS, Rossana Rocha. *Soberania...* op. cit., p. 150.

⁷⁰⁸ BLITZ, Brad K. *Migration and Freedom...* op. cit., p. 14.

⁷⁰⁹ CASTLES, Stephen; MILLER, Mark. *The Age of Migration: International Population Movements in the Modern World*. New York: Guilford Press, 1998. p. 290.

trafficking⁷¹⁰, considering the lack of adequate legal channels for migration to take place. Therefore, unilateral policies of border control are questionable, since immigration has its own causes, dynamics and concerns people's decisions and expectations, composing a complex scenario in which the border crossing is just one of the obstacles to be surpassed, if the concerned person has decided to immigrate. As Sassen explains,

large-scale international migrations are highly conditioned and structured, embedded in complex economic, social, and ethnic networks. States may insist on treating immigration as the aggregate outcome of individual actions, but they cannot escape the consequences of those larger dynamics⁷¹¹.

In addition, there is epistemic thinking, based on state sovereignty and its consequent role on border control, which understands immigration simply as the ensemble of individual decisions, on the part of immigrants, to enter the country of destination. Part of this conception is the “push-pull” model, which will look to the factors which moves people out, and the attraction causes in the host countries. That view corresponds to a logic that tends to associate pull factors, such as higher wages in the places of destination, with highly skilled immigrants; and push factors with negative conditions and events in the places of origin, what would force low-skilled “economic immigrants” and asylum seekers to leave their home countries⁷¹².

This assumption, although valid to certain extent, disregards that “there is a pattern in the geography of migrations [which] shows that the major receiving countries tend to get immigrants from their zones of influence”⁷¹³. Which means that international migrations are part of a wider geopolitical setting, and economic transnational dynamics, some of which date back to colonization⁷¹⁴. Moreover, the push-pull model disregards new factors typical of the globalized world, such as the increased individual possibilities of studying abroad, and can lead to a *posteriori* decision of migrate, as well as the informational technology of

⁷¹⁰ LOPES, Cristiane Maria Sbalqueiro. **Direito de Imigração:** o Estatuto do Estrangeiro em uma perspectiva de Direitos Humanos. Porto Alegre: Núria Fabris, 2009. p. 60.

⁷¹¹ SASSEN, Saskia. **Losing Control?**... op. cit.

⁷¹² BLITZ, Brad K. **Migration and Freedom...** op. cit., p. 28.

⁷¹³ SASSEN, Saskia. **Losing Control?**... op. cit..

⁷¹⁴ Ibid.

today, which allows people to take this kind of decision on the basis of comparative mechanisms about possible destinations⁷¹⁵, what includes refugees⁷¹⁶.

A problem which certainly affects citizenship in the countries of origin is the “brain-drain” phenomenon, since when many skilled and highly qualified people leave the country, it loses important human capacities, as well as people whose dissatisfaction could turn into action for promoting necessary improvements locally. According to Blitz, there are evidences that brain-drain can cause lowered economic growth, as well as greater inequality in the source countries⁷¹⁷. Despite attempts of some States to deter the exit of their qualified nationals, the phenomenon of immigrating for better life prospects is framed in a broader optic of freedom of movement, and it will keep occurring since most people and families look forward to maximize their economic and social well-being, while abyssal inequalities of opportunities and income levels in many countries persist.

Another important change affecting the state capacity of controlling immigration refers to the ascension of the international human rights norms. Sassen demonstrates how this have been shaping migratory policies. For instance, the European Court of Human Rights, as well as national administrative courts, have been blocking governmental attempts to limit family reunification, with fundament in the right to familiar life⁷¹⁸.

In fact, human rights law has been “playing an important role in the internationalization of migration policy”⁷¹⁹, since many human rights instruments contain protective rules applying to immigrants⁷²⁰. Two examples are the provisions that guarantee the right to family reunification for the child, including in migratory context, previewed in the UN Convention on the Rights of the Child⁷²¹, and the minimum procedural guarantees enjoyed by non-

⁷¹⁵ For example, the availability on the internet of “world rankings”, indexes and surveys on “best quality of living” countries and cities, some based on objective criteria and data. Also, websites which give a real-time estimate on the cost of living in different countries, automatically comparing one to another, and even providing medium salaries and other aspects of the economic, social and cultural life on the desired destination. Those tools, in a context of widespread internet access, help people to take more informed migratory decisions (although millions of people still remain without internet access).

⁷¹⁶ During the recent boom on forced displacements caused by the Syrian civil war to Europe, it became clear that most asylum seekers had in mind their aimed destination countries, where to meet family members and also, considering the conditions of acceptance and living possibilities, what made many states in Eastern and central Europe mere passage paths, mainly towards Germany and Sweden, as widely reported. That means refugees and other forced displaced people are not always fleeing in a rush for any first place of arrival, but sometimes can take the decision to leave their homes in a planned way, although that does not mean that this kind of decision is not difficult, and sometimes, severely dramatic.

⁷¹⁷ BLITZ, Brad K. **Migration and Freedom...** op. cit., p. 29.

⁷¹⁸ SASSEN, Saskia. **Losing Control?...** op. cit.

⁷¹⁹ LEGOMSKY, Stephen. **The last bastions of state sovereignty...** op. cit., p. 52.

⁷²⁰ See a specific analysis of those rights applicable to immigrants in the section “human rights of non-citizens”, in the last chapter of this thesis.

⁷²¹ UN GENERAL ASSEMBLY. **Convention on the Rights of the Child...** op. cit., Articles 9, 10, 16.

citizens before being expelled, in the absence of compelling national security reasons, as stated in the International Covenant on Civil and Political Rights⁷²². The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which was signed in 1990 and entered in force in 2003, is an important instrument which tries to give some minimal guarantees for people working abroad. The problem with this instrument is its low effectivity, since no intense immigration receiving country has ratified it, case of the USA, Canada, Australia, Japan and Western European countries.

International refugee law is another good example, since it clearly limits the scope of the states' border control⁷²³, through the *non-refoulement* principle, and other related guarantees. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, in addition to the tireless work mandated by the state-parties to the UNHCR, have been vital to protect and assist millions of people forced to flee from persecution and violence.

The states have also adopted other agreements which seek to enhance cooperation in issues like human trafficking, counterterrorism and irregular immigration. In the case of the first, it is significative the adoption of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime⁷²⁴.

At the regional realm, the case of Europe is emblematic, since the EU does not have proper competence over immigration or asylum matters. But with the recurrent emergencies in the Mediterranean Sea, it was called to step in, being gradually involved with the design of a regional migration policy, especially after the creation of the FRONTEX – the European Agency for external borders control⁷²⁵, even if at the actual stage the Agency is more devoted to “monitoring and assisting” member-states in respect to borders control, since they maintain full sovereign control over their own borders.

It is clear that migratory policies are being influenced by the process of gradual reshuffling of the sovereign power, which as seen, is being decentered towards supranational entities and global economic institutions. This process reduces the margin of the state to

⁷²² LEGOMSKY, Stephen. The last bastions of state sovereignty... op. cit., p. 52.; UN GENERAL ASSEMBLY. International Covenant on Civil and Political Rights... op. cit.

⁷²³ UN GENERAL ASSEMBLY. Convention Relating to the Status of Refugees... op. cit.

⁷²⁴ UN GENERAL ASSEMBLY. **Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime**, 15 November 2000. Available at: <http://www.refworld.org/docid/4720706c0.html>. Accessed on: 24 Oct. 2017.

⁷²⁵ Established by the European Council Regulation (EC) 2007/2004, with the carefully chosen name of “European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union”, the organism has been gaining prominence lately, in an effort to reinforce the external borders of the free movement area known as “Schengen”.

define autonomously its immigration options, since there is a multiplication of forces interested on these issues, composed internally by non-state actors like individuals and NGOs, and externally by regional political and economic agreements, as well as human rights' protection agreements and institutions⁷²⁶. In sum, economic globalization and human rights are changing the governance of international human mobility, which is likely to be increasingly less decided on exclusive national-determined criteria, considering the growing interdependence and complexity of today's world.

For Legomsky, there are some reasons why the states would be conceding some space to international law over their autonomy to adopt policies on nationality and migrations. After deciding to internationalize flows of goods, services, money and information, states are realizing that it is becoming impossible not to do the same in relation to human mobility across national boundaries⁷²⁷, considering the intrinsic interdependence on the matter, enhanced by the boost on communications and transports. Also, it seems to be emerging some consensus over the question that increasing coordination among states, as well as a sound normative framework is likely to produce safer, orderly and regular migrations⁷²⁸.

In this direction, in 2016 the General Assembly of the UN has approved the New York Declaration for Refugees and Migrants, which draws concerns and commitments by the 193 member states, on a human rights basis and with the aim to share responsibilities for the challenges on international human mobility⁷²⁹. The next step is the adoption in 2018 of a Global Compact for Migration, and a Global Compact on Refugees, whose objective is to set a guide on common principles and approaches to be followed by the states on these two aspects of human displacements. That reveals how the theme was recently raised as a primary political concern in the international political landscape.

Moreover, the fact that human rights law has gained prominence in international law, basing protection on personhood, independent of the individual's nationality, have been raising protection safeguards for non-citizens, turning states accountable by the appropriate treatment of persons within its jurisdiction, independent on their legal status⁷³⁰.

⁷²⁶ SASSEN, Saskia. *Losing Control?*... op. cit.

⁷²⁷ LEGOMSKY, Stephen. *The last bastions of state sovereignty*... op. cit., p. 53.

⁷²⁸ According to the IOM, "for the first time on 19 September 2016 Heads of State and Government came together to discuss, at the global level within the UN General Assembly, issues related to migration and refugees. This sent an important political message that migration and refugee matters have become major issues in the international agenda". INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM). **Global Compact for Migration**. Available at <https://www.iom.int/global-compact-migration>. Accessed on: 24 Oct. 2017.

⁷²⁹ UN GENERAL ASSEMBLY. **New York Declaration for Refugees and Migrants**: resolution adopted by the General Assembly, 3 October 2016. Available at: <http://www.refworld.org/docid/57ceb74a4.html>. Accessed on: 31 Oct. 2017.

⁷³⁰ LEGOMSKY, Stephen. *The last bastions of state sovereignty*... op. cit., p. 54.

Additionally, scholars have been pointing to a growing capability, in the globalized informational societies of today, from the individuals to have multiple attachments and belongings, since “in our more cosmopolitan society, national citizenship as the source of legal rights has inevitably been devaluated and the role of the international community has correspondingly expanded”⁷³¹.

Therefore, for the purpose of this work, we consider there is a two-fold account of globalization, one relating to the economic and political changes of the last decades, which is sufficiently studied since the 1990s, and another more recent, currently unfolding, represented by a truly human globalization. This globalization does not refer to the mere circulation of peoples over the world, since this is an immemorial dynamic, which started with the first nomad peoples. What we call human globalization refer to the quest of a more unfettered circulation of people across the international borders, especially after the end of the Cold War, moved by the opening of global markets, the resumption of multilateralism, and since the turn of the century, from a multiplication of the networks of social movements, NGOs and activists, stimulated by a growing virtual interconnectivity⁷³². To this process in added the gradual blurring of the distinction between citizens and non-citizens, brought as seen by the recognition and application of universal human rights principles, such as non-discrimination.

In regard to the intrinsic link between migration and citizenship, we submit that globalization in general, and the growing interconnectedness among people driven by the advancement of technology, represent elements for potentially improving human mobility, since international migrations are an increasingly important part of international relations, and could be lifted, from the last developments, to a more substantial political debate on its roots and effects in the future, promoted at least by non-state actors such as NGOs and intergovernmental organizations, like the International Organization for Migrations (IOM) and the UNHCR.

⁷³¹ LEGOMSKY, Stephen. *The last bastions of state sovereignty...* op. cit., p. 54.

⁷³² A series of protests of the so-called anti-globalization movements have taken place, especially in the beginning of the 2000s, against the WTO and IMF meetings and big multinational enterprises. Such criticism eventually became more organized, gaining support inside the academy and convening big gatherings to openly discuss global problems and public responses. The pick of these wave was the *Fórum Social Mundial* (World Social Forum), an event created in 2001 in Porto Alegre, Brazil, in response to the annual World Economic Forum which happens in Davos, Switzerland. Reuniting social, environmental and cultural organizations from all over the world, the FSM became in the following years a geographically wide-spread annual meeting, gaining visibility and promoting an intense exchange of ideas and strategies among movements of different nationalities and causes, which realized they had a lot in common, mainly, the criticism on a form of globalization they were not satisfied about.

If by one side, more international cooperation is needed from the countries of the North, towards the developing states from the South, in order to help to overcome the immense difficulties that most of their population face, like extreme poverty, persistent armed conflicts and sharp inequality, it is also necessary to build more coordination between countries of destination, since to have a more “safe, orderly and regular” migration, to use the words of the New York Declaration (2016), the states will have to admit that such an objective is only possible in the long term with a joint effort, which recognizes migrations as an inescapable reality, seeking therefore to understand the causes of human displacements, and accordingly, assume commitments that goes beyond the national borders of each state alone.

Another critical need would be to rethink, with the support of international law, the policies of maintaining migrants in a condition of “second class” members of the society, since public policies of inclusion, which grants immigrants full rights, including political participation, would be clearly more in line with the human rights *ethos*, especially with the aim to prevent marginalization and social conflicts inside the concerned states.

In the case of permanent migrants, it would be the case to facilitate them access to citizenship, as a recognition to the fact that the immigrant, with time, becomes a full member of the community, without losing its culture of origin. That represents an opportunity of intercultural exchange and cross-identity learning. No attempt of total assimilation to the local culture, nor separation or ghettoization, will adequately respond to the growing assemblages inevitability driven by international migrations. Multiple identities have been developing in the post-modern societies, and the migrant condition exposes persons, both the migrants and the host population, to external influences, creating multi-layered identities, subject to constant renegotiations, which have the potential to make appear new transcultural elements, transforming local communities into more creative spaces of permutes and exchanges. Moreover, multilingual competencies and intercultural sociability are important professional assets in the context of a globalized economy. Global cities already benefit from the richness of a broad human and cultural diversity, which can translate into a great source of energy and innovation⁷³³.

Despite the countervailing tendencies of some chauvinist mentalities, characterized by discourses preaching borders closure, migrations and forced displacement are likely to keep occurring, making national divisions slowly but permanently weakened⁷³⁴ by globalization and the spontaneity of human mobility. The multiplication of transnational and virtual

⁷³³ CASTLES, Stephen; MILLER, Mark. **The Age of Migration...** op. cit., p. 297.

⁷³⁴ *Ibid.*, p. 298.

networks, the political regionalization, and a consolidated global regime of human rights protection, is already turning, at least in theory, the “human person” as more important than the “citizen”, with the potential of humanizing international law and national legislations, adapting them to the truly global challenges humanity is facing nowadays.

3.2 Citizenship in the era of international human mobility

3.2.1 The emergence of the modern citizenship

In the first chapter, it was explored the differences in the use of the terms nationality and citizenship, from a legal perspective. The conclusion was that, in most writings, both were used interchangeably. In this section, the intention is to go deeper, pursuing the many senses and uses of “citizenship”, not only on the legal literature, but from a broader socio-political account.

Initially, it is necessary to recognize that citizenship is a vast subject, and as such it would not be possible to give it a single definition, since it can be seen in multiple perspectives - historical, sociological, political, cultural, normative – whose categories can sometimes converge or overlap, referring to the same or similar phenomena, or in other cases be talking about completely distinct theoretical aspects.

The second relevant aspect concerns the antiquity of citizenship. Its first appearance in a way which resembles today’s account, dates back to Athens in the Ancient Greece. According to Aristotle, man is naturally a political animal, and the state emerges when there is a self-sufficing community, which depends on collective agreement to protect the community from external threats⁷³⁵. The Athenians developed the notion of rule of law, comprehending the obedience to the norms created by the citizenry of the *polis*⁷³⁶. Famous for being the birth place of direct democracy⁷³⁷, for what concerns citizenship, Athens is important because it is where clear limits to political belonging were established. Indeed, slaves, women, children and foreigners were excluded from the possibility of any participation, and thus were not citizens of the state. Citizenship in the Greek context was defined by mandatory kinship ties, that is, an early form of *jus sanguinis*. Just those descending from the *polis*

⁷³⁵ ARISTOTLE. **Politics**. Translated by Benjamin Jowett. Oxford: Clarendon Press, 1920.

⁷³⁶ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration**. Globalization and the Politics of Belonging. New York: Routledge, 2000.

⁷³⁷ According to the mythical discourse about the Greeks, direct democracy would be practiced in a context of small city-states, with very small population, who would come together in a square to vote and adopt collective decisions. CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration...** op. cit. p. 30.

would have citizenship privileges, with the exception of the grant of Athenian citizenship to some persons or groups for honorable reasons, as happened with Dionysio and his family, or the Plataians, who were Athenians' allies in the war against Spartans⁷³⁸.

In the Ancient Rome, the situation was different. Citizenship was conceded to a vast number of peoples conquered by Romans, with no explicit restrictions regarding traditions, customs, or language. Latin language was an important instrument of integration and prestige for the connoisseurs, facilitating the relations with the Roman rulers, and influencing decisively Western Europe, with many languages deriving from it. Polytheist peoples such as the Greeks, Syrians and Germanics were annexed and could maintain their religiosity. The same cannot be said about Jews and Christians, who were fiercely repressed, until the conversion of Constantine to Christianity in 312 AD⁷³⁹. In any case, liberated slaves were granted citizenship, likewise the warriors of allied tribes, useful to the expansion and maintenance of the Empire. For the first time, citizenship meant to be a legal subject, part of a political community, and holder of clear rights and duties, independently of ethno-cultural origin⁷⁴⁰. This privilege was hereditary, passing from one generation to another. Nevertheless, Roman openness in terms of citizenship did not mean effective participation of their citizens in the public life. Magistrates and Senators came from wealthy families, constituting an inaccessible oligarchy. Thus, just influent individuals had access to power, and citizenship was exercised in a passive (but not always pacific) way. In sum, there was territorial inclusiveness, not democracy though⁷⁴¹.

The modern citizenship was born with the construction of the nation-state. As seen in the first chapter, that state emerges with the end of feudalism, a new organization of the territories in much bigger areas, and the ruling of the *primus inter pares*, what turned the power from fragmentation to despotic absolutism. The enlightenment brought new ideas, and the notion of social contract was developed by Locke, Hobbes and Rousseau. With different fundamentals, the basic idea was that instead of being subject to arbitrariness and tyrannical state power, centralized by the Sovereign, individuals should endeavor to turn state authority in socially accorded hierarchies, based on human reason⁷⁴². From that starting conception, revolutions started to spark, followed by public documents asserting the rights of

⁷³⁸ SINCLAIR, R. K. **Democracy and Participation in Athens**. Cambridge: Cambridge University Press, 1991. p. 25-26.

⁷³⁹ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration...** op. cit., p. 33.

⁷⁴⁰ Ibid., p. 32.

⁷⁴¹ Ibid., p. 33.

⁷⁴² Ibid., p. 34.

citizens against those unlimited monarchies. This process varies from contexts where the rulers decided to compromise with oligarchies not to lose power, like the Glorious Revolution in the United Kingdom, that led to the concession of a Bill of Rights (1689), to more “popular” revolutions⁷⁴³, as the American Independence and its historic Declaration (1776) and the French Revolution with the Declaration on the Rights of Man and the Citizen (1789).

Those two last liberal revolutions marked the emergence of the modern citizenship, being “first an assertion of popular will, and then a list of legal rights that are regarded as inherent in all people as equals”⁷⁴⁴. Fundamental citizen’s rights were fruit of this phase, such as the right to life, freedom of expression, religion, conscience and association, as well as judicial guarantees and possibility to complain against state abuses. Equality before the law was importantly established, without regard though to equality of opportunities. The union of the citizens was forged by the common fight against state tyranny, and considering outside threats, what reinforced a sense of national belonging. In the case of American Revolution, clear political rights came into place, providing the opportunity for a “government of the people, by the people and for the people”⁷⁴⁵. There was an emphasis on individual capacity, as well as the will of liberty from the conditionings of the past, in an economical context of flourishing industrialization and land occupation. But that collective will, in practice benefiting particularly an enriched aristocracy, was severely put in question by the socialist criticism.

In fact, the advent of socialism marked a new way of seeing citizenship. The focus passed from individualism to social concerns. The Industrial Revolution accentuated inequality between those who had resources to invest in factories, and those who had no alternative apart from selling their work force. Salaries were dictated by the economic law of supply and demand, and women, children, elderly and people with disabilities had no guarantees regarding their special needs whatsoever. No public health was in place, neither public education, making these demands something exclusive for the citizens who could afford them. In sum, the existent rights by then were almost exclusively to guarantee liberties against state oppression, but did not consider collective rights based on effective equality. This is the background against which the socialism discourse appeared.

⁷⁴³ Those revolutions were “popular” only in the sense of departing from the people against the state, but as known they were led by mostly by aristocrats and traders with specific interests, mostly to guarantee private property and other personal freedoms.

⁷⁴⁴ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration...** op. cit., p. 36.

⁷⁴⁵ The phrase is attributed to a speech by American President Abraham Lincoln, in November 19th, 1863, known as Gettysburg Address, during the American Civil War.

Therefore, from a private undertaking that managed to overrule absolutism, the focus was to rethink the relation of the citizen with work and property, stressing the severe unequal levels of economic prosperity and social wellbeing. To overcome this situation, an active citizenship would have to fight for economic and social rights, in addition to the civil and political rights conquered during the previous revolutions. In this sense, the Russian Revolution in 1917 overthrows the Tsarist rule and founds the Soviet Union, based on the socialist ideals. Moreover, the socialist criticism was in part assimilated by the Western-European countries when they built their welfare systems from the 1950s on. T. H. Marshall notably argued that full citizenship required the enjoyment of a decent standard of living conditions, as well as adequate social rights provided by the state⁷⁴⁶. As argued by Castles and Davidson,

It seems obvious that the core notion of the active neo-Kantian citizen is impracticable if that person is unable for economic, social or educational reasons to fulfil that role. However, it took over a hundred years before it was accepted in the first welfare states established after 1945⁷⁴⁷.

After the Second World War, a renovated polarization between capitalist and socialist world views was forged by the USA and URSS, which lasted until 1990. Nevertheless, with the creation of the United Nations in 1945 and the adoption of the Universal Declaration of Human rights in 1948, it becomes clear that an essential list of rights was ought to be respected in every national polity, and those rights were in fact inspired by both ideologies, reuniting civil, political, economic, social and cultural rights in one instrument, further developed by other more specific and enforceable human rights international instruments.

The story above is almost the history of human rights. Indeed, good part of the authors relate citizenship with rights. But other accounts of citizenship are also revealed. Helen Irving explains that citizenship is not just a “status”, as described formally by law. To be a citizen is rather an *experience*. In her words,

we are asked to think of citizenship as a primary value, not as against the citizens of others countries (that is, not nationalistically), but as a source of protection, a way of attaching persons to a territorial home, an important, indeed paramount, human need⁷⁴⁸.

⁷⁴⁶ MARSHALL, T. H. **Citizenship and Social Class and other essays...** op. cit.

⁷⁴⁷ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration...** op. cit., p. 36.

⁷⁴⁸ IRVING, Helen. **Citizenship, alienage, and the modern constitutional state: a gendered history.** New York: Cambridge University Press, 2016, p. 241.

This sociological approach is brought by because the author explored in her book the loss of citizenship by women, upon change on marital status. The analysis shows the cultural and personal impact of losing one's nationality in an arbitrary manner, because of unfair laws. That is why, for Bobbio, to be a citizen means to empower oneself against subjection. The more complex is the surrounding, more important becomes to turn those acts of empowerment into rights⁷⁴⁹.

Rainer Baubock considers that citizenship has four main dimensions, departing from the core concept in which it is considered "equal membership in a self-governing political community"⁷⁵⁰. In this comprehensive account, citizenship can be understood as

1. a formal legal status that links individuals to a state or another established polity (such as the European Union or a federal province);
2. a bundle of legal rights and duties associate with this status, including civil liberties, rights to democratic representation and social rights to education, health care and protection from poverty risks;
3. a set of responsibilities, virtues and practices that support democratic self-government;
4. a collective identity that can be shared across distinctions of class, race, gender, religion, ethnic origin or way of life⁷⁵¹.

Instead, Kymlicka and Norman divided citizenship in two main areas: *citizenship-as-legal-status*, which means the full membership in a given political community; and *citizenship-as-desirable-activity*, whose analysis focus on the extent and quality of one's participation as a citizen⁷⁵². In a similar way, Macklin divides the concept in *legal citizenship*, to refer to the formal status of member of a state (nationality), and *social citizenship*, referring to the "rights, responsibilities, entitlements, duties, practices and attachments that define membership in a polity"⁷⁵³. For the purpose of this work, we will stick with the recurrent classification of citizenship, which relates it to "rights" and "participation", exploring the interfaces of citizenship as opposed to mere nationality.

⁷⁴⁹ BOBBIO, Norberto. *A era...* op. cit.

⁷⁵⁰ BAUBOCK, Rainer. *Stakeholder Citizenship...* op. cit.

⁷⁵¹ *Ibid.*

⁷⁵² KYMLICKA, Will; NORMAN, Wayne. Return of the Citizen: A Survey of Recent Work on Citizenship. *Ethics*, v. 104, n. 2, p. 352-381, Jan./1994.

⁷⁵³ MACKLIN, Audrey. Who Is the Citizen's Other? Considering the Heft of Citizenship. *Theoretical Inquiries in Law*, Cegla Center for Interdisciplinary Research of the Law, v. 8, n. 2, 2007. Available at: <http://www7.tau.ac.il/ojs/index.php/til/article/view/638/599> Accessed on: 14 Aug. 2017.

3.2.1.1 Citizenship as rights

The term citizenship is used in legal doctrine normally connected with access to rights. It would be the “right to have rights”, in the famous account of Hannah Arendt. The reason why that affirmation makes sense, is because in the Westphalian order, a person must have a state to formally belong, in order to require and exercise her rights. In part, this is due to a sense of protection, constituted by membership to a political community, which situates the individual in relation to the rest of world.

Nevertheless, one might not lose sight that the right’s access enabled by citizenship is the consequence of citizenship, not its own essence. The right to vote, for instance, being a manifestation of the participation in the choice of political representatives, and thus representing membership of a polity, usually requires citizenship, but it is not enough. The question refers to the enactment of political participation, through the enjoyment of political rights. Although it is commonly necessary to be a citizen to be able to participate, the right to political participation alone does not turn the person into a citizen⁷⁵⁴. That would be the case of the European citizens, who are able to vote in local elections upon residence in a country different from the one of their national citizenship. That right does not make them citizens of the state in question. Inversely, children, persons with mental disabilities, and in some countries prisoners and people who live abroad, although ineligible to vote, are still citizens. In the case of migrants, “we know that aliens live in the community’s jurisdictional territory and are subjects to its law. But claims that they should, therefore, enjoy political rights do not presuppose them to be, or confuse them with, legal citizens”⁷⁵⁵.

Therefore, citizenship as rights is given by relating it to the sense of “protection”. As firmly assented in international law, there is a right of the state to protect its citizens internationally, through the institute of diplomatic protection. But also in terms of domestic law, the concept of citizenship requires a duty of general protection by the state. As Irving puts, “citizenship cannot be an empty concept, susceptible to any content the state chooses to give it, or capable of describing any type of relationship with the state. It must involve a relationship of protection”⁷⁵⁶.

In any case, it should be remembered that citizen’s rights are exercised, required and enforced necessarily through the national states. Even though the ascension of human rights

⁷⁵⁴ IRVING, Helen. *Citizenship...* op. cit., p. 241.

⁷⁵⁵ Ibid.

⁷⁵⁶ Ibid., p. 252.

at international level empowers individuals, to the extent that they have where to resort (international human rights courts), human rights law will charge *states* to comply with international and regional norms. In fact, as studied along this thesis, statelessness result from the lack of the indispensable tie between the individual and a state. Indispensable exactly because the state is, up to now, the only institution which can provide, in practice, the rights guaranteed on the international arena for their citizens. What is changing is the scope of citizenship today, which is being broaden and re-contextualized, as will be studied below.

It is also true that international law has been evolving, and national states are more and more compelled to adequate and act properly, especially due to peer surveillance from other states and international organizations. For instance, when the government of a country commits mass atrocities against its own people, or abandon them to their own fate in case of calamities, the international community can enact mechanisms of international criminal investigation⁷⁵⁷, or mobilize to provide humanitarian assistance to the affected people⁷⁵⁸.

Thus, the states are not alone, although the citizens are mostly dependent on them to receive legal protection. One can mention the case of the so called “failed states”, which have no capacity to provide such protection, and the fact that there are states which persecute their own nationals⁷⁵⁹. If in the first case, international and regional initiatives of assistance can be enacted, as mentioned above; in the second, the fear of persecution enables people to seek asylum abroad. In these cases, the lack of protection by the state of origin produces an inversion, with the protection being searched by the individual abroad, in another state.

Another question to be considered when talking about citizenship as rights is the fate of non-citizens⁷⁶⁰. In effect, expanding citizen’s rights can create an atmosphere which can legitimate the withdraw or denial of rights for non-citizens. In this regard, “there should be no antinomy between the alien and the citizen, no privileging of one over the other with regard to rights”⁷⁶¹. As traditionally citizenship marks this boundary between those who belong and those who not, the palette of rights for citizens is much wider than for non-citizens, but this has been challenged by a number of human rights based arguments, as will be studied below. In any case, it is symptomatic that just the citizen has (as a rule) the right not to be

⁷⁵⁷ The facts, if amounting to genocide, war crimes, or crimes against humanity, according to the Rome Statute, can be referred to the Prosecutor of the International Criminal Court (ICC), who can acted to investigate the supposed perpetrator(s) if the Court has jurisdiction over the case.

⁷⁵⁸ See AMARAL JÚNIOR, Alberto do. **O Direito de Assistência Humanitária**. São Paulo: Renovar, 2003.

⁷⁵⁹ MACKLIN, Audrey. Who Is the Citizen’s Other?... op. cit.

⁷⁶⁰ The debate about what is being a citizen and what represents not to be a citizen of the state is complex, reason why it will better in a specific section below.

⁷⁶¹ IRVING, Helen. **Citizenship...** op. cit., p. 243.

banished, or from another perspective, the states consider to have a right of expulsion towards foreigners. John Finnis even put this as a matter of constitutional principle, stating that “risks to the public good that must be accepted when posed by the potential conduct of a national (citizen) need not be accepted when posed by a foreigner, and may be obviated by the foreigner’s exclusion or expulsion”⁷⁶². As Irving sums up, “the alien, in other words, must act like a citizen or risk expulsion from the community of real citizens”⁷⁶³.

Finally, if one thinks about citizenship as rights, it is inevitable to think about equality, that is, on the role citizenship plays to enable access not just to political rights, but in relation with equal access of opportunities and affirmative actions by the state to equate different points of departure. The perspective of fairness and unfairness brought by birthright citizenship, and possible ways of contouring it, is explored by Aylet Shachar, on her book *The Birthright Lottery*⁷⁶⁴, whose ideas will be examined in the section 3.4.4.

3.2.1.2 Citizenship as participation

Citizenship can also be seen in the sense of participation, as a “civic virtue”. A republican view of citizenship draws attention to the public conduct of the members of society, who in order to make self-government happen, are ought to promote and practice public virtues, represented by their duties as citizens. This view, summarized by Richard Dagger, criticizes the political liberalism, with its emphasis on individual autonomy and self-interest, by considering it turns people to be concerned more with consumption and private pleasures than with the public well-being. The individuals in the liberal view would be citizens just in the paper, lacking an ethical dimension to their membership⁷⁶⁵.

Clearly, when considering this use of the word citizenship, the quest for quality education emerges, since it is essential to acquire basic notions of the role of each and every citizen in society, the functioning of the institutions and possible ways of participating, as well as an open debate on shared political values to be collectively pursued. As a way of stimulating a proactive posture of the citizens, schools, families and other spheres of socialization can promote and adopt practices that help citizens to engage constructively in their

⁷⁶² FINNIS, John. Nationality, Alienage and Constitutional Principle. University of Oxford Faculty of Law, **Legal Studies Research Paper Series**, Working Paper n. 08/2008, Mar./2008.

⁷⁶³ IRVING, Helen. **Citizenship...** op. cit., p. 260.

⁷⁶⁴ SHACHAR, Ayelet. **The birthright lottery...** op. cit.

⁷⁶⁵ DAGGER, Richard. Republican Citizenship. In: ISIN, Engin; TURNER, Bryan (Eds.). **Handbook of Citizenship Studies**. London: SAGE, 2002. p. 145-158.

local community. In this sense, we submit that human rights education is an important platform to be used, as point of departure, since human rights were built historically in basis of common values, such as equality, liberty, social justice and non-discrimination⁷⁶⁶.

Kymlicka argues that citizenship education is not just learning about governmental institutions and constitutional principles in school, but also working a sense of shared membership, since “citizens must have a sense of belonging to the same community”⁷⁶⁷. That is learnt also in voluntary organizations of civil society, such as cooperatives, churches, unions, neighborhood associations, groups that fight for a cause and charities. It is in those places where people would voluntarily develop their character and internalize the idea of personal responsibility and mutual obligation, necessary for a healthy and democratic society⁷⁶⁸.

Therefore, citizenship has its component of participation, but that participation should be accounted in relation to the public sphere. Which means that citizenship should not be confused with any kind of moralism, since there is no such a thing like the “good citizen”. Following the law, being well informed about collective demands, being tolerant with the differences, debating political questions in a respectful manner, and not acting with violence in any sense, are no doubt attitudes necessary to a peaceful and functional society. In any case, promoting those democratic values should not be confused with arguments that invade the private sphere of each person’s identity, choices, opinions, cultural memberships and life styles.

All citizens of a given polity are essentially equal in rights, but every and each person is unique in her history, character, experiences and emotions. It seems that in our times not everyone is aware of the richness of human diversity, and thus, with the imperative need to act with respect and empathy towards one another. In our account, human rights do not represent a universalistic moral to be followed, being instead a common platform of global ethics, serving as a point of departure from which extracting useful values to be translated in the spaces of social interaction. Important to note that those values are freely interpreted, being able to openly adjust to different societies and cultures. The citizenship role is exactly to bring these principles, and other locally achieved common values, to the daily personal and institutional practices.

⁷⁶⁶ ASSUNÇÃO, Thiago. Educação em Direitos Humanos. In: SILVA, Eduardo Faria; GEDIEL, José Antônio Peres; TRAUZYNSKI, Silvia Cristina. (Org.). **Direitos humanos e Políticas Públicas**. Curitiba: Universidade Positivo, 2014, p. 85-98.

⁷⁶⁷ KYMLICKA, Will. **Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship**. Oxford: Oxford University Press, 2001.

⁷⁶⁸ Ibid.

At the same time, citizenship still refers to the relation people-state. In democratic countries, the engagement with politics and public debate about policies to be adopted are one of the main ways to “be part” of the polity. But this limited conception has been challenged by different authors, who enlarge the scope of citizenship to additional forms of attachments and belongings. Particularly, it is prolific the studies which point to the existence of denationalized forms of citizenship, which is a substantial debate, reason why it will be object of analysis in a separate section (3.4.3).

In the case of national citizenship though, it is clear that countries which have a functional public educational system, one which is able to form not just good professionals, but also citizens clearly aware of their rights, duties and social responsibilities, are much more capable to prevent conflicts, create innovative solutions and take good care of the public interest. Rights are just ink on a piece of paper if not implemented by local, regional and national governments, with the participation of civil society.

If on the one hand, governments are ought to work properly as representatives of the people, what presupposes good application of public resources and capacity of delivering appropriate public policies, on the other, people shall be aware that government is composed of persons coming from the society itself. Incompetence, insensitivity with social problems or dishonesty are all nested in the sein of our own community. That is a good reason why mechanisms of access to power should be carefully built, with evolving electoral rules and institutions able to attract capable, well intentioned individuals to run the *res publica*. Also, preparing society to be able to participate with civism, fostering a productive and solution-oriented debate, instead of just stimulating hatred and corrosive criticism, which lead to skepticism or cynicism, would be a way of fostering a truly democratic citizenship⁷⁶⁹.

3.2.2 Citizenship and statelessness

Citizenship can be also accounted as a condition of “statefulness”, a legal right of membership to a certain territorial space, or the opposite of statelessness⁷⁷⁰. The relation between nationality and statelessness was largely explored in the precedent chapters. However, when citizenship is used in a broader sense, to reflect rights attached to the condition

⁷⁶⁹ That depends on each one’s views and varies greatly from which society we are talking about. In this case, we were thinking about Brazil in the context of its deep political, social, economic and ethical crisis (2017).

⁷⁷⁰ IRVING, Helen. *Citizenship...* op. cit., p. 256.

of citizen, and participation in the public domain, fresh relations between this status and statelessness emerge.

The condition of being a stateless deprives a person from most of her rights, since as seen, those rights are exercised as a rule before a national state. In addition, stateless people lose one very important form of belonging, the connection with a political community. The opinion of a stateless person would not count, since his participation is not legally recognized. So, apart from the technical fault of not having a nationality, the problem of the stateless is that they have also affected their individual identity. In the account of Hannah Arendt, the “rightless” suffered “the loss of the entire social texture into which they were born”⁷⁷¹. In this sense, citizenship is the enabler which guarantees to everyone a “distinctive place in the world”⁷⁷², that is, a place to call home.

Even if new forms of memberships emerge, there are many entitlements that come only with national citizenship. Stateless people are most likely to have trouble with documentation, since birth certificate, marriage, passport, driver’s license, social security card and bank accounts are generally not accessible without proof of nationality. Their ability to work is affected, as well as access to public services such as education, healthcare, and social assistance. A stateless person sometimes transfers her condition involuntarily to their children. In this case, the suffering is doubled. Statelessness can also lead to difficulties of movement, traveling or attest residence, what in many cases drag them to human trafficking, forced labour and arbitrary detention. Nationality laws containing gender-based discrimination are also a problem, turning women particularly vulnerable to the lack of citizenship. Finally, stateless people are sometimes discriminated or segregated, in contexts where they become susceptible to insecurity, violence and forced displacement⁷⁷³.

Having in mind the dimensions of citizenship explored above, it is easy to identify that statelessness leads to a general lack of access to rights and participation. To the extent that citizenship also reflects the capability to participate in public life, statelessness represents emptiness. Stateless persons have no right to vote or to be elected, thus they are precluded to be significantly listened in the political process. Their invisibility derives from the fact that their opinion does not count, given their exclusion from the formalities of citizenship, what makes them human shadows. Hannah Arendt captured this feeling when wrote

⁷⁷¹ ARENDT, Hannah. *As origins...* op. cit.

⁷⁷² Ibid.

⁷⁷³ See a more extensive analysis of the consequences of statelessness in chapter one.

that “the loss of citizenship deprived people not only of protection, but also of all clearly established, officially recognized identity”⁷⁷⁴.

In fact, identity is certainly one of the most dramatic losses for the stateless persons. A sense of complete displacement, lived temporarily by the immigrant when arrives in a new land, is indefinitely prorogated in the case of the stateless. No place is home, or at least, not recognized as such. The stateless can be expelled or deported as a defaulter tenant from the place he considers home (the country of residence), even if he pays the rent (the sense of membership). It is as if the “payment” which allows one to stay was completely ignored by the lessor (the state).

3.2.3 Citizenship and national belonging: the question of identity

If once nationality was thought in terms of ethnical belonging, as seen with the attempt to produce states based on “nations”, conforming similar language, traditions and ethnicity, the modern constitutional state shaped a different form of membership, based on the rule of law, fundamental rights and equality before the law. “Modern citizenship, as it has developed, indeed, has the virtue of neutrality with regard to identity-markers such as ethnicity, race or gender”⁷⁷⁵.

To be a citizen does not require patriotism, and many people in fact view citizenship of a country as an unimportant part of their identity. This seems particularly so for those persons who, by living abroad for a long time, or working for transnational NGOs and international organizations, have (partially) lost a need of attachment to a particular nation. They can still be connected with their family of origin and friends, wherever they live, and have a mother tongue different from the one they use daily. But today they have the possibility to be connected online with everyone they like, and in many cases, they can profit from the learning opportunities of truly multicultural environments, sharing projects and ideals at work or where they study with colleagues from different countries. Those are the kind of human experiences that have been contributing for the legitimate questioning to the weight is given for national belonging, and the weight it really has for many people nowadays, all over the world.

It is necessary to differentiate, however, the privileged and mobile “world citizens”, from the bulk of immigrants who displace for a variety of reasons, but as a rule leave their

⁷⁷⁴ ARENDT, Hannah. *As origens...* op. cit.

⁷⁷⁵ IRVING, Helen. *Citizenship...* op. cit., p. 257.

“home” to build another in a completely new country, where they are intended to stay. Here is where intricate questions of adaptation, integration, assimilation or segregation take place. In any case, the globalization process has created an increasing cultural exchange, accelerating international migrations. In this process, the idea of distinctiveness and autonomy of each national culture has been put in question. Any quest for national homogenization represents in fact a myth, since “virtually every nation-state has been made up of a number of ethnic groups, with distinct languages, traditions and histories”⁷⁷⁶.

In addition, frontiers are not really “closeable” as some politicians make them appear. Since their historically situated installation with the advent of the modern state, national borders have been subject to an intense flux of persons (and goods, brought by persons). The permanent exchange among different cultures has been something ordinary since the first displacement of nomad tribes, and today it is trivial on the everyday lives of millions of people. The borders are imaginary lines, which can hardly be effectively closed. Individuals determined to immigrate, if legal channels are not available, commonly find a way to enter through land, sea or airway, in some cases trying as many times as are necessary⁷⁷⁷. What has changed in the last three decades was that, with globalization, the facilitated means of transport and communication approximate and make it easier for individuals and families to migrate, turning many cities, especially in the global North, into completely multicultural places. That process started to blur the remaining intentions to preserve the national culture intact, since other interactions and demands are critically in place.

Moreover, the intense exportation of media production and instantaneous circulation of cultural products, mainly coming from hegemonic countries, especially the United States⁷⁷⁸, puts huge pressure on national and local cultures elsewhere⁷⁷⁹. At the same time, while “populations have become more heterogenous and culturally diverse, cultural difference and social marginalization are often closely linked, creating ethnic minorities with disadvantaged and relatively isolated positions in society”⁷⁸⁰. There would be a process of “re-ethnization of culture at a subnational level”, manifested in a trend of “resistance to both the

⁷⁷⁶ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration...** op. cit., p. 7.

⁷⁷⁷ This is one of the reasons why borders control always has a certain efficacy limitation, since many migrants that see themselves without options, for example, if they need to reach their families, are likely to entering in the territory desired, even paying for smugglers if necessary. Therefore, immigration restrictive policies, which disregard the demand of entry and the root causes of emigration, tend to be relatively ineffective, wasting public resources, if not causing harm to persons, families and communities, especially in bordering areas.

⁷⁷⁸ If before the case was for Hollywood movies and icons of pop music, today the phenomenon is deeply rooted on the internet, with almost universally used search mechanisms, popular social medias and platforms of online movies being used simultaneously all over the globe, all being originated in the USA.

⁷⁷⁹ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration...** op. cit., p. 8.

⁷⁸⁰ Ibid.

nationalization and the globalization of culture”⁷⁸¹. That can be verified nowadays with the search of recognition and empowerment of some minority groups (not necessarily ethnic), and whose struggle transcends frontiers, such as LGBT persons, black people against the targeted violence from the police, and also the strong return of the feminism in the last years.

Castles and Davidson put the question in a very clear way, when looking to the fact that “in every city of Western Europe and North America, ethnic heterogeneity has become an inescapable reality. This Other has no shared past with the people within the receiving society”⁷⁸². First, they differentiate the immigrants from former colonies, whose culture has similarities with the destination states due to historical reasons (case of the Algerians in France), from immigrants with more tenuous linkages, case of the Chinese in the United States, for instance. In both cases, the question is whether any form of acculturation is really necessary; if such a policy would be possible in the context of multiethnic societies forged by globalization; or if citizenship based on the nation-state will have to change to fit the reality of the collective presence of the Others in those societies⁷⁸³.

Thus, the question is: if citizenship was molded with the advent of nation-state, and as such, is regarded as the national membership to a political community within certain territorial boundaries, then what for those who were not originally part of this national experience, but are still fully present in that same territory? If in the past there were attempts to assimilate minority groups on the national culture⁷⁸⁴, today the question is much more complex, because with the raise of an international order which praises the human rights, and at the same time, the consolidation of constitutional states, based on fundamental rights (substantially the same rights, such as non-discrimination), then from the legal perspective, citizenship should be independent of any cultural difference, origin or background. Therefore, the paradox is that citizenship was born on the basis of the “national”, but is called to deal with increasing new forms of belonging, which are essentially “non-national”. There are, in addition, those who personally do not identify with “one nation”, and are avid for seeing loosened their travel restrictions among the nations where they have family or work.

In any case, “one ought not to equate the declining importance of citizenship in a particular state with a diminution in the value of citizenship in *a* [any] state”⁷⁸⁵. Which means that demonstrating how citizenship to a national state is losing prominence, in face of

⁷⁸¹ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration...** op. cit., p. 8.

⁷⁸² Ibid., p. 9.

⁷⁸³ Ibid., p. 10.

⁷⁸⁴ Ibid., p. 12.

⁷⁸⁵ MACKLIN, Audrey. Who Is the Citizen’s Other? Considering the Heft of Citizenship... op. cit.

globalization, the raise of transnational actors, the multiplication of spheres of membership, the growing importance of regional and international institutions, and increased global mobility, does not entail the complete disregard for the state as instance of public attachment, but instead, helps to identify the changing roles of those instances and the new dynamics of membership in an era of recurrent human displacement.

3.3 The non-national other: citizenship and migrations

3.3.1 Interculturality and inclusion

As international migrations increased in volume in the past fifty years, representing 244 million people, or 3.3 per cent of the global population in 2015⁷⁸⁶, the policies associated with the question changed in quality. Rich countries of destination were willing to receive, to a certain extent, migrants to fill the shortage of labour force and stimulate economic growth. Some migration policies were thought to attract migrants from countries with similar culture, which would be gradually assimilated and supposedly, with the time, adopt the local national identity, especially their children.

But migrations in general do not follow a standard, they cannot be “controlled”. Globalization as seen shortened distances, and the technological revolution since the 1990s has been turning virtually accessible every corner of the world. Thus, migratory movements started to diversify and respond to specific logics, driven mainly by the resounding socio-economic disparity between the Global North and the South of the world. From the moment migrants of many different countries start to arrive, and becomes clear that any attempt of assimilation would not work, given their attachment to the homeland cultural identity, the already existent human diversity in the host countries grows to the point that most of their big cities, especially in the North, turn into completely multiethnic societies⁷⁸⁷, as it is already the case of New York, Paris, London, Vancouver or Barcelona.

Acknowledging this reality, since the 1970s some states started to adopt multicultural policies and institutions. Two relevant cases are Canada and Australia⁷⁸⁸. The Canadian case

⁷⁸⁶ According to the International Organization for Migrations (IOM), there were three times more migrants in 2015 than in 1970, although the relative share of the world population who are international migrant remained relatively stable over the last few decades (between 2.2 and 3.3 per cent). INTERNATIONAL ORGANIZATION FOR MIGRATION. Global Migration Data Analysis Centre. Migfacts: international migration. Available at: <http://gmdac.iom.int/gmdac-migfacts-international-migration> Accessed on 30 Oct. 2017.

⁷⁸⁷ CASTLES, Stephen; DAVIDSON, Alastair. *Citizenship and Migration*... op. cit., p. 159.

⁷⁸⁸ While the United States has a multiethnic immigration since the nineteenth century, it developed a pluralist sense of national belonging. In Europe, German and France have stronger senses of national identity, refusing to adopt multicultural practices, while some countries such as the Scandinavians, English and Dutch have been

is permeated by the French-speaking and other national minorities, and Australia is an interesting example of the abandonment of any attempt to nationalize citizenship, since “with the arrival of multiethnic forces, the requirement that someone belong nationally before obtaining citizen rights has been given up”⁷⁸⁹. For this to be possible, the demand for new civil, economic and cultural rights started to be more closely addressed, since the demographic reality is marked by inhabitants which do not share common cultural values, but have the desire to belong, have rights and participate of the community fully, as equals.

Nevertheless, multiculturalism has its limits. The recent arrived communities will always be in minority, even if they were conceded the right to participate through vote, turning particularly difficult for their specific demands to be democratically provided. In Anglo-Saxon countries, that fact led to the assertion of rights through the judicial system. However, as the Courts are predominantly composed ethno-culturally to the local majority, many judges would hardly identify and understand migrants demands appropriately. As sharply put by Castles and Davidson:

Inevitably, judges who know nothing about other worlds and are taught to care even less, however good-hearted and progressive they may be, cannot defend migrants. They themselves know this, and many have pleaded in the 1980s and 90s for the politicians to introduce a bill of rights so that they do not have to find more and more fantastic “implied rights” in a constitution that was set up by an Anglo-Celtic élite to maintain itself forever in power⁷⁹⁰.

The response to this issue could be reinforcing legislative guarantees against minority rights violations, both nationally and internationally. Some international mechanisms already exist to perform this duty, as the regional human rights protection systems, even though in practice they do not reach the vast majority of the population⁷⁹¹.

In the case of USA and France, which are proud of their citizenship based on a republican democracy, a certain closure to outside criticism opened space for ultranationalist positions, and *in extremis*, xenophobic views towards the Other, based on the exacerbated defense of the national culture⁷⁹², as well as religious and moral bias.

multicultural in their approach until recently, with approaches rapidly changing lately since the so called “immigration crises”, especially in the Netherlands and Denmark.

⁷⁸⁹ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration...** op. cit., p. 166.

⁷⁹⁰ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration...** op. cit., p. 170.

⁷⁹¹ Hence the importance of the legal community to be aware and actively promote ways to increase access to international justice.

⁷⁹² For Castles and Davidson, in the case of these countries, “the defence of what are arguably the most advanced nation-state citizenship norms (and their promotion in massive civics programmes) rapidly slides into a defence of what is ours as specific difference and thence to extreme nationalism and racism”. CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration...** op. cit., p. 171.

For Rossana Reis, there was a clear securitization of the migratory question, especially in those two countries, with the stigmatization of immigrants as threats to the national security, restrictions on their rights, as well as a policy of reinforced border control⁷⁹³. That political environment is contrasted, at the same time, by the struggle of migrants' movements like the *Beur*⁷⁹⁴ in France, which fight for political rights, the revision of the French nationality policy and other equality claims⁷⁹⁵.

The main question seems to be that, the feeling of belonging to the political community among citizens and migrants, do not pass necessarily through cultural inherited patrimony, that is, national identity, but is something “consciously forged together”, in a “never-closed entry of new voices into the debate speaking in their own idioms”⁷⁹⁶.

Such a view points to the need of building, beyond multiculturalism, an intercultural citizenship, where cultures are open not just to tolerate and respect, but exchange and learn constantly from each other. This might be possible with a shared sense of civism, encompassing a culture of respect for the human rights, a debate on democratic ways of dealing with ethical questions, as well as the construction of common goals to be socially pursued, based on values open to permanent debate and resignification.

3.3.2 Human rights of non-citizens

The rights of non-citizens in a world organized around citizenship is one of the most prominent questions in international law today. The problem of the rights of the foreigner was, in the beginning, seen as a simple matter of state protection by the country of nationality, solved through the institute of diplomatic protection. However, states became gradually reluctant to use this prerogative to protect their citizens abroad, since the profile of the nationals who emigrate passed with time, from wealthy trade explorers, to average migrant workers⁷⁹⁷.

At the same time, the emergence of the international human rights law entails the notion that those rights are to be provided for the *human being* as such, independently of national affiliation. In fact, “most of the migrants’ rights which need protection relate to

⁷⁹³ REIS, Rossana Rocha. Migrações: casos norte-americano e francês. *Estudos Avançados*, v. 20, n. 57, p. 59-74, 2006.

⁷⁹⁴ *Beur* is a neologism created in France to designate the descendants of migrants from North Africa. The term comes from the word Arab, *a-ra-beu* inverted as *beu-ra-a* and then *beur* by contraction.

⁷⁹⁵ REIS, Rossana Rocha. Migrações: casos norte-americano e francês... op. cit.

⁷⁹⁶ CASTLES, Stephen; DAVIDSON, Alastair. *Citizenship and Migration*... op. cit., p. 182.

⁷⁹⁷ EDWARDS, Alice; EDWARDS, Carla F. *Human Security and Non-citizens*. Law, Policy and International Affairs. Cambridge: Cambridge University Press, 2009. p. 34.

personhood and not to citizenship or to their particular condition as migrants”⁷⁹⁸. This is implicit in the broad phrasing of the Universal Declaration of 1948: “Everyone is entitled to all the rights and freedoms set forth in this Declaration”.⁷⁹⁹ More specifically, the 1966 International Covenant on Civil and Political Rights (ICCPR), guarantees that

Article 2 (1) Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, *national* or social origin, property, birth or other status. [...] Article 26 All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, [...] *national* or social origin [...].⁸⁰⁰

In addition, the General Comment No. 15 of the UN Human Rights Committee reassures that “the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his nationality or statelessness”⁸⁰¹. The Committee on the Elimination of All Forms of Racial Discrimination clearly declared in its 1993 that

Differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim⁸⁰².

Therefore, although human rights in general refer to personhood and not citizenship, differentiation regarding citizens and non-citizens remain valid according to international law, considering they are legitimate and proportional, and as long as it does not constitute “unjustifiable disparate impact upon a group distinguished by race, color, descent, or

⁷⁹⁸ MATIAS, Gonçalo. **Citizenship as a Human Right**. The fundamental right to a specific citizenship. London: Palgrave Macmillan, 2016, p. 155.

⁷⁹⁹ UN GENERAL ASSEMBLY. **Universal Declaration of Human Rights...** op. cit.

⁸⁰⁰ UN GENERAL ASSEMBLY. International Covenant on Civil and Political Rights... op. cit. emphasis added.

⁸⁰¹ UN HUMAN RIGHTS COMMITTEE (HRC). **CCPR General Comment No. 15**: The Position of Aliens Under the Covenant, 11 April 1986. Available at: <http://www.refworld.org/docid/45139acfc.html>. Accessed on: 31 Aug. 2017.

⁸⁰² COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION. General Recommendation No. 11: Non-citizens, UN Doc. A/46/18, 19 Mar. 1993. In: UNITED NATIONS INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, **Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies**, 12 May 2004. Available at: <http://www.refworld.org/docid/411a34374.html>. Accessed on: 31 Aug. 2017.

national or ethnic origin”⁸⁰³ and “if the criteria for such differentiation are reasonable and objective”⁸⁰⁴.

The ICCPR sets two exceptions, distinguishing “everyone”, “all persons” and “every human being”, used along the document, from the “citizen”, who is the only recipient of the right to political participation and vote (art. 25)⁸⁰⁵. In addition, the liberty of movement and freedom to choose each one’s residence (art. 12) is conceded only to those “lawfully within the territory of a State”⁸⁰⁶. In any case, restrictions to these rights are allowed according to ICCPR since

provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant⁸⁰⁷.

In 2002, the Committee on the Elimination of Racial Discrimination adopted the General Recommendation XXX on Discrimination Against Non-citizens, a guide for compliance by states not just in relation to this specific convention, but towards international human rights law in general. Apart from compiling the relevant norms on the subject, the document goes further by providing that:

- Immigration policies and any measures taken in the struggle against terrorism must not discriminate, in purpose or effect, on grounds of race, colour, descent, or national or ethnic origin;
- States have a duty to protect non-citizens from xenophobic attitudes and behaviour;
- States are obliged to ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization and that all non-citizens enjoy equal treatment in the administration of justice;
- Deportation or other removal proceedings must not discriminate among non-citizens on the basis of race or national origin and should not result in disproportionate interference with the right to family life;

⁸⁰³ COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION. General Recommendation No. 11: Non-citizens, UN Doc. A/46/18, 19 Mar. 1993. In: UNITED NATIONS INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, **Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies**, 12 May 2004. Available at: <http://www.refworld.org/docid/411a34374.html>. Accessed on: 31 Aug. 2017.

⁸⁰⁴ UN HUMAN RIGHTS COMMITTEE (HRC). **CCPR General Comment No. 18: Non-discrimination**, 10 November 1989. Available at: <http://www.refworld.org/docid/453883fa8.html>. Accessed on: 1 Sep. 2017.

⁸⁰⁵ UN GENERAL ASSEMBLY. International Covenant on Civil and Political Rights... op. cit. **Article 25**. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.

⁸⁰⁶ UN GENERAL ASSEMBLY. **International Covenant on Civil and Political Rights**... op. cit.

⁸⁰⁷ Ibid.

- Non-citizens must not be returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses;
- Obstacles to non-citizens' enjoyment of economic, social and cultural rights, notably in education, housing, employment and health, must be removed⁸⁰⁸.

Equally important is the principle of non-refoulement, which consists in the proscription of deportation or expulsion to where the person could be subject to violence, persecution or to be tortured, constituting a fundamental safeguard for non-citizens⁸⁰⁹. Deportation or expulsion of persons should not take place “without taking into account possible risks to their lives and physical integrity in the countries of destination”⁸¹⁰. However, that principle can be exceptionally surpassed when the individual is considered a danger for the security of the state, or was convicted of a particularly serious crime⁸¹¹. In any case, a non-citizen subject to expulsion is entitled to submit reasons against the order, to have its case reviewed by a competent authority and to have access to legal remedies to appeal of the decision. He also has the right to be expelled to a country which accepts to receive him, what can be a problem in the case of a stateless persons, as studied before.

There is also a strict prohibition of collective expulsion of non-citizens. Any measure to expel a group of people on any basis require an objective examination of each individual (personal) case, which means that any arguments or proposals tending to expulse collectively people from this or that nationality, ethnicity or any particular group as a whole is unlawful⁸¹².

Non-citizens, like citizens, have the right to personal liberty and security, and therefore must be protected against arbitrary detention. If detained, they cannot be held in slavery or servitude, nor suffer torture, cruel, inhuman or degrading treatment or punishment. In particular, non-citizens when detained have the right to have access to consular assistance from their country. States have the obligation to respect all the human rights of the foreigner detainees under their control, irrespectively if they are in the territory of the state or not⁸¹³.

⁸⁰⁸ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR). **The Rights of Non-Citizens**, 2006. Available at: <http://www.refworld.org/docid/46ceabb22.html> Accessed on: 1 Sep. 2017.

⁸⁰⁹ See Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Article 33 of Convention Relating to the Status of Refugees.

⁸¹⁰ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR). **The Rights of Non-Citizens...** op. cit.

⁸¹¹ UN GENERAL ASSEMBLY. *Convention Relating to the Status of Refugees...* op. cit.

⁸¹² UN HUMAN RIGHTS COMMITTEE (HRC). **CCPR General Comment n. 15...** op. cit.

See also UN GENERAL ASSEMBLY. **Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live**: resolution / adopted by the General Assembly, 13 December 1985. Available at: <http://www.refworld.org/docid/3b00f00864.html>. Accessed on: 4 Sep. 2017.

⁸¹³ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR). **The Rights of Non-Citizens...** op. cit

In case of armed conflict, additional protection is made available by the international humanitarian law. In any case, non-citizens are entitled to all the rights regarding detainees already previewed in human rights law, without discrimination related to nationality, statelessness or irregular migratory status.

Non-citizens, comprehending migrants, refugees and stateless, do not have a recognized right to enter or reside in countries from which they are not citizens, without the concerned state's permission. The ICCPR provides that "no one shall be arbitrarily deprived of the right to enter his own country"⁸¹⁴. But the Human Rights Committee has been interpreting this broadly, in the sense of expanding the right to return "to stateless persons who are resident in a particular state and others with a long-term relationship with the country, but who are not citizens"⁸¹⁵. In addition, "non-citizens who are lawfully within the territory of a state have the right to liberty of movement and free choice of residence"⁸¹⁶.

In times of renewed transnational terrorism, it is important to take into account that international law requires certain safeguards regarding any state of emergency, which should be justified by an officially proclaimed vital threaten to the country. The measures which may affect fundamental freedoms must be considered strictly on the basis of legality, necessity, reasonableness and proportionality, and must not be inconsistent with other obligations of the state under international law⁸¹⁷.

In relation to nationality acquisition, apart from the already studied "right to a nationality", it is essential that states do not discriminate against particular groups of non-citizens on the access to birth registration and naturalization. In truly democratic states, the criteria must be equal to all. Citizenship transmission for the children should be made effective regardless the sex of the parents, or if they are married or not. Also, the access to citizenship by marriage should be made available to both spouses without distinction of sex⁸¹⁸. Gender equality is indeed a main concern, since women are still in disadvantage regarding nationality worldwide, with persisting discriminatory rules.

In the case that a group of non-citizens constitute an ethnic, religious or linguistic minority, "persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice

⁸¹⁴ UN GENERAL ASSEMBLY. International Covenant on Civil and Political Rights... op. cit.

⁸¹⁵ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR). **The Rights of Non-Citizens...** op. cit. See Human Rights Committee, concluding observations on the fourth periodic report of New Zealand (A/57/40 (vol. I), para. 81 (12)).

⁸¹⁶ Ibid.

⁸¹⁷ Ibid.

⁸¹⁸ Ibid.

their own religion, or to use their own language”⁸¹⁹. Additional and more specific rights regarding minorities are set in the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted in 1992⁸²⁰. Regarding economic, social and cultural rights,

Governments shall take progressive measures to the extent of their available resources to protect the rights of everyone—regardless of citizenship — to: social security; an adequate standard of living including adequate food, clothing, housing, and the continuous improvement of living conditions; the enjoyment of the highest attainable standard of physical and mental health; and education⁸²¹.

Special attention is ought be made in the case of healthcare, social assistance and access to education. Distinguishing citizens and non-citizens usually includes restrictions for non-citizens on access of public policies, and sometimes this is the most sensitive issue relating to the xenophobic discourse against immigrants, refugees or stateless persons. Populist perceptions of an unjustifiable increase on public expenses, to look after newcomers, are usually taken as a motivation to demand tougher borders control. Apart from the socio-economic problems of such a view, since it disregards the long term contribution in terms of entrepreneurship, job creation, innovation and taxes contribution of non-citizens, from the human rights law perspective, it is generally unlawful to discriminate non-citizens in regard to those rights.

Indeed, the International Covenant on Economic, Social and Cultural Rights refers mostly to “everyone” when advancing the rights set in the treaty. The only exception is made in Article 2 (3), which reads “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”⁸²². Considering the human rights framework, that exception should be read restrictively, by taking into account concrete and temporary governmental incapacity to provide those rights to non-nationals, according to the local context and subject to governmental review as soon as the conditions are established, with transparency and accountability towards civil society.

⁸¹⁹ UN GENERAL ASSEMBLY. International Covenant on Civil and Political Rights... op. cit.

⁸²⁰ UN GENERAL ASSEMBLY. **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**, 3 February 1992. Available at: <http://www.refworld.org/docid/3ae6b38d0.html> Accessed on: 4 Sep. 2017.

⁸²¹ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR). **The Rights of Non-Citizens...** op. cit.

⁸²² UN GENERAL ASSEMBLY. International Covenant on Economic, Social and Cultural Rights... op. cit.

In any case, health and education should be provided by the states irrespectively of migratory status, considering not just the individual right to them, but as a matter of humanity and also in the interest of the state itself. Moreover, to have residents in good health is a matter of public interest which benefits the whole society. Finally, immediate access to education for non-citizens, at least in the case of their children, is an elementary way of integrating those persons on the local environment, allowing them to build a promissory future, and to collaborate directly with the development of the host community.

In the case of asylum seekers and refugees, they have a branch of international law which is specifically devoted to their rights. The main instrument, the 1951 Convention on the Status of Refugees and its additional protocol of 1967, advances a whole set of rights for their condition. As a general rule, the Convention awards to refugees at least the same treatment conceded to foreigners, when there are no more favorable provisions. In fact, some of the rights of refugees are equated with the most favorable treatment conceded to nationals of a foreign country, as in the right of association (art. 15) and wage-earning employment (art. 17). In other cases, the convention concedes the same treatment as of for nationals, such as to the right of access to elementary schooling (art. 22), access to public relief and assistance (art. 23) and access to courts and legal assistance (art. 16)⁸²³.

At the same time, states are obliged to respect international human rights law and humanitarian law, even in regard to individuals who are not nationals and are beyond the territory of the state, but are under their effective control⁸²⁴.

Also in the realm of work and employment, non-citizens enjoy some protections, even if their migratory condition is usually decisive to whether they will be authorized to work legally or not. In general, “non-citizens who are lawfully present in a State are entitled to treatment equal to that enjoyed by citizens in the realm of employment and work [and] everyone, including non-citizens, has the right to just and favorable conditions of work”⁸²⁵. The International Labour Organization has adopted several conventions and recommendations applicable to migrant workers, irrespectively of their citizenship⁸²⁶. For instance, the Convention No. 143, concerning working conditions and equal treatment of migrant

⁸²³ UN GENERAL ASSEMBLY. Convention Relating to the Status of Refugees... op. cit.

⁸²⁴ TZEVELEKOS, Vassilis P. Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility. *Michigan Journal of International Law*, v. 36, n. 1, p. 129-178, 2014.

⁸²⁵ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR). *The Rights of Non-Citizens...* op. cit

⁸²⁶ The most important of them are: Convention No. 97 concerning migration for employment; Convention No. 143 concerning working conditions and equal treatment of migrant workers; and Convention No. 118 concerning equality of treatment in social security.

workers, provide rights which apply to non-citizens regardless of the legality of their presence in the territory, and recalls that member states are ought “to respect the basic human rights of all migrant workers”⁸²⁷.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, signed in 1990 and in force since 2003, is a crucial legal instrument in this regard. It protects many migrant’s rights, such as freedom from arbitrary or unlawful interference with privacy, family, home, correspondence or other communications, and equality of treatment between nationals and migrant workers as to work conditions and pay. The Convention also protects migrant’s family members, considered spouses and unions to which the law gives equivalent effects, dependent children and other dependent family members. Most of the rights derived from the Convention are common to authorized or irregular migrants, but Part IV reserve rights which are due only to documented migrants, such as the liberty of movement in the territory of the state of employment and freedom to choose place of residence (art. 39)⁸²⁸.

Article 3 of the Convention exclude from its ambit some categories, which shall not be treated as migrant workers, namely representatives of states and international organizations, refugees and stateless people, students, investors, trainees and seafarers⁸²⁹. This article, although comprehensible in the case of the first two categories, fragilizes the remainders.

But the main problem with the Migrant Workers Convention is that no intense immigration receiving country has ratified the treaty, which counts with only 51 parties to date, mainly from Latin American and Asia⁸³⁰. USA, Canada, Australia, Japan and all the countries from Western Europe have not ratified the treaty, what limits severely its effectivity.

In the regional human rights systems, most of the rights recognized at global level are also protected. In the case of the European Convention on Human Rights, apart from reaffirming non-discrimination, it states that “no one shall be deprived of his liberty” if not by certain cases exhaustively described in Article 5, being one of them the “lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition”⁸³¹. That

⁸²⁷ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR). **The Rights of Non-Citizens...** op. cit.

⁸²⁸ UN GENERAL ASSEMBLY. **International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families**, 18 December 1990. Available at: <http://www.refworld.org/docid/3ae6b3980.html>. Accessed on: 5 Sep. 2017.

⁸²⁹ Ibid.

⁸³⁰ See the map of the countries which ratified the Convention at <http://www.ohchr.org/Documents/HRBodies/CMW/StatRatCMW.pdf>

⁸³¹ COUNCIL OF EUROPE. **European Convention for the Protection...** op. cit.

provision is tailored to allow detention of irregular immigrants present or trying to enter in Europe. In different cases, the European Court of Human Rights made clear that state-parties shall, in exercising this prerogative, comply with all other international and regional human rights norms, which includes non-discrimination of any sort, and in particular, the absolute prohibition of torture and inhuman or degrading treatment or punishment, irrespective of the circumstances and of the victim's conduct⁸³². Recently, the Court of Justice of the European Union has understood that detention of asylum seekers is a valid measure in view of the protection of national security and public order, under the Directive 2013/33/EU⁸³³.

The American Convention on Human Rights guarantees the non-discrimination principle as a fundamental right, and reserves political participation, right to vote and access to public service only for citizens⁸³⁴. The Interamerican Court of Human Rights, in an Advisory Opinion of 2003, requested by Mexico, made clear that the non-discrimination principle and the right to equality constitute *jus cogens*, and as such is applied to all residents regardless their migratory status. Moreover, the Court affirms that under Interamerican human rights law, the states have the right to deport migrants in irregular situation, but at the same time, if the immigrant is already employed, he is entitled to all the labour rights available to authorized workers⁸³⁵.

The African Charter of Human and People's Rights, likewise the American Convention, refers to "every individual" on most of the rights it proclaims, in addition to the collective approach typical of this instrument, and also maintains the right to participate in government and to have access to the public service only for citizens⁸³⁶.

In regard to the voting right for non-citizens, as seen, not guaranteed as a human right, it is interesting to note how this non-right materializes the contradiction inherent to the classical conception of citizenship, since it shows the preoccupation by the states of preserving sovereignty through a restricted access for those who "belong", considered by law "part of the nation". The contradiction resides in the fact that long term migrants, refugees or

⁸³² COUNCIL OF EUROPE. European Court of Human Rights (ECHR). Press Unit. **Factsheet – Migrants in detention**. July 2017. Available in http://www.echr.coe.int/Documents/FS_Migrants_detention_ENG.pdf Accessed in 01 Sept. 2017.

⁸³³ COURT OF JUSTICE OF THE EUROPEAN UNION. **Case C-601/15 PPU**, 15 February 2016. Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=174342&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1045024> Accessed on: 05 Sep. 2017.

⁸³⁴ ORGANIZATION OF AMERICAN STATES. **American Convention on Human Rights...** op. cit.

⁸³⁵ COSTA RICA. Inter-American Court of Human Rights (ICHR). **Advisory Opinion Oc-18/03**, Requested By The United Mexican States, September 17, 2003. Available at: http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf Accessed on: 05 Sep. 2017.

⁸³⁶ ORGANIZATION OF AFRICAN UNITY (OAU). **African Charter on Human and Peoples' Rights**, 27 June 1981. Available at: <http://www.refworld.org/docid/3ae6b3630.html> Accessed on: 5 Sep. 2017.

stateless persons, by their physical presence, live in that given territory just as any other person, requiring public services such as health, education and transport. Of course, they do have opinions and should be able to manifest them freely, including in the public arena, especially when the debate is about their own presence and rights. One solution already proposed is to concede voting rights to permanent residents, which would be in the middle between non-citizens and citizens⁸³⁷.

Despite all these international legal guarantees, in practice non-citizens have less rights and limited access to public services compared to recognized citizens, and many times remain in a situation of vulnerability. The discourse of threats to national security, and more recently, the protection of national labour market, is a recurrent commonplace in the political landscape, opening space to the adoption of discriminatory restrictions for non-citizens⁸³⁸. They also suffer from stricter national rules in relation to land and property access, migratory restrictive labor rules and lack of adequate access to justice and political participation.

The most vulnerable are stateless persons, undocumented or irregular migrants, asylum seekers, refugees, and unaccompanied children. Hostility against minority migrant groups, such as Muslims in Europe, is another main concern. Asylum seekers have been pushed back in the Mediterranean waters, violating the non-refoulement principle. Detentions of irregular migrants, asylum-seekers and stateless persons, who have not committed any crimes, have been occurring all over Europe, backed by European legislation.

In effect, instead of having a “migratory” or “refugees” crisis, the Mediterranean area has been in a deep humanitarian crisis, with a multiyear large-scale movement of people from Africa and Middle East to Europe, driven by the desperate sate of persons and their families from fierce armed conflicts, such as the civil war in Syria, and extreme poverty in sub-Saharan Africa, many times doubly victimized by migrant smugglers. Those facts reveal the political incapacity of the European states to act appropriately and united in response to this challenge, in sharp contrast with their exemplar regional human rights protection system.

3.3.3 The “citizenship” of non-citizens

As seen in the last sections, the citizenship concept has been in question, considering the unfolding complexity of the international human mobility. According to Ernst Ballin, “the old-fashioned view that international law has nothing to say about giving and

⁸³⁷ MATIAS, Gonçalo. *Citizenship as a Human Right...* op. cit., p. 183.

⁸³⁸ EDWARDS, Alice; EDWARDS, Carla F. *Human Security and Non-citizens...* op. cit., p. 39.

withholding citizenship is fading. There is a trend for this to be more and more the case, resulting from the human rights perspective”⁸³⁹.

In his view, democracy has been increasingly in the radar of international law, and as citizenship is the key for democratic participation, “the recognition of a universal right to democratic governance will bring citizenship unequivocally within the ambit of human rights”⁸⁴⁰. Self-determination, as the right of people to collectively determine their political status⁸⁴¹, and the rights of freedom of expression and free participation in elections, compose the three pillars for the recognition of the democratic principle in international law⁸⁴², opening an interesting area for further research.

The main question to be considered when we talk about rights decurrent from citizenship is the phenomenon of a growing incongruence between the encapsulated nationality of the individual, and the demand of rights to be accomplished by the state, for whoever is present in its territory. In other words, “it is clear that the legal system can no longer be based – if indeed this was ever the case – on the unquestioned congruence of state and nationality”⁸⁴³. And that happens because of the factors studied above, mainly the interconnectedness brought by globalization, the transnationality of actors and causes, the ascension of the individual as subject of international rights, the regionalization of some areas of the world, and the increase of international migrations.

Indeed, the social reality and the legal framework are being decoupled, since there is a practical inconsistency between the multiculturalization of modern societies, and the anchorage of nationality. The problem is that implementation of human rights still depends on the citizenship of a state, what may require a “redefinition of citizenship [which] lead us to the question of whether it could be regarded less as tied to the state and more in terms of human rights”⁸⁴⁴.

Nevertheless, up to now, the enjoyment of human rights indeed depends upon the state, not just in terms of democracy and rule of law, what is indispensable for their fair and equal enjoyment, but also in regard to administrative and socio-economic conditions. Administratively, what is at stake is the quality of the public policy planning and implementation, and socio-economically, the availability and adequate prioritization of public resources,

⁸³⁹ BALLIN, Ernst H. **Citizens’ Rights...** op. cit., p. 116.

⁸⁴⁰ Ibid.

⁸⁴¹ See common Article 1 of the ICCPR and ICESCR.

⁸⁴² BALLIN, Ernst H. **Citizens’ Rights...** op. cit., p. 117.

⁸⁴³ Ibid., p. 120.

⁸⁴⁴ Ibid.

as well as their responsible and efficient application. Since the main responsible for realizing rights is the state, through adequate public policies, without a clear mindset from the public administrator, to conjugate both democratic practices with efficient planning, human rights remain a distant chimera.

From another standpoint, legitimation of human rights, through the constitution of a state, brings with it the paradox that the rights approved by the citizens, via legislative power, will be applicable also to non-citizens, which did not have the chance to participate. That would not be a problem for persons who are temporarily in that polity, like students or tourists, but it is a matter of concern in the case of permanent residents, longtime refugees and protracted stateless persons, all formally non-citizens.

The question is how to reconcile the universal human rights, that should be applicable to all, with the political setting that recognizes only the citizen as member and subject of rights within a state. There should be a “*legal recognition as citizens* of those members of a society who are ready to assume the ensuing rights and responsibilities”⁸⁴⁵. From the point of view of the state, that would mean a need to rethink the content of sovereign power, in order to “recognize, give or withhold citizenship as an obligation mirroring the human right [of a person] to citizenship in the state [...] where he or she is *at home*”⁸⁴⁶.

Differently from those who advocate a right of option of the individual regarding citizenship, Ballin situates yet on the state the right, and in regard to its population, the duty to assess “whether or not someone’s bonds with the society justify and require his recognition as a citizen: social cohesion can be damaged both by over-inclusion and by under-inclusion”⁸⁴⁷.

The author argues for a human right to citizenship, beyond the established norms about nationality, which is generally given *ex lege*, and beyond the international protection against stateless. This view converges with what we have been arguing in this thesis: changing the focus of nationality attribution from a merely legal perspective, to a political one, where the broader right to citizenship is proposed and considered a right of the individual, is to privilege the expansion of the access to rights and public participation, both necessary in a world of intense human mobility.

In the same manner, Ballin does not disregard the role of the national state. In his view, the cosmopolitans present the state “in too much a negative light, as if it primarily

⁸⁴⁵ BALLIN, Ernst H. *Citizens’ Rights...* op. cit., p. 122.

⁸⁴⁶ *Ibid*, our emphasis.

⁸⁴⁷ *Ibid.*, p. 124.

constitutes a threat to human rights”, what would overlook the capacity of the state to protect human rights, and in addition, “the state as a framework within which citizens decide on their political destiny in a democratic process”⁸⁴⁸. Indeed, suggesting the need to rethink national citizenship, acknowledging the emergence of a transnational one, does not exclude the importance of the citizenship attached to one or more particular states, considering the state is and is likely to keep being the institutional reference, where the individual’s political and legal attachment is present, and rights are appropriately claimed.

Therefore, to be a citizen of one or more states does not preclude other spheres of membership, regardless if local, regional or global. The multiplication of those spheres of belonging gain space in the imaginary and daily life of a great amount of people today. For instance, international human rights law created a space of recognition and *loci standi* which are not situated on the limited jurisdiction of states. In the sense of rights, there is a truly international citizenship, when we think on the many rights adopted internationally, and whose protection led to the creation of international courts and UN quasi-judicial organs. Having direct access to some of those mechanisms is the prove that the individual today is part of a global community, which cares more than in the past with human rights violations.

It is true that the states still have the final word on adopting or not those international instruments. Also, not always non-citizens have access to international justice mechanisms in a state where they are not considered members. But it seems that the increasing public awareness in questions related to human rights, partially caused by the instantaneous access to news about violations, in addition to the personal and collective requirements of participating as equals in the international society, are both factors that constrain states, if not really to address the violations, at least to be subject of international comparison, having to carry the political burden of answering publicly to denounces and criticism.

Hiroshi Motomura considers that immigration can be seen as a transition from alienage to citizenship. He coined the expression “Americans in waiting”, considering that most of immigrants in the USA are in a path towards full citizenship, through naturalization⁸⁴⁹. In this account, national citizenship is seen as vital for the non-citizen to accomplish its full membership. Until becoming citizens, as immigrants have an expectation to belong, they should be awarded growing rights, including the right to vote. The idea is that by being allowed to participate, immigrants would be able to confirm or not their expectations in

⁸⁴⁸ BALLIN, Ernst H. **Citizens’ Rights...** op. cit., p. 125.

⁸⁴⁹ MOTOMURA, Hiroshi. **Americans in waiting**. The Lost Story of Immigration and Citizenship in the United States. New York: Oxford University Press, 2006.

relation to the host country, and if it is the case, by the time they become formal citizens, they are already integrated and feeling part of the local community. The length of residence could be, for instance, one of the criteria to escalate rights acquisition throughout the time⁸⁵⁰.

Baubock, in the same direction, points to the fact that many rights are conceded to long-term resident foreigners. Those rights derive not from citizenship, but from “denizenship”, that is, the quality of inhabitant of the territory, what can configure in certain cases a “quasi-citizenship”. That would be the case of European citizens living in another European country, which have even the right to vote in local elections. That is also the case of countries who guarantee a set of rights for stateless persons, regardless of citizenship; and when ethnic-kin minorities, whose collective membership surpasses the borders, are conceded rights in neighboring countries⁸⁵¹, such as some indigenous groups. The problem is, first, that most of the countries of the world will not allow them to vote, accentuating the democratic deficit of their condition, and second, their rights would be strictly linked to the actual residence, what in a world of constant displacements would limit the enjoyment of rights. Baubock concludes that denizenship should be regarded as a supplementary status which will never replace citizenship⁸⁵².

However, one should acknowledge that not everyone intends to become a citizen. It is common nowadays the existence of the so-called *expats* (expatriates), that is, “highly trained young professionals who work for multinational companies and who are typically relocated in the early stage of their careers”⁸⁵³. Those relocations are usually temporary and unstable, so those individuals do not have the time to integrate locally. Even their migratory procedures are done by specialized departments or law firms. That indicates that not all migrants are in the same situation or have the same desires, and the *expats* are an example of the new fluxes of persons moved by globalization, transnationalism and interconnectedness.

Therefore, even not being recognized as citizens before the law, migrants, refugees and stateless persons reaffirm their presence on the territory by requiring and enjoying some fragments of citizenship. In the meantime, the scope of citizenship itself has been object of questionings and resignifications, at least from the political and sociological perspective, without being clear for the moment, how this debate can effectively change the assented notion of nationality in international law.

⁸⁵⁰ MATIAS, Gonçalo. **Citizenship as a Human Right...** op. cit.

⁸⁵¹ BAUBOCK, Rainer. *Stakeholder Citizenship...* op. cit.

⁸⁵² *Ibid.*

⁸⁵³ MATIAS, Gonçalo. **Citizenship...** op. cit.

3.4 The contemporary multiplicity of memberships

3.4.1 The role of multiple nationality

Dual or multiple nationality normally occurs when children are born of parents with different nationalities, or when the person has recognized a *jus sanguinis* nationality, in addition to a *jus soli* one she already had. These and other combinations possible are a reality in the lives of millions of people, and in times of accelerated international human mobility, having more than one citizenship is becoming common.

In the past, double nationality was considered undesirable by the states, worried with questions related to loyalty of the citizen to the state, especially in case of military conscription. But this worry started to dissipate while conscription of nationals in many countries ceased to be mandatory, or requires residence in the territory in addition to nationality⁸⁵⁴.

The phenomenon relates directly to personal identity, since to obtain a new nationality is not something trivial, being associated to familiar ties, or residence in a different country. For this reason, multiple nationality is a matter of individual autonomy, and as such, a question of belonging to a political community, which entails access to rights and possibility of participation.

Spiro argues that for this reason, multiple nationality is increasingly seen in a rights frame. Although not yet regulated by international law, one important development was the 1997 European Convention on Nationality, which affirms the “desirability of finding appropriate solutions to consequences of multiple nationality and in particular as regards the rights and duties of multiple nationals”⁸⁵⁵. The Convention dedicates the entire Chapter V to establish general rules on multiple nationality. It requires states to allow multiple nationality of children born with this status, as well as of those who acquire another nationality upon marriage. It also guarantees equality of treatment for dual nationals with other nationals.

However, the Convention protects the power of states to withdraw its nationality if the individual acquires another one, and the right of the state to submit as requirement for the acquisition of its nationality, the renunciation of a previous one. As noticed, this gap represents the maintenance of state discretionary power on nationality, posing a possibility of limitation of multiple nationality in internal law, which seems incompatible with the

⁸⁵⁴ SPIRO, Peter J. Mandated Membership... op. cit.

⁸⁵⁵ COUNCIL OF EUROPE. European Convention on Nationality... op. cit.

general trend of recognition or non-interference on the individual's right to be part of more than one polity.

Nevertheless, from the state practice point of view, there is growing acceptance of multiple nationalities⁸⁵⁶, contrasting with the old suspicion in regard of this status. Some relevant "sending states" as Turkey, Mexico and Dominican Republic reformed their laws recently to allow multiple nationality of their nationals naturalizing in other countries. If by one side, those changes are in the best interest of the states themselves, since they facilitate the maintenance of ties with their emigrants, many of whom are responsible for large resources remittances; on the other side, this loosening is in the interest of immigrants, who are not forced to make an unfair choice of membership, eliminating the danger of losing rights in their homeland by moving abroad. This can gain relevance considering that immigration is many times contingent on the conditions of permanence, and some are pushed back to their countries of origin when those conditions, including authorization to stay and economic welfare, cease to exist.

From the point of view of international law, the acceptance of multiple nationality is not yet a customary norm, even if Spiro believes it can arrive to that point with the advancement of a rights framework, in which dual or multiple nationality can be recognized as an individual international right⁸⁵⁷.

What seems certain is that multiple nationality blurs the boundaries of national identity, since it defies the regime of mutual exclusivity, allowing individuals to belong to more than one political community, whatever are the causes or intentions in this regard. Spiro argues that to allow multiple citizenship even lowers the costs of instrumental citizenship acquisition, by eliminating the need of abandonment of the primary citizenship. In fact, the "cost" to maintain formal membership to more than one state is low, both to the individual, as to the state. In the case of the states, that allows them to have "representatives" abroad, and to keep a door open for those who wish to come back, investing and paying taxes in the country; for the individual, to acquire a new citizenship can give access to better accepted passports, improving international mobility; migratory benefits, including protection from deportation or expulsion; and eligibility for social benefits and property rights⁸⁵⁸.

⁸⁵⁶ BOLL, Alfred M. **Multiple...** op. cit., p. 195. In the same sense: SPIRO, Peter J. *Mandated Membership...* op. cit., p. 96.

⁸⁵⁷ *Ibid.*, p. 97.

⁸⁵⁸ SPIRO, Peter J. *Mandated Membership...* op. cit., p. 103.

In this sense, we submit that the access to multiple nationality should be increasingly facilitated, since the causes for multiple ways of belonging are expanding. The acquisition of a second or third nationality, if the person has the subjective right to it, is a matter of individual choice, instead of state discretion. Indeed, the state does not have the right to interfere in another state's decision to concede citizenship for the individual, as the personal condition of plurinational is beyond the scope of the state, which has authority only in regard of its own nationality attribution.

The improved travel possibilities of today, in addition to the permanent exchange of cultures facilitated by internet, the desire to live in a more prosperous or safer place, and the internationalization of jobs, are all elements that lead to more multicultural acquaintances and encounters. As a consequence, is already perceptible the multiplication of binational marriages, which open legitimate needs of sojourn and membership. Millions of children are being born in multicultural homes, speaking two or three languages since early childhood, and this social fact alone (apart from its richness in terms of human diversity), must be accompanied by the evolution of the laws on citizenship, to avoid senseless bureaucratic requirements, that can potentially damage familiar ties and welfare. Therefore, in those cases easy recognition of multiple nationality is the best way to promote cultural integration, social cohesion and familiar wellbeing.

Moreover, identities today are more fluid than in the past, and what matters most for the contemporary citizens is the pursuit of wellbeing, composed by public goods like decent work, healthcare, quality education, personal security, and life prospects. Individuals are increasingly comparing themselves with citizens of other nations, through enhanced means of communication, thus moving to other countries became a concrete life option for many people nowadays.

If undocumented migration can be one byproduct of this development, by attracting people who cannot afford or wait to immigrate through ordinary means, also regular migration aimed as a first step for naturalization, and citizenship acquisition via *jus sanguinis*, for descendent of older generation of immigrants⁸⁵⁹, became both legitimate ways of overcoming constrains related to each one's nationality.

⁸⁵⁹ That is notably the case of millions of descendants of Italians in Brazil, which rebuild their genealogical tree to require the recognition of their birthright *jus sanguinis* citizenship, in addition to their original Brazilian one. In the case of Italy, no limit of generations to pass the nationality is posed by the law. That fact, and the great number of Italians which emigrated to Brazil, especially in the end of nineteenth century, made the number of requests for citizenship recognition increase exponentially in the last decades. In the Consulate General of Italy in Curitiba (Brazil), for instance, the waiting list to take the documents, after presenting the demand, has taken at least ten years. To overcome that line, many *oriundi* decide to move to Italy temporarily to present

Something to be carefully considered when studying multiple citizenship refers to the fact that it can turn and function as a commodity. Highly educated elites from the Southern hemisphere, for instance, can “determine that citizenship elsewhere offers a more attractive or secure package of benefits” and count on familiar resources or personal savings to immigrate, through one of the skilled-worker immigration programs offered by countries like Canada and Australia⁸⁶⁰. After accomplishing the residence time required, they may become citizens of a wealthy state, gaining enhanced options of career development and the possibility of a promising future for them and their families.

Another way of obtaining a brand-new citizenship is through investment. Small countries like Dominica, Antigua e Barbuda, Cyprus and Malta, but also big ones like the USA, Spain and Portugal, have programs in which a foreigner can literally buy their citizenship. By investing a certain amount, and paying the taxes involved, investors become full citizens, sometimes without other personal requirements such as residence in the territory⁸⁶¹. The biggest consumers of these programs have been wealthy individuals from China, Russia and the Middle East. They see this practice as an opportunity to overcome visa restrictions, to establish their families in well-off countries, and as a way of keeping the doors open in a stable country, in face of economic and political uncertainty in their homeland⁸⁶². From the states point of view, especially the cash-strapped ones, the citizenship-by-investment programs represent an opportunity to attract financial resources, both for the private as to the public sector, in the hope that the investments become productive, creating jobs and local development⁸⁶³. This commoditization of citizenship, if by one side causes strangeness, by giving a monetary value for rights and participation, and thus raising legitimate concerns, one the other, it reinforces the denationalization of citizenship, considering it puts in question the need to belong culturally to the “nation”, by adding to the equation practical considerations, which can eventually be of interest of the state in question.

the demand directly in a local *Comune*. The time of recognition in this case, which is preceded by establishing residence in the territory, varies from 3 to 6 months, but the costs are higher, since until having the citizenship they cannot work legally.

⁸⁶⁰ MACKLIN, Audrey. *Who Is the Citizen's Other?*... op. cit.

⁸⁶¹ Some programs require a minimum job creation quota, or the maintenance of the investment for a certain time, while others require a residence time, conceding a residence permit in the end of which the investor can apply for citizenship. In any case, a simple search on the internet gives a dimension of the flourishing “passport market” worldwide.

⁸⁶² For a complete analysis of this phenomenon, see: ONG, Aihwa. **Flexible citizenship: The Cultural Logics of Transnationality**. Durham: Duke University Press, 1999.

⁸⁶³ HOOPER, Kate; SUMPTION, Madeleine. The Golden Visa: "Selling Citizenship" to Investors. **Migration Policy Institute**, Washington, 18 Dec. 2013. Available at <http://www.migrationpolicy.org/article/top-10-2013-%E2%80%93-issue-3-golden-visa-selling-citizenship-investors> Accessed on: 22 Set 2017.

As seen, multiple nationality is an increasingly common fact, whatever are its causes or motivations. Being able to pertain to more than one state is already an advancement, considering dual nationality was already contested in the past. It represents the recognition that people can effectively have ties with different polities, by affective or practical reasons, by birthright or by choice. It also enhances access to rights and participation for the holder, and can facilitate considerably the mobility for those with family members residing on more than one country.

However, it is relevant to acknowledge that multiple nationality is still attached to the paradigm of the nation-state discretionary nationality attribution. That is, multiple nationality is not fully affected by critical accounts regarding the expansion of citizenship scope, or a right to citizenship enforceable against any state, instead been a simple horizontal expansion of the formal capability of belonging. In any case, it seems appropriate that multiple citizenship becomes in the future a right of the individual, since it may refer to personal identity and individual autonomy, and the states have nothing to lose with it.

3.4.2 Communitarian citizenship in Europe

Any person who is a citizen of a European Union (EU) member state, is automatically a European Union citizen. That is clearly stated in the Treaty on the Functioning of the EU, which also explains that the “citizenship of the Union shall be additional to and not replace national citizenship”⁸⁶⁴. The treaties of the EU concede a series of rights to its citizens, such as non-discrimination; the freedom to move and reside in other member countries of the EU; the right to vote and stand for elections, either in the European Parliament and in municipal elections in the place of residence (even if not in the country of nationality); the right to require diplomatic protection and consular assistance to any other EU country, when the country of nationality is not represented in the territory of a third country; the right to petition to the European Parliament and access to other EU institutions; and the right to address and receive a response from European institutions in one of its 24 official languages⁸⁶⁵. European citizens have also the right to equal access to the EU Civil Service, for becoming a public official of the regional organization.

⁸⁶⁴ Article 20 of the Treaty on the Functioning of the European Union European Union. EUROPEAN UNION. **Consolidated version of the Treaty on the Functioning of the European Union**, 13 December 2007. Available at: <http://www.refworld.org/docid/4b17a07e2.html>. Accessed on: 3 Oct. 2017.

⁸⁶⁵ EUROPEAN UNION. **Consolidated version of the Treaty on the Functioning of the European Union...** op. cit.

But apart those rights, what really means this expansion of the concept of citizenship in Europe, towards a supplementary postnational one? First, it is important to acknowledge that the European integration project was driven by the economic aim to build a common market. Since the signature of the Treaty of Rome in 1958, that is the focus, with successive steps given progressively in this sense. It was not until 1992, with the Treaty of Maastricht, that a more political, cultural and social perspectives started to gain track. The political negotiations and the policy designing of the European Union were markedly moved by turning into reality, and giving efficiency, to the internal freedom of goods, services and capital. Just in 1985, with the adoption of the Schengen Agreement, initially with not more than five member-countries, that the free movement of persons started to become a reality, mostly motivated by the needs of allowing labour force to circulate, making it possible the deepening of the economic integration⁸⁶⁶.

Therefore, the European citizenship is still a minor concern in the European integration process, although it has facilitated the lives of millions of member states citizens. EU citizenship would be, in the opinion of Martinello, “nothing more than a *functional* semicitizenship as opposed to *substantive* citizenship. It merely formalizes under the official heading of EU citizenship a set of preexisting rights with a few novelties”⁸⁶⁷. The author compares his view with the one advanced by Soysal⁸⁶⁸, for whom a postnational citizenship emerged, since citizens’ rights started to be available also to foreign legal residents through human rights norms⁸⁶⁹. In this view, “citizenship rights and national identity have been increasingly decoupled in European immigration countries”⁸⁷⁰.

Instead, Martinello finds that EU citizenship has actually reinforced the nationalistic logic, bringing a complementary supra-citizenship that in fact, reaffirms the existence of several distinct cultural and political identities corresponding to the nation-states members of the Union. More importantly, this form of “supranational nationalism” makes sharper the exclusion of third-country national residents, by depriving them from citizenship rights, and thus, making citizenship rights and nationality still completely associated. “In short, the

⁸⁶⁶ MARTINELLO, Marco. Citizenship of the European Union. In: ALEINIKOFF, Alexander; KLUSMEYER, Douglas. **From migrants to citizens: membership in a changing world**. Washington D.C.: Brookings, 2000. p. 341-382. p. 354.

⁸⁶⁷ Ibid.

⁸⁶⁸ Her seminal work on the emergence of a postnational citizenship will be examined in the next section.

⁸⁶⁹ SOYSAL, Yasemin N. Changing citizenship in Europe. Remarks on postnational membership and the national state. In: CESARANT, David; FULLBROOK, Mary. **Citizenship, Nationality and Migration in Europe**. London: Routledge, 1996. p. 17-30.

⁸⁷⁰ MARTINELLO, Marco. Citizenship of the European Union... op. cit., p. 354.

fundamental criterion for granting EU citizenship remains the possession of a nationality, that is, the belonging to a nation as sanctioned by nationality laws⁸⁷¹.

Another critical account is that EU citizenship was built from above, departing from a compromise between member states and the European institutions, and not from below, that is, by the struggle of grassroots movements which, from the citizen's point of view, required citizenship to be expanded regionally⁸⁷². Therefore, the European citizen was forged in a regional high level political process, which was legitimately intended to give the integration process a democratic character.

In any case, the introduction of the European citizenship can be explained by five reasons analyzed below. In the first place, there was a technical need to allow high qualified workers inside the EU to circulate, for the sake of the economic integration. At least the executives of the companies who had as internal imperative to regionalize its activities, had to be granted facilitate travel freedom, improving the efficiency of the internal market. The fact the European citizenship does not contemplate economic and social protection rights is symptomatic. The concession only of freedom of residence and limited political rights, indicates that mostly already employed expatriates benefited immediately with the introduction of such regional citizenship⁸⁷³.

The second reason relates with an attempt to respond to the recurrent alleged “democratic deficit” of the European integration process. Only the European Parliament is effectively elected by direct vote of the European citizens⁸⁷⁴. Although this right of vote exists since 1979 for the nationals of EU member-states, it is not clear if it is enough to overcome the criticism from part of the public opinion, which considers the ensemble of the European institutions too distant and bureaucratic.

Thirdly, it is conceivable that the federalist architects of the EU citizenship envision a united European political and cultural community, which would progressively bound together, distinguishing more and more from the “extra-communitarian” peoples, and expecting that the regional citizenship would be a first step towards the future transfer of powers and sovereignty to the European Union level⁸⁷⁵.

⁸⁷¹ MARTINELLO, Marco. Citizenship of the European Union... op. cit., p. 354.

⁸⁷² TURNER, Bryan. Outline of a Theory of Citizenship. **Sociology: The Journal of The British Sociological Association**, v. 24, n. 2, p. 189-217, 1990.

⁸⁷³ MARTINELLO, Marco. Citizenship of the European Union... op. cit., p. 357.

⁸⁷⁴ *Ibid.*, p. 358.

⁸⁷⁵ For Benhabib, “European identity is not given a thick cultural or historical coating; no exclusionary appeals are made to commonalities of history or faith, language or customs”. BENHABIB, Seyla. **The Rights of Others...** op. cit., p. 166.

That can be defended both by conservatives and liberals. The firsts can evoke the European Judeo-Christian history, as well as the Greek and Roman common heritage, assenting a common identity also on democracy and capitalist tradition; while liberals opt to advance the creation of a new “common European cultural space”, based on a constructivist policy planning which stimulates “plurilinguism, education and universities, multimedia, publishing, and so on [...] to promote a common European identity”⁸⁷⁶.

In our account, the latter view is likely to result in a more inclusive citizenship, since it relies on policies which tend to empower individuals, by offering citizens, and ideally also immigrants, opportunities of self-development and intercultural integration⁸⁷⁷. Indeed, the European Commission has been developing constantly exchange programs, mobility opportunities for academics and researchers, and has been succeeding in carrying on a European common approach to University credits and titles’ harmonization.

The fourth reason why EU citizenship was created refers to the declining life standards of many Europeans since the adoption of the common currency, the Euro. In this account, creating an additional layer of citizenship would be a way found by member states, to convince their populations to support the adoption of the Maastricht Treaty. The regional citizenship then would be “more an attempt to create a ‘feeling of belonging to the European construction’ than as the expression of a political will to provide the European citizens with a real and direct means of participation”⁸⁷⁸. Yet, it is emblematic the creation of symbols such as the European flag and an European anthem (the iconic “Ode to Joy”, from Beethoven’s 9th Symphony), which were intended to be seen not as “mere and futile gadgets but as central elements of identification to the European Community”⁸⁷⁹.

Finally, the fifth reason relates to European political boundaries. When talking about citizenship, it is inevitable to pose the question: who belongs, and why? In the case of EU citizenship, since the only criterion is to be in possession of a European nationality, everyone one who does not fulfill this formality is excluded, irrespectively of time of residence, cultural affiliation, social attachment or local contribution. As Benhabib asserts, “the obverse

⁸⁷⁶ MARTINELLO, Marco. *Citizenship of the European Union...* op. cit., p. 360.

⁸⁷⁷ I personally benefited from a university exchange during graduation in Lisbon, Portugal, where I lived and studied with many young Europeans participating of the EU Erasmus exchange program. It was an experience which left me with a strong conviction that offering support to European students, to live in a different European country of their choice, is a sound and fruitful regional policy, which clearly fosters intercultural empathy and a sense of community. That in turn is likely to result in individual openness towards diversity, and a long-term understanding of Europe’s common future.

⁸⁷⁸ MARTINELLO, Marco. *Citizenship of the European Union...* op. cit., p. 361.

⁸⁷⁹ *Ibid.*

side of membership in the EU is a sharper delineation of the conditions of those who are non-members”⁸⁸⁰.

Thus, that system maintains a difficult to justify deprivation from full membership of a number of immigrants, asylum seekers, refugees and stateless persons⁸⁸¹, and also, many children and second generation migrant descendants, which depending on the nationality criteria adopted in the host country, remain without access to local citizenship.

Moreover, Europe is a continent composed of more than twenty nations, some of them containing large migrant populations deriving from their colonial past, others subject to continuous labor migration processes, and more recently, virtually all receiving, voluntarily or not, a significant number of asylum seekers. Therefore, European societies have been *de facto* multiethnic, multicultural and multiracial for a long time. Unfortunately, though,

the idea that one should be an EU citizen and ‘culturally’ European to reap the benefits from Europe’s relative economic well-being seems to be gaining growing public support. This support could lead to the assertion of an ethnoracial conception of the European society that could be used to justify the exclusionary practices suffered by the nonmembers of that European society⁸⁸².

Important to note, European citizenship in general does not give access to automatic social rights or benefits for the individual in another member country. There is an ongoing debate regarding the extension of a comprehensive bundle of social protection rights for EU citizens living in another EU country, such as unemployment compensation, healthcare, and pensions on retirement in old age⁸⁸³, but up to now the social systems of each country varies greatly and coordination depends mostly on bilateral arrangements, with minimum standards slowly set forward by the EU.

With respect to asylum seekers and refugees, although they are not the specific object of this study, it is nevertheless relevant to note the extreme difficulty from the old continent on dealing with the question. Although member states retain sovereign discretion over their asylum and immigration policies, the 1997 Treaty of Amsterdam has brought the question to the regional framework. Since then, the under construction “Common European Asylum System” is still not a *system*, but instead, a “sum of different legal instruments adopted on

⁸⁸⁰ BENHABIB, Seyla. *The Rights of Others...* op. cit., p. 149.

⁸⁸¹ MARTINELLO, Marco. *Citizenship of the European Union...* op. cit., p. 362.

⁸⁸² *Idem*.

⁸⁸³ BENHABIB, Seyla. *The Rights of Others...* loc. cit.

the same topic”⁸⁸⁴. With the intensification on the demand for asylum in the continent in the last five years, the comings and goings of the EU institutions and complete disaccord among member states on how to reform the existing rules, it remains a “key challenge [...] to transform the existing collection of eclectic instruments into a coherent regime of refugee protection”⁸⁸⁵. In the opinion of Benhabib, referring to the European context, “immigration and asylum issues remain time bombs in the hands of demagogues and right-wing politicians, ready to explode at very short notice”⁸⁸⁶.

What is certain is that, nowadays, asylum seekers and refugees in Europe are completely dependent on the good will of each EU member state. In many cases, especially after the outbreak of the Syrian war, which provoked a large scale forced displacement of people, first to Turkey, then to Greece and the rest of Europe, asylum seekers have been suffering restrictions in their right to movement and are proscribed the possibility of being legally employed. They are in practice obliged to live in campsites and public housings, becoming easy targets for xenophobic manifestations⁸⁸⁷. Benhabib goes further, by affirming that

refugees and asylees are treated as if they were quasi-criminals elements, whose interaction with the larger society is to be closely monitored. They exist at the limits of all rights regime and reveal the blind spot in the system of rights, where the rule of law flows into its opposite: the state of exception and the ever present danger of violence⁸⁸⁸.

Moreover, stateless persons in Europe do not count with any specific protection framework at regional level, apart the already studied European Convention on Nationality, which does not directly interfere with states’ discretion on designing their nationality laws, with each member states applying their own rules on the subject. Stateless, more than the refugees, are therefore the true blind spot, the invisible ones in this descending spiral of supranational citizenship, national one, and no one.

In the case of immigration, it is true that the EU has been helping to improve information sharing, including but not limited to the security aspect. There is cooperation on uniformization of procedures for visa granting, and the adoption of biometric identifiers. Some efforts to coordinate with sender countries in the Middle East and North African region are

⁸⁸⁴ CHETAIL, Vincent. The Common European Asylum System: Bric-à-Brac or System? **In:** CHETAIL, Vincent; DE BRUYCKER, Philippe; MAIANI, Francesco. (Eds.). **Reforming the Common European Asylum System: The New European Refugee Law**. Martinus Nijhoff, 2016. p. 3-38.

⁸⁸⁵ Ibid.

⁸⁸⁶ BENHABIB, Seyla. **The Rights of Others...** op. cit., p. 151.

⁸⁸⁷ Ibid., p. 163.

⁸⁸⁸ Ibid., p. 152.

in place, with the aim to avoid irregular immigration and human trafficking⁸⁸⁹. None of that, clearly, help to solve the root causes of forced displacement, motivated by violent conflicts, persecution, extreme poverty and other hazards consequences of the abyssal inequality between the North and the South shores of the Mediterranean Sea.

At the same time, there is a countervailing trend decurrent from the European human rights protection system, which is functional in guaranteeing rights to resident migrants under the member states jurisdiction, on the basis of personhood. This relatively thick protection has been intensely developed, mainly by the performance of the European Court of Human Rights, which by applying the regional human rights law, in certain cases contradicts the political interests of some states.

That system, added to the action of the European Court of Justice, which enacts EU law containing minimum standards of institutional behavior, are both factors with the potential to contribute to the increment of external borders control by the member states. First, because this protection machinery is activated after the entry of the migrant or asylum seeker in European soil⁸⁹⁰, so avoiding them to enter would prevent access to those guarantees. At the same time, it is not feasible politically to simply reduce rights from the foreign residents at the regional level.

While the openness of internal borders was followed by stricter rules on external border controls, the citizenship of the EU has created two unsettled groups of people, representing the under and over inclusion distortions of EU citizenship: third country foreign residents (extra-communitarians), some of whom were born inside the EU and thus know no other homeland, but who are not members by not possessing any European nationality; and those who were born abroad, and thus are strangers to the language, customs and history of the host countries, but have acquired a European country nationality through *jus sanguinis*, what is enough to give them full membership⁸⁹¹. This situation is directly linked to the criteria for nationality attribution, chosen by each country, affecting in this case the national and European citizenship.

Another tricky debate has taken place recently in Europe, when President François Hollande, after the Paris terrorist attacks of November 2015, proposed to reform the French Constitution to strip convicted dual national terrorists from French citizenship. His motivation was the find that all the terrorist suicide bombers were also EU citizens, either French

⁸⁸⁹ BENHABIB, Seyla. **The Rights of Others...** op. cit., p. 151.

⁸⁹⁰ *Ibid.*, p. 167.

⁸⁹¹ *Ibid.*, p. 151.

or Belgian, which facilitated their circulation within the Schengen free movement area. However, the French President had to drop his proposal, under heavy criticism, including from his own Socialist party⁸⁹². In any case, European authorities have been enhancing security cooperation measures, in order to identify “foreign fighters”, that is, radicalized European nationals which joined the civil war in Syria or established ties with terrorist groups like ISIS, and may come back to collaborate on planning new terrorist attacks in Europe.

What is interesting in this equation, for the purpose of this work, is to acknowledge that, unlike the common-sense opinion that terrorists are always Islamic radicals coming from abroad, and as such, something should be done not to allow them to enter into European territory, radicalized persons can be born in the territory, or simply be a national citizen, as radicalization can occur in any community where these persons grow up, and therefore, irrespectively of nationality. In any case, the French President move is revealing, since it seems an attempt to find outside or in the Other someone to blame, avoiding the debate about what went wrong internally, or in terms of foreign policy. For instance, what kind of integration policies were in place for second or third generation of migrant descendants, how was their education and childhood development, were there issues regarding cultural segregation, alienation or marginalization, which could help to explain the root causes of radicalization? In sum, those difficult questions have to be done to allow a transparent, non-nationalistic debate on the course of action to be followed in the future. Insisting on emotional political reactions, after each act of collective violence, risks turning democratic states into states of exception, as already adverted by Agamben⁸⁹³.

For Helen Irving, “citizenship belongs to the citizen, not to the state”⁸⁹⁴. Thus, expanding citizenship withdraw on discretionary basis, like criminal matters, is to deviate the attention from legitimate security concerns, to a nationality-based discourse which tends to generalize and stigmatize groups of persons⁸⁹⁵, facilitating “draconian policies of citizenship

⁸⁹² WILLISHER, Kim. Hollande drops plan to revoke citizenship of dual-national terrorists. *The Guardian*, Paris, 30 Mar. 2016. Available at: <https://www.theguardian.com/world/2016/mar/30/francois-hollande-drops-plan-to-revoke-citizenship-of-dual-national-terrorists> Accessed on: 07 Oct 2017.

⁸⁹³ AGAMBEN, Giorgio. *Estado de exceção*. Trad. Iraci Poleti. São Paulo: Boitempo, 2004.

⁸⁹⁴ IRVING, Helen. *Citizenship...* op. cit., p. 272.

⁸⁹⁵ In an op-ed article from 01 March 2016 at The Guardian, Nesrine Malik argues, against the consideration of adoption by the British Government, of additional measures to strip dual nationals from British citizenship, in case of commitment of serious crimes, that such move was likely to create “a two-tier citizenship, one unearned and unstrippable no matter what, another contingent on good behavior”, stressing the fact that it could lead to racist results, since it would divide citizenship in “one, senior and inalienable, extended to British citizens of no foreign extraction; and the other subordinated, contingent and mutable, for those foreign born or of foreign origin”. MALIK, Nesrine. Stripping criminals of their UK passports – even terrorists and sex abusers – is dangerous. *The Guardian*, New York, 01 Mar. 2016. Available at:

deprivation that were practiced in the past”⁸⁹⁶. What seems certain is that no significant shift of the content of EU citizenship seems likely to occur, because in the present context of raising nationalist feelings, the member states “will strive to keep control of what is left of their sovereignty, namely the independent determination of who can be considered as their nationals”⁸⁹⁷.

As seen, notwithstanding the EU citizenship can be considered a historic novelty and a relevant expansion on the traditional view of citizenship, to a wider supranational one at a regional level, it is still tied to national citizenship, with limited effects on citizen’s rights, apart from allowing mobility and residence facilities within EU space, and enabling local and regional political rights.

In any case, regional citizenship, not only in Europe, has a promising potential of enhancing rights for its beneficiaries, since dynamics of regionalization evolve or are kept in the horizon in different parts of the world. Those integration processes are likely to be increasingly though not only from above, but also measured by the consequences they have on the peoples affected. Those developments, however, require due attention to avoid in parallel, discriminatory measures towards migrant residents from third countries, as well as asylum seekers, refugees and stateless persons.

3.4.3 Global, transnational or postnational citizenship

As studied up to now, citizenship is traditionally conceived as the political membership to a given polity, by which citizens can exercise legal rights and duties, being able to participate and belong to a community. The framework where citizenship is located is usually the national state. Indeed, “it has been assumed to be an institution or a set of social practices situated squarely and necessarily within the political community of the nation-state”⁸⁹⁸. Nevertheless, putting together the thoughts developed along this work, there is a clear indication that this view is increasingly outdated, considering the transformations of the international politics and international law during the last two decades.

<https://www.theguardian.com/commentisfree/2016/mar/01/stripping-criminals-uk-citizenship-racism-sex-abusers-terrorists-two-classes-citizens> Accessed on: 07 Oct. 2017.

⁸⁹⁶ IRVING, Helen. **Citizenship...** op. cit., p. 272.

⁸⁹⁷ MARTINELLO, Marco. **Citizenship of the European Union...** op. cit., p. 375.

⁸⁹⁸ BOSNIAK, Linda. **Denationalizing Citizenship.** In: ALEINIKOFF, Alexander; KLUSMEYER, Douglas (eds.). **Citizenship Today: Global Perspectives and Practices.** Washington D.C.: Carnegie Endowment for International Peace, 2001. p. 237-252. p. 237.

The historic role of the nation-state for modeling modern citizenship was already studied. States comprehend a population within a territorially defined jurisdiction, and a public authority to govern the polity. However, the quality of the governance of the state, and especially, if it is democratic or not, is also important to the concept of citizenship. As seen, increasing international migrations have blurred the automatic correspondence between the territoriality of the state and its democratic architecture, since the government should be accountable for those who are citizens but are outside of the country, as well as handle appropriately, in the light of human rights, those who are inside but are not citizens.

In fact, a number of phenomena occurring at the global arena, as studied above, lead to the finding that citizenship is not anymore depending completely on the national state. There is an “emerging discourse that exclusively nation-centered understandings of citizenship are unduly parochial in this period of intensive globalization”⁸⁹⁹. A number of expressions have been adopted to reveal this trend, such as *transnational citizenship*, *global citizenship*, and *postnational*⁹⁰⁰ forms of citizenship⁹⁰¹.

The reasons to explain why this denationalization of citizenship is arising varies greatly, depending on the point of view, including the perspective of different disciplines, such as history, sociology, politics and international law. But it seems they entwine, pointing to a growing loss of the absolute prominence of the national state in the international arena. This phenomenon is embedded in different dynamics occurring at the same time, in different parts of the world⁹⁰².

Yasemin Soysal was one of the first authors to identify the diminishing role of national membership⁹⁰³. She argues that in the post [Second] war era, national citizenship started to change in Europe, both in terms of rights deriving from it, as in relation to identity. The foundational principles of citizenship, namely congruence between territorial state and national community on the one hand, and national belonging as source of identity and rights on the other, have been superseded gradually since 1945, moved by four main factors.

⁸⁹⁹ BOSNIAK, Linda. Denationalizing Citizenship... op. cit., p. 238.

⁹⁰⁰ One of the first scholars to use the term “postnational” was sociologist Yasemin Soysal, in his book *Limits of Citizenship: Migrants and Postnational Membership in Europe*. Chicago: University of Chicago Press, 1994.

⁹⁰¹ For Bosniak, “those terms are not necessarily interchangeable, and none of them is defined in any clear way in the emerging literature”. Ibid., p. 240.

⁹⁰² The context analyzed below refers mostly to Europe and developed countries in general, since it is where those dynamics seem more intense nowadays, driven by increased displacements levels.

⁹⁰³ SOYSAL, Yasemin N. *Changing citizenship in Europe*... op. cit. The author had advanced some of the ideas hereby present in an earlier work: SOYSAL, Yasemin N. **Limits of Citizenship: Migrants and Postnational Membership in Europe**. Chicago: University of Chicago Press, 1994.

First, massive migratory flows to Europe have broadened the ethnic composition of the continent, undermining existing uniformity for national belonging. Second, the big scale decolonization process, which occurred in a rights frame and assertion of universalistic values promoted by organizations as the United Nations and UNESCO, as well as the emergence of social movements asserting individual and collective rights, questioned the national citizenship practices adopted by then. In fact, national institutions had to acknowledge those movements for rights, composed by women, environmentalists, youth and civil rights advocates. Third, the emergence of multi-level polities, as the European Union, “breaches the link between the status attached to citizenship and national territory, by conferring rights which are not necessarily located in a bounded nation state”⁹⁰⁴. And fourth, the intensification of the global discourse on human rights, entailing legal instruments which reveal a codification of universal rights, transcending the membership to a particular nation-state. In Soysal words, “human rights increasingly constitute a world-level index of legitimate action and provide a hegemonic language for formulating claims to rights above and beyond national belonging”⁹⁰⁵.

Moreover, even though most immigrants in Europe are not considered formally citizens, many rights and privileges reserved for citizens are available also to immigrants through the status of “permanent resident”. Those rights encompass in some European countries the access to public education, healthcare and other social rights, including the access to the labour market. The only right which intrinsically differentiates national citizens from immigrants is the right to vote, although local voting rights are granted for non-citizens in some cases⁹⁰⁶.

The author then reflects on the emergence of a postnational citizenship, calling it a “new model of membership anchored in deterritorialized notions of personal rights”⁹⁰⁷. She mentions three important differences between national citizenship and the postnational one. The first refers to the territorial dimension of citizenship: if in the traditional view, citizenship is bounded by the nation-state, from which derives “well-defined, exclusionary boundaries and state jurisdiction over the national population within those boundaries”⁹⁰⁸, the postnational model reveals fluidity, in the sense that individuals can access rights and make

⁹⁰⁴ SOYSAL, Yasemin N. **Changing citizenship in Europe...** op. cit.

⁹⁰⁵ *Ibid.*, p. 19.

⁹⁰⁶ *Ibid.*, p. 18.

⁹⁰⁷ *Ibid.*

⁹⁰⁸ *Ibid.*, p. 22.

claims independently from national boundaries. Rights which were typically granted for citizens are also conceded to non-citizens, on transnational grounds.

The second difference relates to the multiplicity of memberships. In the classical citizenship model, a certain horizontal equality entitles citizens with the same rights and privileges, while in the postnational account, the distribution of rights varies among groups of immigrants and citizens. Indeed, different groups of non-citizens have access to different bundles of rights: irregular immigrants, temporary and permanent residents, asylum seekers and refugees, citizens of another European Union member-state, dual citizens, and so on. Thirdly, legitimation of membership varies, since in the national citizenship model, “shared nationhood” constitutes the basis of membership, no matter if assuming a political ideal, a common culture or ethnicity. In the postnational paradigm, nationhood is replaced by personhood, since legitimation is provided by a global ideology of transnational community, based on universal human rights, independent of national attachment of the individual to a certain state. In this view, the “individual transcends the citizen”⁹⁰⁹.

Finally, on the intricate relationship between sovereignty and human rights, Soysal argues that while universal rights of the individual undermine the boundaries of the nation-state, the principle of sovereignty reinforces national boundaries and invents new ones. An example is something that even if commented by the author in the 1990s, seems impressively actual: “violent vocalization of anti-foreigner groups throughout Europe, accompanied by demands for restrictive refugee and immigration policies”⁹¹⁰. This development relates to the fact that “as [national] citizenship matters less, national identities are articulated in new ways, either in exclusionary narratives, or as search for new national identities”⁹¹¹. What we have then is the paradox of a “deterritorialized expansion of rights despite the territorially closure of polities”⁹¹².

The world is made of territorially defined polities, and even postnational rights are still organized based on national political units, responsible for the implementation and enforcement of those global human right norms. But if by one side, the nation-state tries to protect its national interests, when adopting more restrictive asylum policies for instance, on the other, it is subject to the evolving norm creation and broadening interpretations of

⁹⁰⁹ SOYSAL, Yasemin N. *Changing citizenship in Europe...* op. cit., p. 23.

⁹¹⁰ *Ibid.*

⁹¹¹ *Ibid.*

⁹¹² *Ibid.*, p. 24.

international law, which have been expanding access to international protection based on human rights. Thus, for Soysal,

Even as the western states attempt to maintain their boundaries through quantitative restrictions, the introduction of expanding categories and definitions of the rights of personhood sets the stage for new patterns of asylum, making national boundaries more penetrable⁹¹³.

Bosniak in turn, goes back to the meaning of citizenship, and asks: “is citizenship, in fact, an inherently national project?”⁹¹⁴. And the first answer comes by situating it historically. As seen in a precedent chapter, citizenship was already in function among the Greeks and Romans, way before the emergence of the nation-state, what demonstrates that citizenship can be formulated in a way that it does not need be detained by the national sphere.

Another question is conceptual, since one cannot assume that what is called citizenship has an absolute, empirical meaning. Actually, citizenship in its political conception is intrinsically disputable, result of permanent struggles and negotiations⁹¹⁵. Therefore, to think about a postnational citizenship presupposes not just asking what a given collectivity understands to be citizenship, but also questioning what citizenship should be, in base of the political direction the community is willing to choose, that is, the kind of collective existence those citizens want to embrace and struggle for⁹¹⁶.

It is clear in this sense the distinction between the legal status represented by citizenship, which presupposes the formal attachment of the individual to a state, by which he can claims rights and is obliged to exercise duties; from a broader conception of citizenship as a programmatic aspiration, represented by the permanent attempt of ameliorating the relation between state and citizens, through improved ways of citizen’s participation on social and political life. This view relates in fact with promoting and enhancing decisions and actions which can contribute to ensuring that public resources are applied in a transparent, balanced and efficient manner; that corruption, a practice which clearly disrupts the confidence of the people towards the government, and the state as a whole, is adequately prevented and combatted; in sum, it refers to a qualified political participation by the citizens, that help to foster good governance and by consequence, increase the effectivity of the democracy.

⁹¹³ SOYSAL, Yasemin N. Changing citizenship in Europe... op. cit., p. 25.

⁹¹⁴ BOSNIAK, Linda. Denationalizing Citizenship... op. cit., p. 238.

⁹¹⁵ Ibid., p. 239.

⁹¹⁶ Ibid.

For Saskia Sassen, the transformation of citizenship departs from two main interconnected conditions. One is the institutional framework change of what is called globalization. That includes not just the economic deregulation of the markets occurred in large scale, but also the prominence of the international human rights regime⁹¹⁷. The ascension and gain in importance of the international human rights law, as submitted along this work, is the most evident aspect of new forms of belongings and the diminishing of the national as the driven element in the citizenship realm. The second condition is the emergence of new actors, organized groups and active communities, whose interconnection reveals their lack of immediate identification with what represents the national state. In this sense,

the growth of the internet and linked technologies has facilitated and often enabled the formation of cross-border networks among individuals and groups with shared interests that may be highly specialized, as in professional networks, or involve particularized political projects, as in human rights and environmental struggles⁹¹⁸.

Those elements are the main features of the slowly, but continuous, strengthening of what have been called denationalized, postnational or global citizenship. What seems to be changing is the multiplication of the spheres of possible participation, as well as the multi-layered levels and means of doing so. And that even inside the nation-state itself. Some refer to cultural citizenship, for instance, to argue that the sense of membership has been evolving among particular cultural groups, by affinity on certain social practices, attaching more individuals to a collective sense of identity, than in relation to the *nation* at large⁹¹⁹. Those affinities do not have to be formalized, since internet plays the role nowadays of a recurrent point of encounter, where opinions are shared, giving voice to claims and emulating a sense of belonging to collectivities who think alike⁹²⁰.

Other examples of the expansion of the citizenship concept are embedded in the multiculturalist view, which claims the democratization of public sphere in a way that it

⁹¹⁷ SASSEN, Saskia. Towards Post-National and Denationalized Citizenship. In: ISIN, Engin; TURNER, Bryan. **Handbook of Citizenship Studies**. London: Sage Publications, 2002. p. 277-292. p. 277.

⁹¹⁸ SASSEN, Saskia. Towards Post-National and Denationalized Citizenship... op. cit., p. 277.

⁹¹⁹ SASSEN, Saskia. Towards Post-National and Denationalized Citizenship... op. cit., p. 281.

⁹²⁰ Clashes with those who think differently often occur in the virtual environment, maybe sometimes in a more incisive and even aggressive way than in person, but that should not be matter of concern if the freedom of expression was enjoyed with respect and tolerance towards the different opinions. Clearly, today this is not a simple task, with notorious cases in Brazil of racism, xenophobia, incitement to hatred and overt political intolerance in social medias.

represents in a fairer way the different cultural groups of society⁹²¹; and the idea of local citizenship, for instance, at the level of cities⁹²², whose inhabitants are capable to find common ground based in daily shared experiences, stimulating communitarian values and by consequence fostering a sense of belonging. An example would be the union of neighbors locally to promote improvements in their area of residence, searching ways of activating the state for delivering better specific public policies, thus helping to elevate the well-being among local residents.

Although those examples refer to realities within the boundaries of a state, they help to understand what is happening also at international level. The proliferation of transnational civil society organizations, as studied in a previous section, is the concretization of “cross-border struggles around human rights, the environment, arms control, women’s rights, labor rights, rights of national minorities”⁹²³, which ultimately creates a similar kind of attachment to causes and participation that occurs at a local level. In fact, both levels today are increasingly interrelated, since internet gave access to global institutions, events and practices, which have been recontextualized, appropriated and emulated locally.

Bosniak understands the denationalization of citizenship or postnational citizenship⁹²⁴ as “the claim that the nation-state is becoming decentered as the locus of our collective institutional and affiliative lives”⁹²⁵. Citizenship in her account is being built, beyond the nation-state, in four different aspects: legal, sociological, civic republican and psychological or cultural.

In the legal sense, the phenomenon of denationalization would be, according to her, less evident. Even in the European Union, where the idea of communitarian citizenship emerged, it remained dependent on nationality of a European Union member state⁹²⁶. Sassen argues that the denationalization, in this case, remains connected to the national experience, which would be simply changing, losing centrality, citing the European Union case as an example of “partial” and “incipient” denationalization⁹²⁷.

⁹²¹ SASSEN, Saskia. *Towards Post-National and Denationalized Citizenship...* op. cit., p. 281.

⁹²² *Ibid.*

⁹²³ *Ibid.*

⁹²⁴ BOSNIAK uses the two expressions interchangeably, while SASSEN makes a distinction. For her, postnational is the term most used and broader, meaning something that is located outside the confines of the national, and has new forms still emerging, while denationalized citizenship refers to the transformation of the national caused by globalization and other alike dynamics, more clearly drawn.

⁹²⁵ BOSNIAK, Linda. *Denationalizing Citizenship...* op. cit., p. 240.

⁹²⁶ *Ibid.*, p. 241.

⁹²⁷ SASSEN, Saskia. *Towards Post-National and Denationalized Citizenship...* op. cit., p. 286.

Sociologically, in regard of the enjoyment of rights by the individuals, Bosniak brings the case of human rights regimes, which transcend the national jurisdiction of each state. This would be the most benefic result of a postnational citizenship, given the fact that it enhances the opportunities to effectively guarantee the enjoyment of certain rights⁹²⁸.

When it comes to political participation, it is even more convincing the denationalizing trend, since as seen, there is an increasing number of people “engaged in democratic political practices across national boundaries in the form of transnational social movements, including those environmentalists, feminists, human rights workers, and trade unions”.⁹²⁹ Although these NGO’s and movements can be physically situated somewhere, which means inside the territory of one or more states, their interconnection, prolific change of experiences, cooperation, and many times, global-wide appealing causes, make them genuinely transnational.

Thus, this is a good example of postnational citizenship, which also fulfils the third, civic republican aspect of citizenship, that of active participation, in this case not limited to the ambit of a national entity. The intended global reach of the above mentioned networks can have a wider public opinion influencing effect, considering they represent in many cases, a commitment to the common good and public interest in an expanded, multipolar way. The effectiveness of that global participation depends, clearly, on democratic means of access, as well as the structural quality and capacity of global institutions to respond to such a multiverse demand. In any case, the way ideas became sharable instantaneously through the internet, and sometimes in a “viral” manner⁹³⁰, come in support of the great potential that global initiatives and networks have to promote changes⁹³¹.

And finally, regarding the cultural point of view of citizenship, “anthropologists and others have recently made it clear that people maintain crucial identities and commitments

⁹²⁸ BOSNIAK, Linda. *Denationalizing Citizenship...* op. cit., p. 240.

⁹²⁹ Ibid.

⁹³⁰ One case worth mentioning is the video “Kony 2012”, published on Youtube by the American NGO Invisible Children. The video was shared more than 100 million times, and makes the case of a war criminal from Uganda, leader of the LRA – Lord Resistance Army, which would have abducted thousands of children to make them soldiers and sexual slaves. The unprecedented global reaction to the film sparked critics, by the Hollywoodian fashion used and to the NGO itself. But in any case, it helped to reveal the worldwide reach of the video platform, as well as the appetite of the public opinion by striking causes with a clear call for mobilization. INVISIBLE CHILDREN. Kony 2012. **YouTube**, 05 Mar. 2012. Available at: <https://www.youtube.com/watch?v=Y4MnpzG5Sqc>. Accessed on: 27 Jul. 2017.

⁹³¹ For example, the emblematic photo of Alan Kurdi, a three-year-old Syrian-Kurdish boy found dead in a Turkish beach, after the boat in which he was trying to reach Greece with his family capsized in the Mediterranean Sea, shocked the world and inevitably attracted attention to the humanitarian crisis of the asylum seekers in the region.

that transcend or traverse national boundaries”⁹³². That is indeed the case of the millions of migrants worldwide, which remain in a deterritorialized manner connected to their country of origin, voting, sending resources and sometimes engaging in struggles in their national community of provenience from abroad.

In this cultural account, postnational citizenship reveals that there is a worldwide identification of people with cross-national practices which transcends the barriers of nationality. The examples are plenty: a determined sport practitioners, environmentalists or any other cause fighters (feminists, racial equality defenders), scientific and arts’ networks, common language cultural associations, and diaspora emigrant groups located in different countries. All have today a relatively easy way to keep connected, influencing each other and putting together common collective objectives.

Therefore, there is a clear incongruence between the emerging denationalizing factors of citizenship, and the existing paradigm of national citizenship as the dominant and institutionalized model. While this is the case, there will be anomalies and disparities between the official rhetoric and the changing features of citizenship⁹³³.

For Kostakopoulou, since the 1980s, poststructuralism, feminism and postcolonial criticism started to question the presumption of a unitary conception of citizenship. There was a complexification of identity formation, and therefore an “inconsistency between the illusory notion of a unified nation and the actual multi-ethnic composition of contemporary states”⁹³⁴. Her contribution remains strikingly actual, even if referring to a period which started forty years ago, since nowadays it is evident a renovation of the struggle entailing

respect for diversity, recognition of the distinctiveness of cultures and subcultures (which have been glossed over and ignored under the nation-state centred model), political claims for equality and empowerment and the critique of culturally embedded representations of women, racial and religious minorities, gay and disabled people⁹³⁵.

The question here is that voices “from below” have been requiring more space to participate, claiming to democratize the debate on citizenship, by making visible the needs of different communities, often marginalized, and preventing the imposition of a single,

⁹³² BOSNIAK, Linda. Denationalizing Citizenship... op. cit., p. 243.

⁹³³ SOYSAL, Yasemin N. Changing citizenship in Europe... op. cit., p. 28.

⁹³⁴ KOSTAKOPOULOU, Dora. **The Future Governance of Citizenship**. Cambridge: Cambridge University Press, 2008. p. 30.

⁹³⁵ Ibid.

dominant view of the law and public interest⁹³⁶. Those claims have been sometimes fiercely demanded, or even more aggressively rejected, since they are aimed to question established rules and customs. Those claims help to highlight the existence of plural identities and multiple attachments, what leads to a more complex conception of identity⁹³⁷, bringing to the horizon a “more dynamic and flexible approach, namely, one that views identities as open, fluid, shifting, interacting and, above all, subject to redefinition, adaptation and change”⁹³⁸.

That sort of multiculturalism became in the end of the twentieth century a human rights’ based discourse, which helped to raise attention to global inequality, as well as to attempts to assimilate minorities. In fact, as remembered by Kymlicka and Norman,

the discourse of citizenship has rarely provided a neutral framework for resolving disputes between the majority and minority groups; more often it has served as a cover by which the majority nation extends its language, institutions, mobility rights, and political power at the expense of the minority, all in the name of turning supposedly “disloyal” or “troublesome” minorities into “good citizens”⁹³⁹.

The multicultural discourse was useful to show it was possible to cope with the differences in a peaceful manner, in and between democratic societies. The possibility of redefining the criteria for participation and belonging would have created more open and inclusive communities, and it seems it did in some countries of the Northern hemisphere for a while (like Canada and Sweden). But that inclusiveness movement has been confronted lately with the rise of ultranationalist political reactions, ghettoization of groups unable to integrate and the troublesome return of openly discriminatory and xenophobic groups. “There has been a shift away from multiculturalism and the politics of difference towards integration and assimilation and a gradual ‘thickening’ of political belonging in western Europe and elsewhere”⁹⁴⁰, a trend which started in 2001 after 9/11, and seems to have been rekindled in the present decade.

The renewed islamophobia in Northern countries is the main example of this setback, which “has already had an adverse impact on community relations and empirical studies report an increased polarization and growing hostility towards Muslims and non-white

⁹³⁶ KOSTAKOPOULOU, Dora. **The Future Governance of Citizenship**. Cambridge: Cambridge University Press, 2008. p. 31.

⁹³⁷ See the interesting work of Zygmunt Bauman, which captured earlier than many this shift in the modern existential condition, which became more fluid, complex, nomad and ambiguous. BAUMAN, Zygmunt; **Modernidade líquida**. Tradução: Plínio Dentzien. Rio de Janeiro: Jorge Zahar, 2001.

⁹³⁸ KOSTAKOPOULOU, Dora. **The Future Governance of Citizenship...** op. cit. p. 31.

⁹³⁹ KYMLICKA, Will; NORMAN, Wayne. **Citizenship in Diverse Societies**. Oxford: Oxford University Press, 2000, p. 11.

⁹⁴⁰ KOSTAKOPOULOU, Dora. **The Future Governance of Citizenship...** op. cit., p. 31.

groups”⁹⁴¹. A recent example is the Netherlands, whose multicultural immigration model was officially replaced by a kind of “mono-culturalism”, oriented towards cultural assimilation and migrations restrictions⁹⁴².

Most European governments have been trying to promote migrant’s integration through a “thicker notion of national belonging”, allowing diversity within an overarching national culture umbrella. It is a policy which seeks to stimulate “identification with national values as prerequisite for political belonging” by one side, and “remaining silent on the structural inequalities and injustices that undermine the sense of belonging”⁹⁴³, on the other. However, as Kostakopoulou submits, “this policy fails to notice that political belonging is best nurtured by institutional inclusion and full participation in society and politics”⁹⁴⁴. Only citizenship can effectively promote both of these objectives.

The main difficulty is that political establishment, and public opinion in democratic countries at large, are used to associate immigrant hosting with a need of integration embedded in a view necessarily attached to the “national” experience. But as seen, the notion of what is national or not is subject to deep transformations since globalization, transnationalism and the multiplication of identities gained traction.

Since the 1970s, social movements have shaken the assumption that citizenship can be abstractly equal for all, since identity demands and the need to combat *de facto* discrimination and marginalization started to be raised. That weakened the attempt of states to maintain a uniform social and cultural identity, related to the nation, which provided “ties that bind by endowing the relations among individuals with trust and mutual affection, [since it] was no longer seen as something natural and unproblematic”⁹⁴⁵.

The nationality based model of citizenship started to be undermined when it became evident that the former convergence between the nation and the state, with its increasingly heterogenous population, was no longer something to be taken for granted. The contemporary reality showed to be much more complex, and the ideal of “citizens as co-nationals” in practice lost strength, since contemporary belonging involves multiple commitments, rights and obligations under, above and beyond the nation.

Indeed, the conception of citizenship attached necessarily to nationality is overlooking a number of citizenship experiences typical of our times, such as

⁹⁴¹ KOSTAKOPOULOU, Dora. **The Future Governance of Citizenship...** op. cit., p. 31.

⁹⁴² Ibid., p. 34.

⁹⁴³ Ibid.

⁹⁴⁴ KOSTAKOPOULOU, Dora. **The Future Governance of Citizenship...** op. cit.

⁹⁴⁵ Ibid.

the experiences of citizens with an outward view owing to transnational, professional, interest-group, commercial and financial links, the experiences of naturalized ethnic citizens and of denizens who retain their connections with their homeland and celebrate their ethnic identity, the emergence of forms of civic participation within and beyond the state that are not reducible to nationality, and the broadening of the obligations of citizenship to include concern for and co-responsibility for the environment and future generations.⁹⁴⁶

But one question at this point in ought to be raised: is citizenship beyond the nations even desirable? The question is important because labelling political and social practices with the mark of citizenship is not just an empirical finding. It has a powerful legitimation function, since it means to bring the case of recognition, that is, the confirmation that a certain form of collective membership plays a role in defining socially and politically our collective lives.

We submit that denationalized citizenship cannot be seen as intrinsically desirable or undesirable, since it depends the form it assumes. For instance, from the point of view of human rights, it is clear that the international human rights protection systems have enhanced the empowerment of individuals to fight against serious violations, since they gained other instances able to constrict states to comply with fundamental rules they have promised to protect⁹⁴⁷. Those rights are normally already on national legislations, composing national citizenship, but they are now international concerns, what created a form of regional and global citizenships. Avoiding abuse of human rights became a concern of the “international community as a whole”⁹⁴⁸.

On the other hand, the denationalization of citizenship can be pervasive if not serving to expand the recognition of the individual rights and multiple affiliations. That means it cannot be left alone with the transnational corporate interests, which are motivated primarily by expanding markets, and in many cases, search ways to overcome national regulations, including free movement paths for high level executives, without much regard for the general migratory policies. Richard Falk explains precisely that

there is a cultural rootlessness that accompanies such “global citizenship”, expressed by the empty homogeneity of international hotels, popular culture, consumerism, franchise capitalism, airports, life style, and the universalizing of the English language. (...) The corporate embrace of globalism should perhaps not even be associated with citizenship, as it posits no accompanying global

⁹⁴⁶ KOSTAKOPOULOU, Dora. **The Future Governance of Citizenship...** op. cit., p. 46.

⁹⁴⁷ That is done by putting light to cases, under the eyes of the world, which are taken into consideration by specialized courts or international organisms.

⁹⁴⁸ See CRAWFORD, James R. *Responsibility...* op. cit.

community, and hence contains no bounds of solidarity with those who are weak and disadvantaged⁹⁴⁹.

The point is that postnational citizenship can sometimes support and sometimes undermine democratic and egalitarian values⁹⁵⁰. The view that citizenship can be considered increasingly denationalized, is useful as far as it helps to describe, first, what is happening in terms of an inevitable internationalization of the law and the politics; second, by challenging the return to normative nationalism⁹⁵¹, which in today's world, marked greatly by interdependence, would enable mistrust, lack of cooperation and even rupture of international agreements⁹⁵², as well as delicately built alliances⁹⁵³; and third, it helps to think ahead, on what kind of options would be available in terms of global governance, that is, how humanity will manage to confront truly global challenges, such as the increasingly common "migratory crises", which require from states and other actors involved, a strong commitment on international development cooperation, cross-national policies coordination, and thicker humanitarian partnerships.

The central question seems to be if the democratic state still needs to appeal to the "nation" ideal to exist, or if there are other values to be collectively shared, and which are able to bound people together. Is it possible to base respect for the rules, tolerance with diversity, and solidarity towards those who need, in values that are not necessarily related to national symbols, such as flags, anthems or local traditions, but instead on *human needs*, already transformed in widely accepted human rights? Ultimately, the real problem would not be one of general ignorance about the meaning, content and compulsory requirement of those rights? That is, does not the question have to do with a weak and pale public knowledge and internalization of attitudes already provided by (international) law, like non-discrimination, respect for the differences, guarantee of personal freedoms, active pursuit of socio-economic equality and a firm stake in human development? In that case, would not be enough bounding people together by investing on sound and effective policies of social

⁹⁴⁹ FALK, Richard. Citizenship and Globalism: Markets, Empire, and Terrorism. IN: BRYSK, Alison; SHAFIR, Gershon. **People out of place: globalization, human rights, and the citizenship**. London: Routledge, 2004. p. 177-190. p. 186.

⁹⁵⁰ BOSNIAK, Linda. Denationalizing Citizenship... op. cit., p. 246.

⁹⁵¹ Ibid.

⁹⁵² For example, by the moment these words are being written, the government of the United States of America announced that it intends to leave the Paris Agreement on climate change, adopted on 12 December 2015 by a virtual consensus of the 197 parties to the Framework Convention on Climate Change.

⁹⁵³ Such as NATO, the North Atlantic Treaty Organization, which ties together Europe and the United States, but whose survival or relevance remain attached to the permanence of political willingness of members to cooperate.

integration for immigrants, without ignoring cultural particularities, but stimulating a clear sense of hospitality, inclusiveness, interculturality, and by doing so, appealing to the general recognition of the human needs of every and each individual in an immigrant condition, like any other human person?⁹⁵⁴ Of course, no easy answers can be provided, but it seems that those questions should be put more often and clearly, considering the political debate on the theme easily lead people to consider the most disparate options, instead of, basing on evidences, searching a minimum convergence, if not on the means, at least on the ends.

As a matter of fact, ultranationalist discourses are one of the highest obstacles for thinking a global, postnational view of citizenship. Although nationalism, as seen in the first chapter, is not something new, the context in which this rhetoric grew in the past ten years is particularly troublesome. Caused in part by a deep economic recession in many countries, in addition to the return of terrorism attacks in the heart of Western cities⁹⁵⁵, as well as mediatic exploitation of the so called “refugees crises”⁹⁵⁶, which revived the fear of a foreign “invasion” in richer countries, the consequence was the gain of track of ultranationalist parties and their populist promises. This kind of nationalism can lead important global actors to undermine multilateral attempts of fostering a more pluralist form of citizenship, which is seen with diffidence, discredited as utopic, or even considered dangerous.

One cannot deny that the security agenda is again up in priority, and in such an atmosphere, the discourse of protection of national interests, national security and economic protectionism regain a central role in international relations. If by one side, these developments

⁹⁵⁴ Those questions lead to another much debatable one: Are not the actual flaws in immigrants integration policies in Europe, to a certain extent fruit exactly of a widespread public opinion indifference, a carelessness reaction regarding global inequality and the desperate exodus of refugees, which result historically (also) from colonization and self-centered geopolitics from the North, and which in the end of the day turn against European own societies, since are likely to result in marginalization, segregation, and even in certain cases, radicalization of those who managed to arrive but are not, and under those circumstances, will never be, effectively integrated or at least, feel welcome? How to talk about integration if many non-citizens in Europe are suffering daily prejudice, having doors closed because of ethnic or religious belonging, and being forced to acknowledge the fact that, if not considered “naturally part” of the local society, no matter how much effort they put, opportunities will be less attainable, and as such, life conditioned by factors out of their control?

⁹⁵⁵ It is important to note that terrorism do not cease to exist while European cities are not attacked, since it is well known that the majority of terrorist attacks occur in poor countries, often under internal conflict or military intervention, almost in a daily basis. An interactive updated world map of terrorism attacks location and data is found in STORY MAPS. 2017 Terrorist Attacks. Available at: <https://storymaps.esri.com/stories/terrorist-attacks/?year=2017> Accessed on: 07 Jun 2017.

⁹⁵⁶ This author considers that what is called “refugee crisis” was a humanitarian crisis, concerning the raise of deaths tolls and failures on humanitarian responses towards people fleeing conflicts and poverty in Africa and the Middle East, through the Mediterranean Sea, in direction of the promised (or dreamed) prosperity of the European continent. The crisis was loudly voiced not just because of the large-scale quantity of migrants and refugees trying to cross the sea (since that was not a new influx), but mainly because of the mainstream diffusion of photos of dead children among the victims, what caused worldwide commotion and urgent appeals for action. That is, by consequence, a good example of global citizenship activism.

can weaken the global citizenship debate, there is a chance that a counterbalance wave, at least in academic circles, turns in the direction of rescuing possibilities to advance changes⁹⁵⁷.

Although analyzing the nationalist electoral discourse worldwide and its political support is beyond the scope of this work, it is important to argue why the nationalist mindset can be an obstacle to any kind of global or postnational citizenship. One elementary, but still striking question, refers to asking why it would be defensible to privilege some people, in detriment of others, only because they are of the same nationality. Perhaps the question gets clearer if it is inverted: why it would be reasonable to exclude persons from normative concern and protection, based on the fact they are non-nationals? Would not be this claim discriminatory, or at least exclusionary, by definition? As Bosniak puts,

why the people with whom we happen to share formal nation-state membership and territory should be the objects of our identification and solidarity more than others with whom we are joined through other affiliative ties?⁹⁵⁸.

The fact is that migrants in general are simply part of the society where they live, and are capable to create social practices and local engagement that make them full active members, even lacking formal, legal recognition. Talking about the American context, Sassen states that

the daily practices of undocumented immigrants as part of their daily life in the community where they reside (raising a family, schooling children, holding a job) earn them citizenship claims (...) these practices produce an at least partial recognition of the individuals as full social beings⁹⁵⁹.

Therefore, even if those immigrants are not legally authorized to be where they are, they can still enjoy social recognition. Which means that what matters ultimately is the effectiveness of citizenship, or what citizenship represents for the person concerned in relation to the polity where she happens to be, as well as for her present social and familiar relations.

The possibility of transformation of someone considered excluded, non-member, into a full national, and then “insider”, reminds us that the ultranationalist view of citizenship can serve as element of sharp exclusion and alienation, against the political community’s long-

⁹⁵⁷ In addition, that setback can also stimulate the search and legitimation of new global initiatives and leaders, more in line with that existing quest for a more multilateral and internationalist view.

⁹⁵⁸ BOSNIAK, Linda. *Denationalizing Citizenship...* op. cit., p. 247.

⁹⁵⁹ SASSEN, Saskia. *Towards Post-National and Denationalized Citizenship...* op. cit., p. 283.

term interest of social cohesion. Therefore, the claim to a postnational citizenship, which is clearly not substitutive, but an additional form of affiliation of the individual, in a planet that seems to be turning smaller, can be a good manner of facing exclusionary trends that lead to intolerance and even social violence⁹⁶⁰.

In conclusion, it becomes clear that instead of considering the Westphalian world order dead, subject to replacement by another system, whatever such a system would be, it is useful to unveil an essential transformation in course on the concept of citizenship. From the closed, encapsulated notion of citizenship exclusively attached to the national experience, it is possible to envision a changing paradigm, in which citizenship can also be understood as explaining how the citizen, by being increasingly connected on a worldwide fashion, and so being part of a growing sense of unity brought by great global challenges, can also claim and enjoy a kind of global citizenship.

This denationalized form of citizenship, seems to be yet in its first stages of elaboration. The gaining in importance of human rights protection at international level, the objective need of uniting to overcome challenges which do not recognize boundaries, such as climate change, and a greater sense of the inevitability of transnational human mobility, with the growing debate on the refugees and migrants' reception and integration, are all factors enabling an open-ended concept of citizenship. To be national of a country, and in that territorial space exercise, in a preferential way, one's rights and duties, is not incompatible with an overlapping, emerging notion of global citizenship.

3.4.4 Inherited citizenship, pluralism and global virtues

In her book "The Birthright Lottery", Ayelet Shachar goes deep in something that is too often taken for granted: depending on where or to whom one is born, and by consequence, which nationality the person carries, her chances, opportunities and possibilities of development in life change drastically. To have the luck of being covert by the innate citizenship of a wealthy country is radically different from having it from a very poor one. That is explained by the *birthright citizenship*.

The work of Shachar is interested in two particular aspects: how inherited citizenship is comparable to the propriety transfer regime, and how the birthright citizenship helps to

⁹⁶⁰ Not coincidentally, it is worth noting the raise of xenophobic demonstrations in many countries, including where this kind of discourse has never achieved such a degree of popularity, as have been happening in Brazil in the last years.

create and maintain global inequalities⁹⁶¹. Her focus is on the entitlement to inherited citizenship, or the transfer of wealth and power through generations, connected to the citizenship framework. In her words, “reliance upon the accident of birth is inscribed in the laws of all modern states and applied everywhere. In fact, the vast majority of the global population has no way to acquire membership *except* by circumstances of birth”⁹⁶².

Shachar thesis is based on challenging this “entrenched assumption that reliance on birth is somehow an unquestionable component of assigning political membership”⁹⁶³. In other words, how and why do we have a system in which where you born will determine most part of your chances in life? She points out to the fact that “full membership in an affluent society emerges as a complex form of property inheritance (...) this inheritance carries with it an immensely valuable bundle of rights, benefits, and opportunities”⁹⁶⁴.

The most important inference in her work refers to a distributive question. Allocating membership to a political community, by using nationality laws based on birthright criteria, would take to the view that this is an apolitical attributive demarcation. But in fact,

birthright-attribution rules do far more than demarcate who may be included in the polity. Like other property regimes, they also define access to certain resources, benefits, protections, decision-making processes, and opportunity-enhancing institutions which are reserved primarily to those defined as right-holders.⁹⁶⁵

Therefore, instead of looking to the right of nationality itself, which from a purely formal point of view, could be accessed in one form or another (for example, by becoming national of other state by naturalization), the attention is turned to the inequality of life chances concerning membership to this or that political community.

The proposals of the author to address the inherited citizenship, which she finds unjust, are polemical and have been widely discussed. First, she proposes a levy to be paid once in a lifetime by the citizens of wealthy polities, who happened to receive the citizenship they have. The levy would be subject to exemptions and deductions, depending on the situation of each individual, and could be replaced by a public service alternative. Moreover, citizens of a country which commits to receive more immigrants could low their citizens’ rates⁹⁶⁶.

⁹⁶¹ SHACHAR, Ayelet. The birthright lottery... op. cit., p. 3.

⁹⁶² SHACHAR, Ayelet. The birthright lottery... op. cit., p. 4.

⁹⁶³ Ibid.

⁹⁶⁴ Ibid., p. 5.

⁹⁶⁵ Ibid., p. 7.

⁹⁶⁶ Ibid.

Benhabib challenges the view that there would be a legal obligation, by the states, to create such a system of distributive global wealth, by taxing the inherited citizenship of the citizens from well-off countries. She contends that such a proposal is moral acceptable, based on the concern that liberal societies have on regulating intergenerational property rights, with the aim to promote equality among citizens. In this sense, it is true that “such transfers radically influence the baseline of socio-economic status from which each child starts”⁹⁶⁷. But in practice, Shachar’s idea would be too radical, comparing to a more prudential claim for the states to increase considerably their international aid to global development, as well as reforming global institutions, both with the aim to create a more equitable distribution of resources and access to opportunities across the globe. For Benhabib, Shachar does not consider those options for being skeptical about global governance and world citizenship⁹⁶⁸.

Finally, the author criticizes the fact that, in such a scheme, the efforts of the earlier generations would be totally dismissed, lacking with respect for their labour, which contributed to the enjoyment of certain benefits for their successors⁹⁶⁹. What is certain is that the sharp criticism on the birthright citizenship, and the innovative proposal of a solution for its “natural” inequality, is a major contribution on the subject, being able to be seized on future debates about global citizenship.

Apart from this important discussion related to global inequality, the debate on the denationalization of citizenship leads to the questioning of what kind of approach then, would favor a more open view of citizenship, not strictly tied to the nation-state? The answers to this question are debatable depending on the local context, but from the point of view of international law, it is interesting to explore the conclusions of those who reflected upon the acknowledgement of postnational forms of belonging.

Rubenstein and Adler point their intention to go beyond the lesson of Linda Bosniak about the denationalization of citizenship⁹⁷⁰, suggesting some concrete consequences for the phenomenon. They argue that the first consequence, would be the increasing willingness in international treaty law to acknowledge multiple nationality; the second, the disregard for the notion of allegiance to a state, which would lose its utility as the multiplication of

⁹⁶⁷ BENHABIB, Seyla. Birthright citizenship, immigration, and global poverty. *University of Toronto Law Journal*, v. 63, n. 3, p. 496-510, 2013.

⁹⁶⁸ *Ibid.*

⁹⁶⁹ *Ibid.*

⁹⁷⁰ BOSNIAK, Linda. Denationalizing Citizenship... *op. cit.*

memberships increases; and third, a more consistent “movement away from the centrality of the state in international law”⁹⁷¹.

Exploring the practical proposals of this bold view, the following ideas are suggested: the right to diplomatic protection for the state would extend to *anyone*, formally nationals or not, provided they have a significant link with the state in question (by birth, blood or later association); the expansion of access to international justice to non-state actors, such as non-governmental organizations, which represent collective interests; the idea that effective nationality should be given more strength than formal nationality, not based on allegiance but on relevant social, psychological and cultural facts, depending on each individual case. And finally, they argue that international law in general could start to adhere to the progressive content expansion of citizenship, what would put it “more in line with a rights-based, individualized focus for international law, rather than a sovereignty-based one”⁹⁷².

Another well elaborated account of this “what then?” is brought by Dora Kostakopoulou, in her book *The Future Governance of Citizenship*. After considering different developments and options to understand widely the role of citizenship nowadays, she bets on a *pluralist* mode of inclusion, relying on the need of finding paths to promote equal participation of minorities in democratically governed societies⁹⁷³.

The main feature of this pluralist view is that it does not condition political belonging on cultural homogeneity or assimilation. It is instead a

vision of community where belonging is defined in terms of being together in a common adventure and sharing responsibility for institutional design and democratic dialogue, rather than on pre-political communalities. The bonds that hold a pluralistic community together are political; namely, the members’ commitment to an (open-ender) future, in the sense of working together, communicating and engaging in the design and re-design of institutions that accommodate differences and respond to distinct as well as common needs⁹⁷⁴.

Thus, what the pluralist account responds to, is the concern that multiculturalism could create encapsulated, homogenous communities with low interaction among themselves. With pluralism there would be more open channels of intercultural interaction and co-operation among members of society. In this approach, diversity is not seen as a threat to social cohesion. Non-native citizens would not be seen as having “problems of integration”, but their demands are seen as legitimate forms of questioning “institutionally embedded

⁹⁷¹ RUBENSTEIN, Kim; ADLER, Daniel. *International Citizenship...* op. cit.

⁹⁷² Ibid.

⁹⁷³ KOSTAKOPOULOU, Dora. *The Future Governance of Citizenship...* op. cit., p. 173.

⁹⁷⁴ Ibid., p. 177.

forms of inequality and domination”, many times caused by “national majoritarian discourses [which] portray minority groups as somehow deficient and inferior”⁹⁷⁵. This view leads to attempts of acculturation, like requiring or stimulating migrants to learn about the host country’s history, costumes or tradition, with an emphasis on their responsibility to integrate. In her words, “their frustration about continuing discrimination and racism, are interpreted as expressions coming from disloyal and troublesome minorities who must learn to respect the laws, codes and conventions as much as the majority”⁹⁷⁶. Instead, a pluralist approach emphasizes there should be a permanent dialogue, a reciprocal learning by which every actor recognizes no one is essentially better than the other. For that to be possible, it has to be created a protective framework, guaranteeing that every member of society, no matter if autochthonous, settled or newcomer, is able to enjoy equal, or when it is the case, equitable status, protection and opportunities⁹⁷⁷.

Finally, the relevance of this view is that it stresses the possibility of anyone to participate, provided it is stimulated the capacity of the individual to build, participate and maintain the ties with others on the basis of a common ethical conviviality, instead of previously classifying or separating residents on the basis of ethnic, religious or cultural differences. It corresponds, therefore, with our view of splitting the concept of nation, apart from the functioning of the state, which, if truly democratic, has as crucial role to mediate differences, without making unjustified distinctions and preferences, if not only to reduce socioeconomic inequality.

Castles and Davidson identify this changing paradigm of citizenship and defend the need of stimulating new civic virtues⁹⁷⁸, which replace the old nation-state shared identity. That kind of identity marker is based in one or more common languages, a national schooling system which teaches a single history of the nation, creating a shared collective memory, and symbolisms such as a flag and a national anthem⁹⁷⁹. Although this national civic education worked for some time, with the growth and complexification of immigration fluxes, and multiculturalization of urban societies, that experience became increasingly outdated. The

⁹⁷⁵ KOSTAKOPOULOU, Dora. *The Future Governance of Citizenship...* op. cit., p. 179.

⁹⁷⁶ Ibid.

⁹⁷⁷ Ibid.

⁹⁷⁸ The literally translated expressions in Portuguese *civismo* and *virtudes cívicas*, as they would be understood in Brazil, do not match with the view proposed here by Castle and Davidson, since those terms are more commonly associated with a conservative worldview, embedded in a patriotist and sometimes moralist discourse. This view seems to be linked with the content of the “Moral and Civic Education”, a school subject during the military dictatorship, which tended to legitimate the regime with nationalist arguments. See ASSUNÇÃO, Thiago. *Educação em Direitos Humanos...* op. cit.

⁹⁷⁹ CASTLES, Stephen; DAVIDSON, Alastair. *Citizenship and Migration...* op. cit., p. 213.

multiple belongings, to which people are subject since globalization took shape, blurred the realm of national identity, since it became impossible to “equate civic education exclusively with teaching people to love their country”⁹⁸⁰. Hence the increased acceptance of dual or multiple nationality, even if that fact alone is not capable to encompass the many variants of this multilevel, complex belongings.

The proposed civility, therefore, is not based on the willingness to kill or die for the nation, but instead, in virtues to be continuously stimulated and shared, such as “tolerance, trust, mildness and love”⁹⁸¹. Putnam calls them *social capital*, referring to “features of social organization, such as trust, norms and networks, that can improve the efficiency of society by facilitating coordinated actions”⁹⁸². As seen, there is a strong ethical component on this view, but also a practical, problem solving orientation. In our opinion, both characteristics are urgently needed today, since individualism, skepticism and indifference towards social problems, seem to have gained space among people in a worldwide fashion.

One must acknowledge, however, that to talk about human values has been an intricate question lately, considering that “such values were considered religious and to be abhorred in favour of enlightened reason”⁹⁸³. We submit however, that one shall not confuse legitimate and lasting human aspirations, recognized by human rights universally adopted, with particular world views related to faith or moral, that are intrinsically personal. Any attempts to impose behaviors or policies based on particularistic world views, both the majoritarian (which is also particular, although dominant), or as expression of a minority, are incompatible with the view of a broader ethical persecution of the common good, that is, the quest for social wellbeing based on a minimum convergence of attitudes, and a collective effort to pursuit a more just, free and equitable society.

In this sense, it seems clear that to sustain peaceful relations among growing diversities, quality education plays a key role in preparing citizens and non-citizens for conflict prevention and resolution. Notions of ethics in human relations, constitutionally adopted rights and duties, celebration of the cultural diversity, absolute respect for the differences, the urgency of pursuing environmental sustainability, and other collective safeguards of a

⁹⁸⁰ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration...** op. cit., p. 214.

⁹⁸¹ *Ibid.*, p. 216.

⁹⁸² PUTNAM, Robert D.; LEONARD, Robert; NANETTI, Raffaella Y. **Making democracy work: Civic traditions in modern Italy.** Princeton university press, 1994, *apud* CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration...** op. cit., p. 217.

⁹⁸³ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration...** op. cit., p. 218.

convivial life in society, should be addressed in formal and informal education at all levels, through human rights education, especially in violent countries like Brazil⁹⁸⁴.

Exploring the values proposed by Castles and Davidson, probably *tolerance* is the most urgent one, due to the obvious fact that without tolerance, there is no democracy. Citizenship should be understood in the context of an enlarged tolerance with the Other, and in the realm of migration, that is the base to any public policy aimed to succeed. Those policies depend greatly on the promptitude of population to be aware and feel compelled to act accordingly. Hence the need to focus on tolerance at large, what differs from the militant demand of specific individual or collective rights, which are also necessary in certain situations. The value of tolerance means that “even the intolerant or those who refuse to abide by democratic rules of debate have themselves to be tolerated” and “no shutting down of debate or use of repression is possible”⁹⁸⁵, if liberty of expression and conscience is to be regarded. That clearly does not preclude legal penalties in case of abuse or damage to others.

Mildness by its turn, would be understood as a quality which entails the ability to defend an argument without impose one’s own view, “even when we have the desire, the anger or the power to do so”⁹⁸⁶. And *love*, a small but meaningful word, residing in the innermost part of human condition, is taken as the act of “refusing to reduce individuals to the general characteristics of their ‘culture’ by looking at them in the face and taking them at ‘face value’”⁹⁸⁷. That means to look and recognize in the Other the same human vulnerability, and therefore desire to be loved, that everyone feels deep inside⁹⁸⁸.

In the same direction, the authors emphasize the promotion of global virtues, whose demand and practice already exist on the work of international institutions such as UNESCO⁹⁸⁹. The significance of those initiatives is one of the reasons why reforms on global governance are urgent, at least to give more coverage and effectivity to international institutions such as the United Nations and its specialized agencies, with the aim to deal

⁹⁸⁴ ASSUNÇÃO, Thiago. Educação em Direitos Humanos.... op. cit.

⁹⁸⁵ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration**... op. cit., p. 219.

⁹⁸⁶ Ibid.

⁹⁸⁷ Ibid.

⁹⁸⁸ These categories are certainly not studied in law or jurisprudence, and although mentioned here, sourced in a political science text, they are present in a variety of writings in the realm of philosophy, psychology and arts, what reveals the importance of transdisciplinarity, that is, an attitude of openness on scientific research, in order to benefit from categories studied in other disciplines, especially when those categories have no closed definitions, since they refer to human experiences and feelings.

⁹⁸⁹ See TAWIL, S. **Education for ‘Global Citizenship’**: A framework for discussion. UNESCO Education Research and Foresight, ERF Working Papers Series, No. 7. Paris: UNESCO, 2013; UNESCO. **Citizenship Education for the 21st Century**, 1998; UNESCO, **Declaration of Principles on Tolerance**, Adopted in 16 November 1995.

more appropriately with questions related to peace, human development and democracy, to the extent that the problems become globalized and citizenship denationalized.

Working the notion of a “global citizenship” as an additional (yet thin) layer of citizenship, has the advantage to be supported by transnational networks of non-state actors, which creatively connect and join forces to address gaps not covered by state action, in the realms of democracy, human rights and environmental protection. Those organizations and their development cooperation projects help to empower people against the chaos of social difficulties⁹⁹⁰, helping to activate the participation aspect of citizenship, and trying to convert into reality the aphorism “think globally, act locally”⁹⁹¹.

Probably a global education project encompassing the fundamentals stated above would not be feasible, considering the complexity and great diversity of political, social and economic needs in different parts of the world. But these fundamentals could be labored through national curricula and initiatives at the local level, adapting to the needs of each particular society. Sharing good practices and connecting well succeeded projects could be done through the new information technologies.

Nevertheless, although the internet has democratized the access to knowledge and connected people to an unprecedented level⁹⁹², it is still not accessible by a huge number of individuals around the world⁹⁹³. Similarly, although English has become in practice a global language, what can have the advantage to facilitate some multicultural dialogues and exchange of information, its knowledge is limited to the native speakers and a privileged minority, who can afford to learn it as a second language. In any case, the formidable linguistic diversity, which represent different cultures and ways of living, should never be disregarded.

In any case, in democratic societies, the only way to achieve social peace and the respect for the rule of law, which bound people together irrespectively of cultural

⁹⁹⁰ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration**... op. cit., p. 223.

⁹⁹¹ This phrase has been used widely in many different contexts, especially in relation to environmental protection and the power that everyone has of applying in first hand globally spread solutions. The origin of the expression is disputable, been attributed to the Scottish urban planner Patrick Geddes (*Cities in Evolution*, 1915), David Brower (founder of Friends of the Earth, 1969), René Dubos, former UN advisor for the United Nations Conference on the Human Environment (1972) and the French sociologist Jacques Ellul.

⁹⁹² One should be aware that the standardization of communication, mainly the internet, which to some extent is controlled by giant multinational companies which have their own goals, not necessarily open to public scrutiny, if not carefully designed by a diversity sensitive approach, can lead to the disregard for cultural diversity, overlooking communities' need to maintain older or create alternative forms of socialization, which better fit local practices and expectations.

⁹⁹³ According to the International Telecommunications Union, while the percentage of individuals using internet in 2017 is of 81 per cent in developed countries, it drops to 41,3 per cent in developing countries, and 17,5 per cent in the least developed countries, with a global average of 48 per cent of world population. Available at: <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> Accessed on: 29 Sep. 2017.

differences, is through an open and continuous civilized dialogue. And that can only be done through “conversational restraint”, that is, a dialogue in which each participant not only exercises an active listening, respecting and learning from divergent views, but also, a dialogue used to “discover what all political participants find not unreasonable, so as to be pragmatically productive”⁹⁹⁴. In any level of public debate, in person or online, that kind of orderly discussion, in which full freedom of expression is guaranteed, but at the same time members are previously committed to follow common accorded rules of conflict management, and most important, the focus is maintained on finding solutions (instead of simply complaining or searching someone to blame), is hardly achieved in places where a strong sense of democracy is not embedded on peoples’ education and culture⁹⁹⁵.

Therefore, only well-functioning democracies gather the conditions to avoid a return to a conception of citizenship in which the citizen is a warrior, in defense of the “ours” (values, tradition, religion) in opposition to the strange Other, whose difference is suspicious or deemed as undesirable⁹⁹⁶.

Those virtues, as argued above, can be included in educational practices, without any kind of proselytism, but instead, departing from the fact that every actual or future citizen of the state is equal in rights and consideration, and should be treated with respect⁹⁹⁷ for his unique experience, identity and expectations. Moreover, every citizen of a given polity is also a citizen of a vast world, full of contradictions, and there is no other path to fix the huge conflicts and inequalities of this global community if not by rethinking our own pre-established political and cultural practices, to a point that self-constrain, tolerance, empathy and hospitality towards the Other becomes the “lowest common denominator” of accepted social practice, from the individual to the international level.

⁹⁹⁴ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration**... op. cit., p. 226.

⁹⁹⁵ We argue that this kind of exercise of citizenship, with sound public engagement and absolute respect for divergent views, is exactly what is critically missing in Brazilian’s civil society nowadays, since radical political polarization and therefore, the lack of commitment to find common ground, turned the dialogue impossible, what delays the way out of an economic and political crisis. It actually turns it into a cultural crisis, which is even more dangerous for democracy, since it open the doors for ultranationalist and populist promises, that not rarely elect scapegoat as public enemies (such as immigrants and refugees), deepening the breakdown of social cohesion and solidarity.

⁹⁹⁶ CASTLES, Stephen; DAVIDSON, Alastair. **Citizenship and Migration**... op. cit., p. 224.

⁹⁹⁷ DWORKIN, Ronald. A new philosophy for international law. **Philosophy & Public Affairs**, v. 41, n. 1, p. 2-30, 2013.

3.4.5 Towards an international (human) right to citizenship

As studied above, international human rights confer a second layer of citizenship for those who are citizens of a state, for the non-citizen residents, who are outside their state of origin, as well as for migrants in irregular situation, refugees and stateless persons.

Peter Spiro considers citizenship as the “last bastion of national sovereignty”, since international norms have advanced in almost every sphere of domestic governance, but nationality laws remained relatively protected from that trend, even if he sees signs that the absolute reserved domain of the states in this area is fading away⁹⁹⁸. The central question for the author is to acknowledge that citizenship is starting to be seen as a right in itself, apart from a generic human right to a nationality and the avoidance of statelessness. This trend is represented by the passage of dual (or multiple) citizenship from something undesirable by the states, to a status which it is related to personal identity and individual autonomy. Indeed, for the author the right to retain multiple citizenship is on its way to become an internationally recognized right⁹⁹⁹.

Moreover, naturalization is also being subject of attention by the international law. Certain standards start to appear, surpassing the logic that it is uniquely upon state authorities to determine the criteria for turning a migrant into a citizen. For instance, the 1997 European Nationality Convention demands that

Each State Party shall provide in its internal law for the possibility of naturalization of persons lawfully and habitually resident on its territory. In establishing the conditions for naturalization, it shall not provide for a period of residence exceeding ten years before the lodging of an application¹⁰⁰⁰.

This treaty reflects a nearly universal practice among states, in which anyone can become a citizen of a state due to long-term residence, provided the criteria of each state is achieved, normally being requested a residence period of ten years or less¹⁰⁰¹.

These trends on multiple nationality and naturalization point in the direction of a necessary shift to a “territorial/civic model of citizenship”, in which citizenship practices are more closely regulated internationally, in the name of the human rights effectiveness. The

⁹⁹⁸ SPIRO, Peter J. *Mandated Membership...* op. cit.

⁹⁹⁹ *Ibid.*

¹⁰⁰⁰ COUNCIL OF EUROPE. *European Convention on Nationality...* op. cit.

¹⁰⁰¹ Normally the period of residence required is around 5 years. SPIRO, Peter J. *Mandated Membership...* op. cit., p. 99.

right to “any” nationality, becomes the right to a “particular nationality”, what clearly has an impact in the way statelessness is seen¹⁰⁰².

In fact, statelessness occurs because no state is willing to confer nationality to the individual, and in the classical framework, nothing can prevent states from acting like that. But with the shifts appointed along this thesis, states are starting to become “in debt” with any stateless person in their territory, subjecting governments to public criticism. At the same time, the evolving interpretation on nationality matters is likely to arrive to the international human rights protection systems, compelling states to adapt to the institutionalization of the protection of citizenship by international law.

For Rainer Baubock, “there is a mismatch between citizenship and the territorial scope of legitimate political authority”¹⁰⁰³. Considering that citizenship practices have become “politicized and volatile” due to “anxieties over security risks and failed integration of newcomers”, the author proposes what he calls “stakeholder citizenship”¹⁰⁰⁴, a principle to guide citizenship policies towards migrants especially in North America and Europe (or democracies in general).

The stakeholder principle would apply to long-term migrant residents, and also to first-generation of emigrants and their children born abroad, since all of them maintain an interest in belonging legal and politically to the state in question, given their life and future depend on the laws and political events of this country¹⁰⁰⁵. The idea is that “citizenship status and rights ought to be extended to all persons whose personal fate is tied to the long-term prospects of a particular polity”¹⁰⁰⁶. That means granting citizenship on the basis of social attachment, case by case.

The author argues that the stakeholder principle was already put in place in the famous Nottebohm dictum: “nationality is a legal bond having its basis a social fact of attachment, a genuine connection of existence, interests and sentiments”¹⁰⁰⁷. This principle would be increasingly reflected in the changing practices concerning nationality, since more and more countries tolerate multiple nationality; voting rights are being gradually extended to non-nationals; and nationality laws in Europe are being slowly reformed to include *jus soli*

¹⁰⁰² SPIRO, Peter J. Mandated Membership... op. cit., p. 99.

¹⁰⁰³ BAUBOCK, Rainer. Stakeholder Citizenship... op. cit.

¹⁰⁰⁴ Ibid.

¹⁰⁰⁵ Ibid.

¹⁰⁰⁶ BAUBOCK, Rainer. Stakeholder Citizenship... op. cit.

¹⁰⁰⁷ INTERNATIONAL COURT OF JUSTICE (ICJ). **Nottebohm Case (Liechtenstein v. Guatemala)**... op. cit.

citizenship¹⁰⁰⁸. For this project to advance, it should be created an enhanced coordination of citizenship policies, among sending and hosting countries, to make sure there would be no unjustified overinclusion (unjustified multiple nationalities) or more importantly, exclusionary decisions, which would affect negatively the individuals concerned.

Unfortunately, that view is confronted nowadays in the West with the rise of anachronic defenses of national sovereignty, as well as growing fears related to security threats and integration failure of immigrants and refugees. Nevertheless, “restricting access to citizenship for immigrants and their children creates a growing legitimacy deficit for democratic governments”¹⁰⁰⁹. But this argument is unlikely to impress politicians from receiving countries, since they are not accountable to persons excluded from the right to vote. The solution, for Baubock, is to take the debate to the public arena, remembering, in the case of USA, Canada and others, their past as nations built by immigrants; and in the case of Europe, looking to the future and acknowledging that countries with an aging population, will need immigration for demographic and economic reasons¹⁰¹⁰.

Ballin instead, believes that there it is in course a redefinition of citizenship, which will make it progressively more tied with human rights than with the state¹⁰¹¹. On that perspective, the author advocates for a human right to be a citizen, which would require from states not merely to respect the norms against statelessness, but

in force of the principles of democratic self-governance and equal respect due to anyone everywhere, states should restate their ‘sovereign’ power to recognize, give or withhold citizenship as an *obligation* mirroring the human right to citizenship in the state [...] where he or she is at home¹⁰¹².

Similarly, Seyla Benhabib argues for a human right to membership, which would be broader than the right to citizenship¹⁰¹³. This right would materialize in a right of naturalization, after first admission, which could not be based on the *kind* of person you are, as for non-elective attributes like race, gender, religion, ethnicity, language or sexuality, but instead, could use criteria related to qualifications, skills and resources, such as length of stay,

¹⁰⁰⁸ BAUBOCK, Rainer. Stakeholder Citizenship... op. cit.

¹⁰⁰⁹ Ibid.

¹⁰¹⁰ Ibid.

¹⁰¹¹ BALLIN, Ernst H. **Citizens’ Rights and the Right to be a Citizen**. Leiden/Boston: Brill Nijhoff, 2014. p. 117.

¹⁰¹² BALLIN, Ernst H. **Citizens’ Rights...** op. cit., p. 122.

¹⁰¹³ BENHABIB, Seyla. **The Rights of Others: Aliens, Residents, and Citizens**. Cambridge: Cambridge University Press, 2004. p. 141.

language competence, proof of civic literacy and demonstration of material resources¹⁰¹⁴. As long as those criteria are made available in advance for the candidate to membership (right to know), and there is in place a clear and lawful procedure, with adequate due process safeguards, the migrant could be a candidate to become officially a member of the society, enjoying full civil rights in the polity concerned¹⁰¹⁵.

This view is commendable as an attempt to democratize the access to citizenship, but doubts remain in relation to its widespread applicability by states, since some criteria could eventually generate distortions, apart from the possibility of generating a “gold rush”, with millions of people trying to fulfill the criteria for membership in one or more states at any cost, with all the commercialization that could come with it. It is truth, however, that similar criteria of membership based on scores already exists¹⁰¹⁶.

At the same time, a relevant concern is that, if by one hand, the territorial approach is likely to increase inclusion for the “outsiders” who are in, on the other, this external mandated access to citizenship can lead to a decline of state-based solidarities. But Spiro ponders that, as the sense of national community is likely to diminish, with thicker international norms on citizenship attribution, so it will the importance of the national state as locus for the protection of rights and distribution of resources, opening space of news forms of association “beyond the scope of legalization”¹⁰¹⁷.

In addition, the territorial conception of citizenship, in which constraints on absolute discretion of states emerge, could lead to a stance of identity reinforcing, instead of identity diluting. For instance, someone who does not have much more than territorial presence, in terms of cultural identification with the place of residence, can feel included through the

¹⁰¹⁴ The author reminds that those “marketable skills are all conditions which certainly can be abused in practice, but which, from the standpoint of normative theory, do not violate the self-understanding of liberal democracies as associations which respect the communicative freedom of human beings qua human beings”. BENHABIB, Seyla. **The Rights of Others: Aliens, Residents, and Citizens**. Cambridge: Cambridge University Press, 2004. p. 139. In any case, we consider that a purely “material resources” criterium could be problematic in terms of fairness with the candidates to such an intended isonomic naturalization procedure, at least if used to classify or “rank” individuals. That would be different, of course, of charging a modicum fee for the procedure to take place, which is perfectly justified given administrative costs, which not necessarily have to represent an additional burden for stablished citizens.

¹⁰¹⁵ Ibid., p. 140.

¹⁰¹⁶ Like the skilled migration programs of countries as Canada and Australia, which rely on objective criteria, attributing points for each accomplishment or criteria fulfilment.

¹⁰¹⁷ At the same time, Spiro adverts that the diminishing of the state can lead to the appropriation of its functions by “less accountable private forms of association”, which would be not subject to external standards or public enforcement. The solution is to be aware that any sort of transfer in competence in this regard should be carefully considered and subject to previous public scrutiny, in name of the public interest and not to danger human rights. BENHABIB, Seyla. **The Rights of Others...** op. cit., p. 101.

right to become a citizen¹⁰¹⁸, departing from the fact that unconditional hospitality¹⁰¹⁹ was offered, what can enhance his sense of belonging, with the benefit that more rights would be available for the person concerned, and the state would have nothing to lose in augmenting the social and cultural inclusion¹⁰²⁰.

Therefore, replacing the absolute discretion of the state on conferring citizenship, for a more qualified analysis of the personal situation and real needs of immigrants and emigrants, would certainly be more in line with the contemporary context of globalization and the current intensification of human displacements.

¹⁰¹⁸ SPIRO, Peter J. *Mandated Membership...* op. cit., p. 101.

¹⁰¹⁹ See the reference to the unconditional hospitality draw by Derrida in the section 4.1.

¹⁰²⁰ Probably, the main reason why this approach is not publicly considered in host countries to date, is that most mainstream parties and politicians still believe that national states should “protect” themselves against what “to many people” trying to immigrate. In this context, any gesture of facilitating citizenship grant could be seen as “opening the doors”, with supposedly additional demographic pressures and consequent public opinion anger, in times of strength of the cultural closure.

4 STATELESSNESS IN BRAZIL AND THE CONSTRUCTION OF A POLICY OF HOSPITALITY

In this chapter, the intention is to look to the phenomenon of statelessness in Brazil, departing from the changes and recent policies adopted in the migratory and refugee laws, arriving to the point which it was finally adopted a specific regulation for stateless persons in the country. Taking Brazil as a case study, the final part of the thesis searches to give a more concrete application to some of the notions raised during the work, although the focus will be to examine the Brazilian experience bearing in mind the category of hospitality, as developed by Francisco de Vitoria, Hugo Grotius, Emmanuel Kant and Jacques Derrida.

4.1 Hospitality as a key for the relation with the Other

Francisco de Vitoria is known as one of the fathers of international law¹⁰²¹. The Professor of Salamanca built his theory of free movement of peoples, developing the notion of *ius communicationis*, a universal norm based on the natural sociability of human being¹⁰²². In effect, he thought that it was a natural law to welcome strangers, since everyone should be allowed to travel and visit other lands freely. It would be evil to refuse welcoming foreigners, as long as they do not cause harm to the host society¹⁰²³. Even if his lessons date from the XVI century, and were embedded therefore in the colonial mentality from that time¹⁰²⁴, his view of hospitality based on equality among nations, and natural friendship (*amiticia*) between men, was an early contribution for the law of the nations in regard to the free movement of peoples¹⁰²⁵.

Hugo Grotius consolidated Vitoria's view, outside the context of colonization, by referring to a "sacrosanct law of hospitality" in his masterwork *Mare Liberum*¹⁰²⁶. In addition to his well-known contribution relating to the right of innocent passage, he argues that

¹⁰²¹ See SCOTT, James Brown; DE VITORIA, Francisco. **The Spanish origin of international law**: Francisco de Vitoria and his law of nations. The Lawbook Exchange, Ltd., 2000; and DE VITORIA, Francisco. **Political Writings**. Cambridge: Cambridge University Press, 1991. v. 250

¹⁰²² CHETAİL, Vincent. *Sovereignty and Migration*...op. cit.

¹⁰²³ Ibid.

¹⁰²⁴ For Chetail, "although this colonial bias undermined his very notion of equality between nations, Vitoria wrote the prologue of international law by drawing the contours of an international society governed by universal norms". Ibid., p. 906.

¹⁰²⁵ Ibid., p. 904-905.

¹⁰²⁶ GROTIUS, Hugo. **Hugo Grotius Mare Liberum 1609-2009**: Original Latin Text and English Translation. Edited and Annotated by Robert Feenstra. Brill, 2009. p. 29.

everyone has the right to leave his own country, and to remain in a foreign one. While leaving the land could be constricted only by interest of the society, in the case of debts and in times of war, the right of a foreigner to remain in another country presupposes a just cause, as well as his respect for the local laws. Grotius goes further to assert a right of asylum, considering that “it is our duty to have compassion on such whose misery is owing not to their crimes but misfortune”¹⁰²⁷, and that “refugees are [...] entitled to protection because they are innocent of [any] crimes”¹⁰²⁸. Therefore, for the Dutch publicist, hospitality is ought to guide the relations between people and the states.

In his “Perpetual Peace: A Philosophical Sketch” (1795), Kant draws the idea that peace among nations require, among other conditions, a cosmopolitan law limited by the requirements of a universal hospitality. In his view, hospitality means the right not to be treated with hostility, that is, the foreigner should not be viewed as enemy. The philosopher refers to a “right of visitation”, which belongs to “all mankind in virtue of our common right of possession on the surface of the earth”¹⁰²⁹. His thought, expressed in the passage below, is revealing of the actuality of his ideas in relation to the themes treated along this thesis, especially in relation to the importance of human rights for the reshaping of citizenship:

Since the narrower or wider community of the peoples of the earth has developed so far that a violation of rights in one place is felt throughout the world, the idea of a law of world citizenship is no high-flown or exaggerated notion. It is a supplement to the unwritten code of the civil and international law, indispensable for the maintenance of the public human rights and hence also of perpetual peace.¹⁰³⁰

Jacques Derrida, from a more subjective perspective, invites us to reflect about an “unconditional hospitality”, which would oppose, in principle, to the conditional hospitality laws, determined by the norms, rights and duties compelling hosts and guests¹⁰³¹. The unconditional law, of an unlimited hospitality, means the “offer to the one who arrives all your *chez-soi* [...], without asking his name, nor compensation”¹⁰³². This law requires the more specific laws regulating hospitality, since *the law* is superior in relation to *the laws*, but at

¹⁰²⁷ GROTIUS, Hugo; BARBEYRAC, Jean; TUCK, Richard. *The Rights of War and Peace* (Natural Law and Enlightenment Classics). New York: Liberty Fund, 2005, as quoted by CHETAIL, Vincent. *Sovereignty and Migration...op. cit.*, p. 909.

¹⁰²⁸ Ibid.

¹⁰²⁹ KANT, Immanuel. **Perpetual peace: A philosophical sketch**. Cambridge: Cambridge University Press, 1970.

¹⁰³⁰ Ibid.

¹⁰³¹ DUFOURMANTELLE, Anne; DERRIDA, Jacques. **Anne Dufourmantelle convida Jacques Derrida a falar de hospitalidade**. São Paulo: Escuta, 2003. p. 69.

¹⁰³² Ibid., p. 70.

the same time, contingent on them. The law of hospitality is a duty-to-be, a direction to be followed for the refinement of the hospitality laws, towards perfectibility. If it was not like that, the unconditional hospitality would be in practice a utopia¹⁰³³.

Derrida differentiates his notion of hospitality from the one drawn by Kant in his *Perpetual Peace*. Indeed, the unconditional hospitality is not a categorical imperative as Kant draws, considering that, for being unconditional, it cannot be required as a duty, nor practiced “by duty”, but instead offered without questionings to the guest¹⁰³⁴.

Moreover, according to the philosopher, there are two common nostalgies for the displaced persons, whatever is the reason of their displacement, thus including the migrants, the refugees and the stateless migrants. The first is a profound desire to return to their homeland to bury their dead. This is so because, in a certain way, what defines “home” is the place where are (or will be) buried one’s parents and grandparents. This is the place in relation to where all the distances are calculated¹⁰³⁵.

On the other hand, the exiled, unrooted, nomads, expelled, deported, foreigners in general, will always recognize a fundamental facet of their identity, of their membership to a political community: their mother tongue. Each ones’ mother tongue, indeed, reminds home, a home that is impossible to leave, a “second skin” that we carry with us wherever we go¹⁰³⁶. For Godoy, during the encounter with the Other, for instance, with the refugee speaking a foreign language, the dialogue is only possible if it is present a certain cultural mediation, an adaptation to the context of the other’s language. To really understand the Other, it is not enough to speak his language, if one does not live in that language. In this sense, the hospitality requires an openness to the other, considering “we are the other of the Other”¹⁰³⁷.

Derrida argues that the language will always be involved in the action of hosting, welcoming, accommodating the Other. He even reflects if the unconditional hospitality would not be more absolute if it was possible to suspend a determined speech, for instance, to avoid asking “who are you? Where do you come from?”¹⁰³⁸ Those questions could

¹⁰³³ DUFOURMANTELLE, Anne; DERRIDA, Jacques. **Anne Dufourmantelle convida Jacques Derrida a falar de hospitalidade...** op. cit., p. 70.

¹⁰³⁴ Ibid.

¹⁰³⁵ Ibid., p. 79.

¹⁰³⁶ Ibid.

¹⁰³⁷ GODOY, Gabriel Gualano de. Refúgio, hospitalidade e os sujeitos do encontro. In: GEDIEL, José Antônio Peres; GODOY, Gabriel Gualano de. (Orgs.). **Refúgio e hospitalidade**. Curitiba: Kairós Edições, 2016. p. 41. Our translation.

¹⁰³⁸ DUFOURMANTELLE, Anne; DERRIDA, Jacques. **Anne Dufourmantelle convida Jacques Derrida a falar de hospitalidade...** op. cit., p. 79.

eventually limit the hospitality, when announcing any kind of judgment in relation to the personal conditions of this Other. In defense of his hospitality, the author leaves the questioning:

how to give rise to a policy and an ethics [...], a law that still respond to the new injunctions of unprecedented historical situations, that effectively correspond to this [the hospitality], changing the laws, determining another citizenship, democracy, international law, etc.? Therefore, really intervening in the condition of hospitality in the name of the unconditional, even if such pure unconditionality seems inaccessible, and inaccessible not only as a regulatory idea [...] but for structural reasons [...]¹⁰³⁹.

Building on those reflections, it is possible to think that all the international refugee law is constructed on the basis of an ideal of hospitality, by which the person who suffers persecution or severe violations of human rights acquires a right to enter, to be received, and to stay temporarily. But in effect it might not be enough to open the geographical borders to receive the Other, when in a certain sense, the border is inside ourselves: usually, “we” (the nationals) represent the most difficult border to be surpassed by the “outsider”¹⁰⁴⁰. With the increasing international migrations, and the consequent multiculturalism of many societies, the outsider is already inside¹⁰⁴¹, what dislocates the debate from the border control, to the presence, to the encounter and to the relations of this different, made Other.

Here gains importance the construction of an “ethics of the encounter”, as proposed by Godoy. He explores the situation of a young Colombian in Brazil, who applying for the status of refugee, had it denied by the Brazilian authorities, based in the allegation that he was a member of a paramilitary group. By testifying the case in first person on his work for the UNHCR, the author identifies a lack of effective listening of the applicant, who was not properly understood in his narrative. In his words,

It is fundamental to understand how the legal procedure happens so as to operate a distance from the concrete subject and his condition at the moment of the

¹⁰³⁹ DUFOURMANTELLE, Anne; DERRIDA, Jacques. **Anne Dufourmantelle convida Jacques Derrida a falar de hospitalidade...** op. cit., p. 129, our translation. Original: Como dar lugar a uma política e a uma ética [...], a um direito que respondam ainda às novas injunções de situações históricas inéditas, que nisso [à hospitalidade] correspondam efetivamente, mudando as leis, determinando outra cidadania, a democracia, o direito internacional, etc.? Portanto, intervindo realmente na condição da hospitalidade em nome do incondicional, mesmo que tal incondicionalidade pura pareça inacessível, e inacessível não apenas como ideia reguladora [...] mas por razões estruturais [...].

¹⁰⁴⁰ GODOY, Gabriel Gualano de. Refúgio, hospitalidade e os sujeitos do encontro... op. cit., p. 43.

¹⁰⁴¹ GODOY, Gabriel Gualano de. O direito do outro, o outro do direito: cidadania, refúgio e apatridia. **Revista Direito e Práxis**, v. 7, n. 15, 2016.

encounter. And this real fellow, before the law, speaks but cannot be heard. What you say does not make sense. And what makes sense is a danger¹⁰⁴².

This example illustrates well that the privileged locus for hospitality to take place, is in the encounter with the Other. And if this encounter is since the beginning marked by fear, suspicion, diffidence or skepticism, there is no possibility of real hospitality. The hesitation in welcoming this Other, or the imposition of arbitrary formal or verbal conditionings, undermine the way this Other arrives and acts, experiencing lack of trust, and therefore, affecting negatively his social integration in the local community.

Emmanuel Levinas brings the idea that the encounter has a clear human face. That is, the logic of “every man for himself”, can only change radically in the presence, face to face, with the Other, since from his helpless human misery, it will become evident the need of acting with generosity and compassion¹⁰⁴³. In other words, the face of the other in our presence can operate an ethical inversion. And this view is confirmed by the persistent indifference of the bulk of the population, from all countries, in relation to economic migrants, refugees and stateless persons fleeing in chaotic conditions, appearing in their distant screens on precarious sinking boats; and on the other hand, the attitude of some residents of the Greek coasts where the boats arrive, when that tragedy is unfolding right before their eyes, compelling them morally to take immediate action to help those unknown others, victims of an inhuman journey for survival¹⁰⁴⁴.

To conclude, when hospitality is considered, in the case of stateless persons, it is important to recognize that an appropriate approach is ought to be used to assert the condition of statelessness, avoiding distant, unaffected application of the law, since to be able to investigate the real situation, one must listen to the applicant’s personal history. It is necessary an effort to put oneself in the place of the other, in order to understand the most relevant

¹⁰⁴² GODOY, Gabriel Gualano de. Refúgio, hospitalidade e os sujeitos do encontro... op. cit., p. 50, our translation. Original: “É fundamental perceber como o procedimento jurídico acontece de modo a operar um distanciamento em relação ao sujeito concreto e sua condição no momento do encontro. E esse sujeito real, diante da lei, fala mas não consegue ser escutado. O que fala não faz sentido. E no que faz sentido, representa um perigo.”

¹⁰⁴³ LÉVINAS, Emmanuel; PIVATTO, Pergentino Stefano. **Entre nós**: ensaios sobre a alteridade. Vozes, 1997.

¹⁰⁴⁴ This is just an illustration of the power of the presence in relation to the Other sufferings, not constituting in any way a rule or pattern of reaction. The intention is to show that distance can provoke indifference, as proximity or presence is able to facilitate alterity. As Babis Manias, a Greek fisherman declared in 2015, after saving alone, swimming, around 20 immigrants from a wrecking boat, including kids: “They are souls, like us [...] I’ve never seen anything like it, the terror that can haunt a human’s eyes.” SMITH, Helena. Migrant boat crisis: the story of the Greek hero on the beach. **The Guardian**, Athens, 26 Apr. 2015. Available at: <https://www.theguardian.com/world/2015/apr/25/migrant-boat-crisis-the-sergeant-who-did-his-duty-towards-people-struggling-for-their-lives> Accessed on 01 Nov. 2017.

facts, discovering what exactly happened, from the legal point of view, for that individual to be rendered stateless. Even the request for presenting documents to attest relevant facts, as birth certificates, should take into consideration the particularities of each case, including the impossibility to recover them. Finally, it should be considered the eventual traumas, and actual despair, that might have plagued that person, who not exactly by choice is obliged to be in the presence of the state authority, asking recognition for reconstituting her life.

4.2 The recent attraction of migrants in Brazil

Brazil is a nation composed by many different ethnicities and cultures. The history of migrations in the country is rich and could not be treated in just a few pages. Therefore, only essential facts will be mentioned, by way of introducing the discussion.

The origins of immigration to the country dates back to the colonial period, which “configures the composition of the Brazilian population in the subsequent periods and forge the assimilation practices from one side, and discriminatory ones, from another”¹⁰⁴⁵. As known, the colonization by the Portuguese had the main objective of economic exploitation of the territory, and with that aim, it was brought to Brazil more than 4 million African slaves¹⁰⁴⁶, in a huge forced displaced movement of peoples, which marks until today the Brazilian society in terms of culture, socio-economic inequality and racial discrimination¹⁰⁴⁷.

After the abolition of the slavery in the country in 1888, a project of peopling was adopted on the basis of occupation of agricultural lands, with the deliberated attraction of European migrants, mainly to the South and Southeast. By 1930, strong restrictions on immigration are imposed by the Brazilian government, and a system of quotas of entrance is adopted in the Constitutions of 1934 and 1937¹⁰⁴⁸. In the following decades, the country did not receive big influxes of immigrants.

¹⁰⁴⁵ PATARRA, Neide Lopes; FERNANDES, Duval. Brasil: país de imigração. **Revista Internacional em Língua Portuguesa–Migrações**, v. 3, n. 24, p. 65-96, 2011, p. 8. Our translation.

¹⁰⁴⁶ Ibid.

¹⁰⁴⁷ Apart the extermination of great part of the indigenous populations. See RIBEIRO, Darcy. **O povo brasileiro: a formação e o sentido do Brasil**. Global Editora e Distribuidora Ltda, 2015.

¹⁰⁴⁸ The restrictions adopted in this phase is much discussed in the Brazilian literature, since it marks a shameful policy of “whitening” the country. According to Endrica Geraldo, “the adoption of the ‘whitening’ ideal, through miscegenation, became a path that would lead to a viable future for the nation while still guaranteeing the biological and social superiority of the white race. This ideal gained more and more space in the nationalist context of the First War, consolidating itself in the 1920s and 1930s, and defining white European immigration as a key issue in relation to miscegenation” (our translation). GERALDO, Endrica. A “lei de cotas” de 1934: controle de estrangeiros no Brasil. **Cadernos AEL**, v. 15, n. 27, 2012.

In the 1980s, the deep economic recession makes many Brazilians leave the country, until the middle of the 1990s, period in which, from recipient of migrants, Brazil passed to be mostly an emigration country. Many of those emigrated, reaching the USA, European countries (mostly Portugal, Spain and Italy¹⁰⁴⁹) and Japan, overstayed after their visa expiration, remaining in irregular situation. A big contingent of low-skilled Brazilian workers lived in the USA in this period, and thousands were deported trying to enter illegally¹⁰⁵⁰.

Since 2010, however, the return of Brazilian emigrants due to the improvement of economic conditions in the country, and mainly the increase of foreign immigration, made the admissions in the Brazilian territory raise considerably. In fact, the number of foreigners who obtained a working or residence visa in Brazil have increased by 60 per cent, from 43,993 issued in 2008, to 70,524 in 2011¹⁰⁵¹. That happened despite the former Brazilian migratory law (Law no. 6.815/1980), which was embedded in a view of national security and protection of the national labour market, containing all kinds of restrictions and administrative difficulties for migrants to come and establish in Brazil¹⁰⁵².

There are some factors that help to explain the rise of Brazil as a country of destination of migrants in the last ten years. Even if the situation has changed again since 2014, with the economic crisis, that phase of increased immigration left important learnings, and some of its elements are likely to be maintained or resumed.

The first element has to do with the Brazilian state foreign policy. Since the Presidency of Fernando Henrique Cardoso, the country has a more assertive presence in multilateral forums and international organizations, participating actively in the global political agenda on issues like human rights, environment and nuclear non-proliferation¹⁰⁵³.

¹⁰⁴⁹ Those countries have clearly advantages from the cultural point of view, with similar languages (the same in the case of Portugal) and historical ties with Brazil and Latin America. In the case of Italy, until today many Brazilians immigrate to the country, temporarily or not, in search of relative's documents for having access to *jus sanguinis* Italian citizenship, which does not have any generational restriction (up to now). With the Italian passport, some of them move to other more prosperous countries of the North, enjoying their status as European citizens as the right to live, study and work in other member states of the EU without restrictions.

¹⁰⁵⁰ PATARRA, Neide Lopes; FERNANDES, Duval. Brasil: país de imigração... op. cit., p. 9. The same happened in recent years with Brazilians having denied access to Spain, in certain cases being temporarily detained in Spanish airports, before being deported to Brazil.

¹⁰⁵¹ Ibid.

¹⁰⁵² The migrant who had a visa expired, for instance, had to exit from the country to obtain a new one, being impossible to require a renovation inside. Foreign students could not work, and the procedure to obtain a work visa was extremely bureaucratic. Thus, the Law received increasing criticism, and since it was not in line with the 1988 Brazilian Constitution, the National Council on Migration (CNIg) have overcome some of its dispositions through infra-legal norms, until its revocation in 2017.

¹⁰⁵³ LAFER, Celso. Brasil: dilemas e desafios da política externa. *Estudos Avançados*, São Paulo, v. 14, n. 38, p. 260-267, Apr. 2000. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0103-40142000000100014&lng=en&nrm=iso. Accessed on: 06 Nov. 2017.

The Brazilian multilateralism of the twenty-first century is defined by a search for establishing rules in the international order, with the aim to benefit equally all nations¹⁰⁵⁴. From 2003 on, the government of the President Luis Inácio Lula da Silva shifts the priorities, investing in a policy of diversification, proximity and political coordination with other developing countries. According to the main responsible for the design of such policy, then Minister of Foreign Affairs Celso Amorim, “at the UN, WTO and other forums, Brazil has sought to sensitize the international community to the serious problems of the poorest countries”¹⁰⁵⁵. Departing from this view, it was enhanced the South-South cooperation, with the prominence of the *Agência Brasileira de Cooperação* (ABC), coordinating in the Itamaraty the technical cooperation with developing countries¹⁰⁵⁶.

In addition, Brazil participated in the creation of two inter-regional mechanisms. In 2003, it was created the IBSA Dialogue Forum, composed by Brazil, South Africa and India, and in 2009, the more active BRICS, acronym for Brazil, Russia, India, China and South Africa¹⁰⁵⁷. Both groups are part of the Brazilian strategy to cooperate with developing countries, gaining influence in the global political agenda¹⁰⁵⁸. Their existence inevitably projects the country internationally as an emergent power.

Another relevant factor that helped to increase the visibility of Brazil worldwide, was the realization in the country of huge sportive events, characterizing a kind of cultural diplomacy¹⁰⁵⁹ which intended to increase the country’s soft power: The Pan American Games in 2007, the Confederations Cup in 2013, and most of all, the World Cup in 2014 and the Olympic and Paralympic Games, in 2016. Those events were fairly successful, despite the fears on the contrary, receiving many thousands of foreign visitors and being watched by millions of viewers through the television and internet, all over the world. The natural beauties of the national territory, as well as the touristic hospitality of the Brazilian people were,

¹⁰⁵⁴ CERVO, Amado; BUENO, Clodoaldo. **História da Política Exterior do Brasil**. Brasília: Editora Universidade de Brasília, 2008.

¹⁰⁵⁵ AMORIM, Celso et al. **A diplomacia multilateral do Brasil: um tributo a Rui Barbosa**. Brasília: FUNAG, 2007, our translation.

¹⁰⁵⁶ ASSUNÇÃO, Thiago e CHOMATAS, Jacqueline. Por que o Brasil hoje é um polo de atração para a imigração internacional? In: SILVA, Karine de Souza; PEREIRA, Maria Rausch; SANTOS, Rafael de Miranda. **Refúgios e Migrações: práticas e narrativas**. Florianópolis: NEFIPO/UFSC, 2016. p. 101-130.

¹⁰⁵⁷ For an interesting academic production about the BRICS in Brazil, see the work of Professor Dr. Oliver Stuenkel, from Getúlio Vargas Foundation – FGV. For instance: STUENKEL, Oliver. **BRICS e o futuro da ordem global**. Editora Paz e Terra, 2017.

¹⁰⁵⁸ ASSUNÇÃO, Thiago e CHOMATAS, Jacqueline. Por que o Brasil hoje é um polo de atração para a imigração internacional?... op. cit.

¹⁰⁵⁹ Brazilian diplomat Carlos Resende called it “diplomacy of the ball”. RESENDE, Carlos Augusto. O Esporte na Política Externa do Governo Lula: o importante é competir? **Meridiano 47 - Journal of Global Studies**, v. 11, n. 122, p. 35-41, Dec. 2010. Available at: <http://periodicos.unb.br/index.php/MED/article/view/1595/1569>>. Date accessed: 06 Nov. 2017.

as usual, appreciated by the visitors¹⁰⁶⁰. However, the events also sparked many protests and criticism, especially considering the removal of populations from their houses before the events for the constructions, the highly elevated public expenses used to build the premises for the competitions, and a very doubtful legacy for the country afterwards¹⁰⁶¹. In any case, those events have put Brazil in the center of attentions, increasing its international exposition, including to potential migrants.

It should be mentioned also the amnesty promoted in 2009 by the Brazilian government. The Law no. 11.961/2009 conceded the possibility of regularization of all irregular migrants present in Brazil since February 2009. In this occasion, around 43,000 foreigners had access to regularization, which was seen as a solidarity gesture, impacting the number of legal residents in the country by 2010¹⁰⁶².

In addition, the Brazilian economy was in a good moment in the first decade of the century. The average Gross Domestic Product (GDP) between 2001 and 2010 was of 3.6 per cent, with a growth of 7.5 per cent in 2010, pushed by a high level of foreign investments and strong domestic demand¹⁰⁶³. Those results, boosted by factors such as the growth of commodities exportation, the expansion in the number of available jobs and consequent low level of unemployment, the policy of valorization of the minimum wage, concomitant with the economic and political stability of the period¹⁰⁶⁴, have set the scenario of a promising country for foreign workers seeking new opportunities.

Moreover, a fundamental measure to facilitate the circulation of people in South America was adopted by the member states of the Mercosur in 2002. It is the Residence Agreement for Nationals of State Parties of Mercosur (and associated states), incorporated in Brazil by the Decree No. 6.975/2009. The Agreement is applicable to intraregional nationals who want to immigrate to one of the countries of the region, or who wish to regularize

¹⁰⁶⁰ “More than one million visitors poured into the 12 host cities – easily surpassing the predicted 600,000 and generating £7.5 billion for the economy” reported The Mirror, mentioning data from EMBRATUR – Brazilian Institute of Tourism. ARMSTRONG, J. Brazil World Cup tourism triumph as 95% of fans say they will return to samba nation for a holiday. **The Mirror**, London, 31 Aug. 2014. Available at: <http://www.mirror.co.uk/news/world-news/fifa-world-cup-2014-leads-6106072> Accessed on 10 Nov. 2017.

¹⁰⁶¹ For a critical analysis of the human rights violations and the legacy of the World Cup, see among others: DAMO, Arlei Sander; OLIVEN, Ruben George. O Brasil no horizonte dos megaeventos esportivos de 2014 e 2016: sua cara, seus sócios e seus negócios. **Horizonte antropológico**, Porto Alegre, v. 19, n. 40, p. 19-63, Dec. 2013; and TIMO, PB. Desenvolvimento à Custa de Violações: Impacto de Megaprojetos nos Direitos Humanos no Brasil. **Sur: Revista Internacional de Direitos Humanos**. v. 10, n. 18, p. 144-165, Jun. 2013.

¹⁰⁶² ASSUNÇÃO, Thiago e CHOMATAS, Jacqueline. Por que o Brasil hoje é um polo de atração para a imigração internacional?... op. cit.

¹⁰⁶³ IBGE – INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICAS. **O Brasil em números (2013)**. Rio de Janeiro: IBGE, 2013. Available at: <https://biblioteca.ibge.gov.br/biblioteca-catalogo?id=72&view=detalhes> Accessed on: 01 Apr. 2015.

¹⁰⁶⁴ NERI, M. C. **A nova classe média: o lado brilhante da pirâmide**. São Paulo: Saraiva, 2011.

their migratory situation. By reducing the requirements for temporary residency of up to two years, and facilitating its transformation into permanent residence, the agreement deepens the relations between Mercosur member countries, advancing the objective of achieving a common market, with the indispensable human component. It also strengthens the free movement of people in the region, no longer applying to the citizens of the bloc the traditional limits imposed on the entry and stay of foreigners in general.

Therefore, at least until 2014, there was an increase in the number of migrants coming to Brazil, moved by the factors studied, which demonstrates an intention by the country to integrate and participate more actively of the international relations, and even if not departing from a specific migratory policy, attracting a growing number of international migrants.

A last factor for the recent Brazilian attractivity refers to the fact that Brazil has engaged for several years in the UN peace operations in Haiti (MINUSTAH)¹⁰⁶⁵, making the population of that country have constant contact with the Brazilian culture, what after the 2010 earthquake, contributed to the increase on the immigration of Haitians to Brazil. By its representativity and subsequent migratory policy turnover, a closer look to the Haitian presence is developed below.

4.2.1 The policy of “humanitarian visas”

In 2010, a devastating earthquake in Haiti killed more than 100,000 people, destroyed more than half of the government structure and 80 per cent of the schools in the area of the capital Port-au-Prince. Being the poorest country of the Americas, and ranking 149th out of 182 countries in the Human Development Index in 2009, the catastrophe displaced more than 2 million people in a few days, with many Haitians fleeing the calamity to neighboring countries, such as Dominican Republic and others in Central America and the Caribbean.

Having an idea about the Brazilian culture, by the domestic presence of many Brazilians engaged with MINUSTAH, and considering the good economic moment, with a low unemployment rate, Brazil became an important destination for the Haitian diaspora¹⁰⁶⁶.

¹⁰⁶⁵ The MINUSTAH - United Nations Stabilization Mission in Haiti was established in 2004, and its military component was led by Brazil during its entire stay in Haiti, until the end of the mandate determined by the Security Council, on October 2017. The Brazilian state cooperates with troops also in other UN peace operations, in Western Sahara, Central African Republic, Cyprus and Democratic Republic of the Congo.

¹⁰⁶⁶ For Sidney da Silva, “Brazil presents itself ‘in their imaginary’ as a prosperous country, where it is possible to grow and earn money. The news of economic growth in Brazil encourages those who are in a situation of total lack of perspectives”. In: FACHIN, Patricia; JUNGES, Márcia. *Haitianos: os novos imigrantes do Brasil. Entrevista especial com Duval Magalhães e Sidney da Silva. Instituto Humanitas*, São Leopoldo, 06 ago. 2011. Available at: <http://migre.me/rtrH> Accessed on: 27 May 2015.

As a consequence, many Haitians embarked in a long journey to arrive in the Brazilian territory, usually reaching Peru and entering in Brazil by land, through the Northern State of Amazonas. Some of them were compelled to pay *coyotes*¹⁰⁶⁷ for assisting in the tough crossing, being explored, robbed and in some cases abused.

Upon arrival, the Haitians started to apply for refugee status, which would allow them to be legal residents and have the right to work in Brazil. Nevertheless, the Brazilian government, through the National Committee for Refugees (CONARE) understood that their case was not of refuge, since the Haitians would not fulfill the definition of refugee of the National Refuge Law. For Pamplona and Piovesan, that was an equivocated decision, since the law provides the recognition as a refugee who, “due to serious and widespread human rights violations, is forced to leave his country of nationality to seek refuge in another country”¹⁰⁶⁸. In their view,

the total incapacity of the Haitian State to guarantee the minimum conditions of survival for the overwhelming majority of its population could be seen as a serious violation of the human rights of its citizens. If the situation was no longer ideal before the earthquake, with its occurrence, the chances of the rescue of the individuals by the State were even more wiped out¹⁰⁶⁹.

The Federal Public Ministry also claimed on a lawsuit that the government conceded them the status of refugee, without success¹⁰⁷⁰. What happens next is a turning point. The CONARE decided to send the case to analysis of the National Council of Migrations (CNIg)¹⁰⁷¹, which after discussing the extraordinary situation, issued the Normative Resolution 97/2012, establishing a special visa for the Haitians, by humanitarian reasons¹⁰⁷². For

¹⁰⁶⁷ *Coyote* is a popular term in Spanish which refers to those involved in people smuggling, originated in relation to the Mexico-USA border crossing.

¹⁰⁶⁸ BRASIL. Law n. 9.474, 22 July 1997. Define mecanismos para a implementação do Estatuto dos Refugiados de 1951, e determina outras providências. Available at http://www.planalto.gov.br/ccivil_03/leis/L9474.htm. Accessed on: 20 Sept. 2017.

¹⁰⁶⁹ PAMPLONA, Danielle Anne; PIOVESAN, Flavia. O Instituto do Refúgio no Brasil: práticas recentes. **Revista de Direitos Fundamentais e Democracia**. v. 17, n. 17, p. 43-55, Jan./Jun. 2015.

¹⁰⁷⁰ Ibid.

¹⁰⁷¹ According to Godoy, “traditionally, the CNIg had a specific normative resolution which allowed it to decide cases not covered by the migratory law of 1980. From 2006, the CNIg established that a request forwarded by CONARE could be analyzed as an omitted case. This practice was finally legitimized with the adoption of the normative resolution no. 13 of CONARE, which specifically provides that a request for refugee status that does not meet the requirements of eligibility provided for in the refugee law may be referred to the CNIg for granting a stay visa for humanitarian reasons.” GODOY, Gabriel Gualano de. O caso dos haitianos no Brasil e a via da proteção humanitária complementar. In: CARVALHO RAMOS, André; RODRIGUES, Gilberto; DE ALMEIDA, Guilherme Assis. **60 anos de ACNUR**. Perspectivas de futuro, São Paulo: Editora CL-A Cultural, 2011. p. 45-68.

¹⁰⁷² In the beginning, an annual quota of 1.200 visa expeditions was issued. The quota system was then extinct by the Resolution 102/2013, in an effort to make the humanitarian visas available for Haitians in other countries of the region, discouraging the harsh Amazon route.

Gabriel Godoy, writing before the approval of the law that incorporated the institute (Law no. 13.445/2017),

What is commonly called a humanitarian visa is actually a stay visa granted by the National Immigration Council (CNIg) of the Ministry of Labor and Employment. Such a visa may be granted to the foreigner applying for refugee status, in need of humanitarian protection, that is not included in the criteria established by the Brazilian refugee law¹⁰⁷³.

The humanitarian visa solution, not originally provided by the migratory law, was seen as innovative, since in this case it meant a special treatment for people who need protection in case of a natural disaster¹⁰⁷⁴. The initiative filled a legislative gap, allowing the Haitian migrants to settle in the country and work legally¹⁰⁷⁵. The lack of workers in some sectors in Brazil in that moment was an opportunity for the Haitians to be employed quickly. They fulfilled vacancies in the sectors of cold stores, civil construction and furniture industry, mainly in the center-south region of the country.

There were, however, many denounces of abuses in the labor relation, and several cases of explicit xenophobia and racial discrimination against Haitians in Brazil¹⁰⁷⁶. One important criticism is that the welcoming policy towards this people could be motivated by the interest of some industries in receiving and exploring cheap workforce, when it was difficult to find national workers available to fulfil harsh and poorly paid positions¹⁰⁷⁷.

In 2015, the federal government decided to regularize the migratory situation of thousands of Haitian migrants. But since 2016, the contingent of Haitians coming to Brazil have declined, motivated mainly by the economic recession in Brazil, among other factors. In any case, the presence of the ones who remained, have transformed some local urban landscapes.

¹⁰⁷³ GODOY, Gabriel Gualano de. O caso dos haitianos no Brasil e a via da proteção humanitária complementar... op. cit. our translation.

¹⁰⁷⁴ GEDIEL, José Antônio Peres; CASAGRANDE, Melissa Martins. A migração haitiana para o Brasil: bases teóricas e instrumentos político-jurídicos. **Monções**: Revista de Relações Internacionais da UFGD, Dourados, v. 4, n. 8, p. 97-110, Jul./Dec. 2015. p. 99.

¹⁰⁷⁵ The Haitians who had asked the status of refugee could also work, since they obtained the protocol of application for refuge from the Federal Police, considering the Refugee Law allows asylum seekers to work while they wait the response. But as the refuge situation would be denied by the government in their case, they would remain undocumented after the denial.

¹⁰⁷⁶ G1 (Portal). **Imigrantes haitianos são vítimas de preconceito e xenofobia no Paraná**. G1, Curitiba, 22 Oct. 2014. Available at: <http://glo.bo/1s8Hm3h> Accessed on: 10 Nov. 2017. For a detailed analysis of the labour conditions of Haitians in the Brazilian state of Santa Catarina, see the PhD thesis of MAGALHÃES, Luís Felipe Aires. A imigração haitiana em Santa Catarina: perfil sociodemográfico do fluxo, contradições da inserção laboral e dependência de remessas no Haiti. 2017. 355 f. Tese (Doutorado em Demografia) Universidade Estadual de Campinas, Instituto de Filosofia e Ciências Humanas, Campinas, 2017. Available at: <http://repositorio.unicamp.br/jspui/handle/REPOSIP/322136> Accessed on: 10 Nov. 2017.

¹⁰⁷⁷ GEDIEL, José Antônio Peres; CASAGRANDE, Melissa Martins. A migração haitiana para o Brasil... op. cit., p. 107.

It is not difficult to find Haitians working and studying in Curitiba, Florianópolis and other cities, and their language, music and traditions have added a new component to the cultural diversity of the center-south of Brazil.

The lesson in this case was the cooperation among different government organs, in order to offer an innovative humanitarian response, complementing the existing refugee protective norms, in the lack of a specific provision. That solution was praised since it solved an emergent situation, and established a precedent that was used once again in the cases of the Syrians scaping from war.

Nonetheless, it remains some shortcomings. Jubilut and others criticize the fact that the visas were established through administrative norms, subject therefore to the political will of the government, by bringing uncertainty and legal insecurity for the persons concerned. In addition, the fact that the visas were established to meet specific contexts, contemplating only determined nationalities, can amount to violation of the principle of equality, constituting discrimination towards other migrants. Finally, the humanitarian visas are temporary, and no contingency plan was designed for after their expiration, in case they wish to stay in the country, and do not find other ways to regularize their migratory situation¹⁰⁷⁸.

In any case, the humanitarian visa has influenced decisively the proposal of the new migratory law, where the institute was adopted, as will be studied below. In conclusion, this innovation can be seen as a practical example of an emerging Brazilian hospitality policy, which marked the openness of Brazil as a country of increasing destination for humanitarian purposes in the last five years.

4.3 Brazil as an emergent destination for refugees

The right of asylum is immemorial, existing at least since the Ancient Greece, for the protection in a territory, of persons persecuted in another. The institute of political asylum gained track in Latin America since the end of the nineteenth century, and remained alive given the political instability of the countries of the region. With the creation of the international refugee law, especially after the Second World War, the right of asylum becomes broader, to include different kinds of persecution. Thus, if in most of the world, the refugee law is used to deal with political persecution, in Latin America the tradition of conferring a

¹⁰⁷⁸ JUBILUT, Liliana Lyra; DE ANDRADE, Camila Sombra Muiños; DE LIMA MADUREIRA, André. Humanitarian visas: building on Brazil's experience. *Forced Migration Review*, n. 53, p. 76, 2016.

more discretionary protection by the state for foreign political dissidents was parallelly maintained¹⁰⁷⁹. For the analysis developed below, only the refugee protection is going to be considered, since it is what represented a significant quantitative variation in Brazil lately.

Indeed, the country has been receiving an increasing number of requests of refuge in the last decade, with a significative raise in the number of recognized refugees. The applications for recognition of refugee status grew from 966 in 2010, to 28,670 in 2015¹⁰⁸⁰. Most of the factors analyzed above for the case of migrants, are also valid for the relatively recent attractivity of the country for asylum seekers, although in the case of refuge, not always the circumstances can wait for comparative rational choices, being sometimes a matter of contingency. It is also true that the number of refugees in general grew dramatically all over the world in the last five years¹⁰⁸¹.

Brazil nowadays has a solid legal framework for refugee protection. The country signed the 1951 Convention relating to the Status of Refugees in 1952, and ratified it in 1960¹⁰⁸². In 1972, it acceded to the 1967 Protocol relating to the Status of Refugees¹⁰⁸³. At that time, the protection of asylum seekers, mainly coming from Chile, Argentina and Uruguay, was dependent basically on the Catholic Church¹⁰⁸⁴. As the government did not want to recognize the persecution of South Americans from dictatorships alike, it only agreed to receive Europeans, and to resettle South Americans in other countries.

In 1982, an UNHCR Office was established, and in 1984 the first UNHCR mandated refugees from South America started to arrive¹⁰⁸⁵. In 1985, the military dictatorship finally ended, and in 1988 the new Brazilian Constitution proclaimed that the country would be

¹⁰⁷⁹ JUBILUT, Liliana Lyra. **O Direito Internacional dos Refugiados e sua Aplicação no Ordenamento Jurídico Brasileiro**. São Paulo: Método, 2007.

¹⁰⁸⁰ BRASIL. MINISTÉRIO DA JUSTIÇA. **Refúgio em números**, 2017. Available at: <http://www.justica.gov.br/noticias/brasil-tem-aumento-de-12-no-numero-de-refugiados-em-2016/20062017refugio-em-numeros-2010-2016.pdf/view> Accessed on: 10 Nov. 2017.

¹⁰⁸¹ The number of asylum seekers was multiplied by three from 2012 to 2016, from 942,797 to 2,826,508 individuals, and the number of refugees raised from 10,497,957 to 17,187,488 persons in the same period, according to official data provided by the UNHCR. Available at: <http://www.unhcr.org/globaltrends2016/#> Accessed on: 27 Nov. 2017.

¹⁰⁸² BRASIL. Decree n. 50.215, 28 January 1961. Promulgates the Convention relating to the Status of Refugees, concluded at Geneva on 28 July 1951. **Diário Oficial da União**, Brasília, DF, 30 Jan. 1961. Seção 1, p. 838.

¹⁰⁸³ BRASIL, Decree n. 70.946, 7 August 1972. Promulgates the Protocol on the Status of Refugees. Available at: http://www.planalto.gov.br/ccivil_03/decreto/1970-1979/D70946.htm. Accessed on: 20 Aug. 2017.

¹⁰⁸⁴ FISCHER DE ANDRADE, Jose H. Refugee protection in Brazil (1921-2014): an analytical narrative of changing policies. In: CANTOR, David James; FREIER, Luisa Feline; GAUCI, Jean-Pierre (Eds.). **A Liberal Tide? Immigration and Asylum Law and Policy in Latin America**. School of Advanced Study, University of London, London, 2015. p. 153-184.

¹⁰⁸⁵ *Ibid.*, p. 11.

guided in its international relations, among other principles, by the “granting of political asylum”¹⁰⁸⁶, what actually means asylum in general. According to Jubilut,

even if the Federal Constitution uses the expression ‘political asylum’, it is understood that it is referring to the right of asylum in its totality, because, as already referred, other legal instruments, as the article 23 of the Declaration and Program of Action of Viena, of 1993, and the preamble of the 1951 Convention, also contain that terminological imprecision, using the species in the place of the gender¹⁰⁸⁷.

In 1996, the UNHCR Office in Brazil was asked to produce a draft of a National Refugee Act¹⁰⁸⁸, which was later discussed and approved by the National Congress. For Fischel de Andrade,

the passing of the 1997 Refugee Act was the result of various factors, namely, the redemocratization process that started in 1985, the need to react to the arrival of numerous African refugees in the early 1990s, and the human rights policy that started to be implemented by the Fernando Henrique Cardoso Administration (1995-2002)¹⁰⁸⁹.

Indeed, the redemocratization was a turning point not only for the countries’ political and social landscape, but also for its humanitarian openness. In 1989, Brazil withdraws from the geographical reservation established by the 1951 Convention, and in 1990 overturns the reservations previously made to articles 15 and 17 of the Convention. “Since the end of the military rule in 1985, the apparent political indifference to refugees gave way to a more liberal application of migration rules to the benefit of refugees”¹⁰⁹⁰.

The Brazilian Refugee Act adopted in 1997, is considered an advanced legislation on the theme, and installed a modern system of refugee protection in Brazil¹⁰⁹¹. Indeed, not all the countries count with a specific legislative act for refugees, treating them many times

¹⁰⁸⁶ BRASIL. *Constituição* (1988)... op. cit., art. 4, item X.

¹⁰⁸⁷ JUBILUT, Liliana Lyra. *O Direito Internacional dos Refugiados e sua Aplicação no Ordenamento Jurídico Brasileiro*. São Paulo: Método, 2007. p. 181. Our translation.

¹⁰⁸⁸ For Fischel de Andrade, “Brazil gave UNHCR a cold shower by not granting the *agreement* for the first UNHCR representative to Brazil in 1953, ratified the 1951 with the geographical limitation and reservations to Articles 15 and 17, granted non-European refugees (Cubans, Vietnamese, Iranians) ordinary migratory status, and had South American refugees resettled to Europe. However, since the end of the military rule in 1985, the apparent political indifference to refugees gave way to a more liberal application of migration rules to the benefit of refugees”. FISCHEL DE ANDRADE, Jose H. Refugee protection in Brazil... op. cit.

¹⁰⁸⁹ *Ibid.*, p. 14.

¹⁰⁹⁰ *Ibid.*

¹⁰⁹¹ For a comprehensive analysis of the Brazilian refugee act, see JUBILUT, Liliana Lyra. Refugee law and protection in Brazil: a model in South America?. *Journal of Refugee Studies*, v. 19, n. 1, p. 22-44, 2006.

together with migrants or asylum seekers in general¹⁰⁹². The Act adopts in its first Article, the same definition of the 1951 Convention, considering “refugee” an individual who,

I - owing to well-founded fear of persecution for reasons of race, religion, nationality, social group or political opinion finds himself outside his country of nationality and cannot or is unwilling to take shelter in that country;
 II - not having the nationality and being outside the country where once he had his habitual residence, is unable or unwilling to return to it, under the circumstances described in the preceding item;¹⁰⁹³

The innovation comes in the item III, which adopted partially the “extended definition” of the Cartagena Declaration¹⁰⁹⁴, to protect those who “owing to serious and widespread violations of human rights, is obligated to leave his country of nationality to seek refuge in another country”¹⁰⁹⁵. This is no doubt a major merit of the national law, since it was the first state in Latin America to adopt the serious and widespread violations of human rights as criterium for concession of refugee status, being a concrete manifestation of the Brazilian political will to protect victims of abuses of human rights, in what Professor Liliana Jubilut calls the “spirit of Cartagena”¹⁰⁹⁶.

The diploma, in addition, brings a series of safeguards for asylum seekers and refugees in Brazil¹⁰⁹⁷. The rights of refugees are guaranteed according to the 1951 Convention and the 1967 Protocol, both ratified by the country, in addition to the rights applicable in the country to migrants in general (Art. 5). The absence of specific rights provided in the body

¹⁰⁹² JUBILUT, Liliana Lyra. **O Direito Internacional...** op. cit., p. 191.

¹⁰⁹³ BRASIL. Law 9.474/1997... op. cit., our translation.

¹⁰⁹⁴ The Cartagena Declaration brought a much broader recommended refugee definition, providing for other hypothesis not contained in the Brazilian Refugee Act: “the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”. ORGANIZATION OF AMERICAN STATES. **Cartagena Declaration on Refugees**. Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19-22 November 1984. Available at: https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf Accessed on: 28 Jun. 2017.

¹⁰⁹⁵ BRASIL. Law 9.474/1997... op. cit.

¹⁰⁹⁶ JUBILUT, Liliana Lyra. **O Direito Internacional...** op. cit., p. 191.

¹⁰⁹⁷ For instance, the application to be recognized as refugee can be made to any migratory authority, any time, and no one can be deported after asking for asylum (Art. 7); the irregular entrance cannot prevent anyone of asking asylum (Art. 8), what configures an essential feature of the right of asylum, since obtaining a passport or visa can be very difficult or impossible in the case of who is escaping from a dangerous situation¹⁰⁹⁷; the recognition of refugee status will prevent the follow-up of any request for extradition based on the facts that gave rise to the grant of refuge (art. 33); and refugees who are regularly registered, shall not be expelled from the national territory, except for reasons of national security or public order (art. 36). BRASIL. Law 9.474/1997... op. cit.

of the law is not ideal, especially in the case of civil, political and cultural rights, whose needs could be differentiated in relation to general migrants¹⁰⁹⁸.

In any case, an important provision of the law refers to the possibility of the asylum seekers to have access to the appropriate national documentation, since the issuance of a protocol attesting the application, which allows them to work legally in Brazil. That measure is fundamental to proportionate a dignifying reception for refugees, most of whom had to abandon their jobs and carriers in the former place of residence.

Another guarantee worth mentioning is the freedom of movement, for asylum seekers and recognized refugees, across the national territory. Provided by the article 26 of the 1951 Convention, to which the Brazilian law refers, this freedom entails “the right to choose their place of residence and to move freely within its territory”, meaning that, differently from other countries in the global South¹⁰⁹⁹, no policy of constricting refugees in camps or specific locals are to be adopted in Brazil.

Finally, the Refugee Act creates under the Brazilian Ministry of Justice, the CONARE - National Committee for Refugees, which is the organ responsible for examining the request of refuge, deciding in first instance for its concession or not, as well as declaring the cessation, and loss of the condition of refugee when it is the case¹¹⁰⁰. Since it is a collegiate organ composed by representatives of several governmental organs, as well as a non-governmental organization dedicated to the theme, and a representative of the UNHCR (with the right of voice, not to vote), the CONARE is considered an appropriate structure to analyze the requests of refuge in Brazil, given its “triparty” structure represents a positive aspect of the law¹¹⁰¹.

¹⁰⁹⁸ JUBILUT, Liliana Lyra. **O Direito Internacional...** op. cit., p. 192.

¹⁰⁹⁹ According to Nicholas Maple, “the right to freedom of movement has most severely been restricted for refugees in long-term encampments. In these situations, refugees can find themselves unable to live outside of the camp, while leaving the camp for even a few hours can require specific reasons, such as medical emergencies. [...] They are set up to deal with periods of mass influx or exist as permanent structures to house all new refugees on an individual basis. [...] Camps that were initially set up as temporary responses to mass influx often evolve into permanent settlements, where new refugees are also expected to live. [...] The highest concentration of long-term encampments is on the African continent”. UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Rights at Risk: A thematic investigation into how states restrict the freedom of movement of refugees on the African Continent.** Research Paper n. 281, October 2016. Available at: <http://www.refworld.org/docid/5857eb794.html>. Accessed on: 8 Nov. 2017.

¹¹⁰⁰ BRASIL. Law 9.474/1997... op. cit.

¹¹⁰¹ ARAÚJO, Nádia de; ALMEIDA, Guilherme Assis de. O direito internacional dos refugiados: uma perspectiva brasileira. **Rio de Janeiro: Renovar**, 2001, p. 229.

4.3.1 Reception of refugees and integration initiatives

The first major contingent of refugees in Brazil came from Angola. By the time that both countries were Portuguese colonies their relation was close, mainly due to the trade of slaves¹¹⁰². In a later context, Brazil was the first country to recognize Angolan independence in 1975, and in the following decades has been active economically in the African country, with investments on the oil and diamonds industries, as well as civil construction. Considering the common Portuguese language and other cultural proximities, the choice of Brazil as a country of refuge by many Angolans was not surprising.

The civil war in Angola took many years and ended in 2002, having caused 4 million internal displacements and the escape of 600,000 Angolans, who lived as refugees in several countries. The first Angolan asylum seekers started to arrive in Brazil in 1992. At the time, an extensive interpretation of the refugee definition, based on the Cartagena Declaration of 1984, was accepted by the government under the auspices of the UNHCR¹¹⁰³, in order to receive persons fleeing from the conflict.

A similar situation happened in Liberia, with the war between 1989 and 2003 causing the death of around 250,000 people and 750,000 displaced. In 2002, the UNHCR declared a cessation clause for refugees of both countries, which means that nationals from those states would not be considered refugees by cause of the war anymore. The voluntary repatriation of the individuals and families willing to return was facilitated by the UNHCR, and at the same time the Brazilian government made available the concession of permanent residency for those who were integrated to the local community. Those who were in Brazil for more than 15 years could also request naturalization, acquiring Brazilian citizenship¹¹⁰⁴.

Another example of the Brazilian welcoming refugee policy was the Solidary Resettlement Program¹¹⁰⁵, part of a broader regional strategy originated in 2004 with the Declaration and Plan of Action of Mexico. Resettlement is the third of the three durable solutions proposed by UNHCR, after voluntary repatriation and local integration are considered¹¹⁰⁶.

¹¹⁰² PATARRA, Neide Lopes; FERNANDES, Duval. Brasil: país de imigração... op. cit., p. 11.

¹¹⁰³ FISCHER DE ANDRADE, Jose H. **Refugee protection in Brazil (1921-2014)**... op. cit., p. 13.

¹¹⁰⁴ ACNUR. Cessação para refugiados angolanos e liberianos pode alterar perfil do refúgio no Brasil. 03 Jul. 2012. Available at: <http://www.acnur.org/portugues/noticias/noticia/cessacao-para-refugiados-angolanos-e-liberianos-pode-alterar-perfil-do-refugio-no-brasil/> Accessed on: 08 Set 2017.

¹¹⁰⁵ For an analysis of the Brazilian Solidary Resettlement Program, see ANNONI, Danielle; VALDES, Lysian Carolina. **O direito internacional dos refugiados e o Brasil**. Curitiba: Juruá Editora, 2013.

¹¹⁰⁶ According to the UNHCR, resettlement is “when refugees are selected and transferred from the country of refuge to a third State which has agreed to admit them as refugees with permanent residence status”. The case for resettlement generally relates to a problem with refugees in the country of first refuge. “Refugees may be denied basic human rights in a country of refuge. Their lives and freedom may be threatened, or they may have

The first to come through this arrangement were Afghans and Colombians. Colombians were during many years among the top countries of origin of asylum seekers in Brazil, due to the conflict of the FARC and other militias.

In 2007, the Brazilian government has accepted 108 Palestinians coming from the refugee camp of Reweished, in the frontier between Jordan and Iraq, which was about to close after the war in Iraq. Brazil received those families and provided them with documentation for work, access to public health, education and financial support¹¹⁰⁷. The frustration of some of them, however, turned into a protest in 2008, in front of the UNHCR office in Brasilia, where they camped for several months in search of dialogue with the UN Agency and the Brazilian government, seeking to change aspects of their resettlement agreement¹¹⁰⁸. This event shows the difficulties of designing resettlement programs which satisfies all the people involved¹¹⁰⁹.

In any case, another chapter of the Brazilian policy towards refugees, refer to the case of Syrians escaping from the civil war started in 2011. During the conflict, around 250,000 people have lost their lives, and apart from the 6 million internal displaced, there are more than 5 million Syrians living as refugees worldwide¹¹¹⁰. With the first asylum seekers arriving in Brazil in 2012, and considering the historical presence of Syrian and Lebanese migrants in Brazil, the CONARE decided to edit the Resolution 17/2013, establishing a special humanitarian visa for Syrian nationals. This visa, issued in Brazilian consulates around the Middle East, allowed the Syrians to reach Brazil legally, and once in Brazilian soil, apply for refugee status. This policy was renewed in 2015, and again in September 2017, for another two years. To date, more than 2,000 Syrian refugees live in Brazil, being the largest national group to

vulnerabilities or specific needs which render their asylum untenable. The authorities in the country of refuge may be unable or unwilling to provide effective protection or address specific needs. In such circumstances, timely relocation through resettlement becomes a principal objective, and an important means of protecting refugees". UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **UNHCR Resettlement Handbook 2011**, July 2011. Available at: <http://www.refworld.org/docid/4ecb973c2.html> Accessed on: 8 Nov. 2017.

¹¹⁰⁷ According to the UNHCR, "they all received a special package of emergency assistance for two years, which included rented and furnished houses, free Portuguese classes, financial subsistence, medical, psychological and dental supervision, as well as professional training - among other services". UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). *Refugiados palestinos completam três anos de reassentamento no Brasil*. Brasília, 29 November 2010. Available at: <http://www.acnur.org/portugues/noticias/reassentamento-no-brasil/> Accessed on: 08 Sep. 2017.

¹¹⁰⁸ MOULIN, Carolina. Os direitos humanos dos humanos sem direitos. *Refugiados e a política do protesto*. **Revista Brasileira de Ciências Sociais**, v. 26, n. 76, 2011.

¹¹⁰⁹ It also puts in question the nature of the humanitarian protection, which in certain specific situations can lead to social marginalization, since the subjects remain under the control of foreign governments and international institutions, without much choice about their own destiny, something common also to other non-citizens. MOULIN, Carolina. *Os direitos humanos...* op. Cit.

¹¹¹⁰ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). *Syria emergency*. Available at: <http://www.unhcr.org/syria-emergency.html> Accessed on: 17 Nov. 2017.

be granted asylum in the country in 2016¹¹¹¹, although the number is minimal comparing to other countries (2,869,421 just in Turkey, and 669,482 in Germany, by the end of 2016)¹¹¹².

Many Syrian refugees who come to Brazil are well-qualified, having tertiary level education, but can hardly exercise their professions, since their qualifications are not legally recognized. There are efforts from some Brazilian Federal Universities to overcome the bureaucratic barriers for diploma recognition, revalidating them and allowing special entrance paths for continuation of the interrupted studies¹¹¹³.

One of the main problems of the “open doors” policy towards Syrian refugees in Brazil is that they do not receive much additional support, apart from documentation, after coming to the country. Indeed, there is an urgent need of adopting adequate integration public policies, in order to provide for the Syrians and other humanitarian migrants and refugees, Portuguese classes, housing facilities and support for insertion in the labour market, among other forms of social integration assistance¹¹¹⁴.

Finally, in the present days another group of people started to seek for asylum in Brazil: the neighboring Venezuelans. In a deep political, economic and social crisis, many people in Venezuela have impoverished quickly, due the rampant inflation and livelihood products shortage. Politic repression and mass violation of human rights have been reported¹¹¹⁵. Thousands of people started to leave the country, and many have chosen Brazil as their destination due to territorial and cultural proximity. The number of applications for refugee status of Venezuelans in Brazil amount to 3,368 in 2016, and around 7,600 in 2017 until June¹¹¹⁶. But the UN estimates that around 30,000 Venezuelans have entered in Brazil

¹¹¹¹ BRASIL. MINISTÉRIO DA JUSTIÇA. **Refúgio em números**, 2017. Available at: http://www.justica.gov.br/noticias/brasil-tem-aumento-de-12-no-numero-de-refugiados-em-2016/20062017_refugio-em-numeros-2010-2016.pdf/view Accessed on 10 Nov. 2017.

¹¹¹² Data provided in the website of the UNHCR. Available at: <http://www.unhcr.org/globaltrends2016/#> Accessed on 27 Oct. 2017.

¹¹¹³ RODRIGUES, Gilberto M. A.; SALA, José Blanes; DE SIQUEIRA, Débora Corrêa. Visas and qualifications: Syrian refugees in Brazil. **Forced Migration Review**, n. 56, 2017. It is the case of the UFPR – Federal University of Paraná, which through the Program Migratory Policy and Brazilian University, established ways of revalidating diplomas and reintegrate foreign students in different academic courses.

¹¹¹⁴ Idem.

¹¹¹⁵ According to the Office of the United Nations High Commissioner for Human Rights (UHCHR), “extensive human rights violations and abuses have been committed in the context of anti-Government protests in Venezuela and point to the existence of a policy to repress political dissent and instill fear in the population to curb demonstrations”. UN HIGH COMMISSIONER FOR HUMAN RIGHTS (UHCHR). **Venezuela: Human rights violations indicate ‘policy to repress’** - UN report. Geneva, 30 Aug. 2017. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22007&LangID=E> Accessed on: 17 Nov. 2017.

¹¹¹⁶ TOKARNIA, Marina. Brasil é o segundo país que mais recebe refugiados venezuelanos, diz Acnur. **Agência Brasil**, Brasília, 18. Jul. 2015. Available at: <http://agenciabrasil.ebc.com.br/internacional/noticia/2017-07/brasil-e-o-segundo-pais-que-mais-recebe-refugiados-venezuelanos-diz> Accessed on 17 Nov. 2017.

by July 2017¹¹¹⁷, with many getting the 90 days tourism visa at the border, and simply overstaying afterwards.

Similar to the case of the Haitians, Venezuelans are entering Brazil through the North, especially in the state of Roraima. The poor economic situation of the region, added to the isolation of the amazon area, and the lack of appropriate infra-structure for reception of migrants and refugees, have turned their arrival into a difficult task for local authorities. In response, the UNHCR has been working with the state and federal governments, as well as civil society organizations, to address the crisis. Many Venezuelans, including indigenous people, were living on the streets of Boa Vista, waiting for applying for refugee status in the Federal Police¹¹¹⁸.

To address their situation, the CNIg issued the Resolution 126/2017, which authorizes temporary residence of up to two years, for migrants coming from bordering countries where the Residence Agreement of Mercosur is not yet in force, including Venezuela, Guyana and Suriname¹¹¹⁹. Once again, Brazil is asked to face a humanitarian challenge, and although the situation is not ideal, an *ad hoc* response was found, considering the lack of adequate law provisions at the time. It shall be acknowledged the leading role of the UNHCR Office in Brazil in this case, by coordinating with national and local authorities to provide timely responses for the sudden needs.

It is worthwhile to mention that, as part of the construction of hospitality towards humanitarian migrants and refugees in Brazil, the Brazilian civil society and academia have responded accordingly in face of the rising demand in the country in the last years. Several initiatives have been created among social movements, NGOS and Universities. A lasting organization, reference in Brazil for receiving, protecting and integrating refugees are the Caritas Archdiocesan of Rio de Janeiro and Sao Paulo, which count with Welcoming Centers

¹¹¹⁷ CHADE, Jamil. **Entidade da ONU estima que mais de 30 mil venezuelanos já fugiram para o Brasil**. Estadão. Internacional. 14 Jul. 2017. Available at: <http://internacional.estadao.com.br/noticias/geral,onu-estima-que-30-mil-venezuelanos-ja-fugiram-ao-brasil-e-que-fluxo-vai-aumentar,70001890102> Accessed on 10 Nov. 2017.

¹¹¹⁸ TOLEDO, Marcelo; VERPA, Danilo. Explode pedido de refúgio de venezuelanos em Roraima. **Folha de São Paulo**, São Paulo, 01 Apr. 2017. Available at: <http://www1.folha.uol.com.br/cotidiano/2017/04/1871807-explode-pedido-de-refugio-de-venezuelanos-em-roraima.shtml> Accessed on 17 Nov. 2017.

¹¹¹⁹ For the Venezuelans, requesting refugee status is a relatively quick way to work legally in Brazil, since after receiving a protocol of application, they are allowed to work, until the final response from CONARE, what can take up to two years. With the CNIg resolution, those who want to obtain the residence permit shall give up from the previous application to become a refugee. See: BRASIL. Conselho Nacional De Imigração. Resolução Normativa n. 126, de 2 de março de 2017. Dispõe sobre a concessão de residência temporária a nacional de país fronteiriço. **Diário Oficial da União**, Brasília, DF, 03 mar. 2017. Seção 1, p. 88. Available at: http://pdfc.pgr.mpf.br/atuacao-e-conteudos-de-apoio/temas-de-atuacao/direitos-humanos/internacionais/copy_of_direito-de-imigrantes/resolucao-126-2017-cnig Accessed on: 14 Aug. 2017.

for Refugees, and the support of the UNHCR and the Brazilian Government for developing their essential work¹¹²⁰. Another organization related to the catholic church very active in the field is the *Instituto Migrações e Direitos Humanos*, under the dedicated leadership of Sister Rosita Milesi. Apart from the consolidated work of those traditional organizations, which count with cooperation agreements with the UNHCR, there are interesting initiatives for the social integration of refugees and humanitarian migrants taking place, evidencing the potential of the Brazilian solidarity towards forced displaced persons¹¹²¹.

When the first Haitians started to arrive in Brazil after the earthquake of 2010, they had to face not only many bureaucratic difficulties to establish in the country, as seen, but also the complete lack of a migratory integration policy. Their first need, after receiving shelter and food from religious NGOs (when necessary)¹¹²², was to learn Portuguese, which would allow them to find a job. As an example of the solidarity mentioned above, a voluntary project of the language teachers of the CELIN – Center of Languages and Interculturality¹¹²³, part of the Federal University of Paraná (UFPR), spontaneously took place in 2013. The language teachers organized free Portuguese classes on their spare time for the Haitians. Soon the project expanded, with the interest of an increasing number of migrants and refugees¹¹²⁴. The teachers learned with the experience, to the point of creating a teaching method,

¹¹²⁰ See the PhD thesis about the due process of law for refugees in Brazil, written from a first-hand perspective, by the lawyer of the Welcoming Center for Refugees at Caritas in São Paulo, Dra. Larissa Leite. LEITE, Larissa. **O devido processo legal para o refúgio no Brasil**. 2015. Tese (Doutorado em Direitos Humanos) - Faculdade de Direito, Universidade de São Paulo, São Paulo, 2015.

¹¹²¹ Some of these initiatives, especially in the city of Curitiba, this author accompanied and participated from the beginning, reason why this section will focus on them, what does not reduce the importance of many other projects and initiatives created with the same spirit all over the country.

¹¹²² As from *Pastoral do Imigrante*, related to the Catholic Church in Curitiba. Worth nothing, however, that not all humanitarian migrants and refugees need this kind of social assistance, since their forced displacement situation does not mean that they did not have a job, a carrier and therefore financial resources before migrating. Many who are forced to leave indeed are already graduated, with linguistic skills and work experience.

¹¹²³ The idealizers were Professors Bruna Ruano and João Arthur Pugsley. To read more about the project, see: BARBOSA, Lúcia Maria de Assunção; RUANO, Bruna Pupatto. Acolhimento, sentidos e práticas de ensino de português para migrantes e refugiados, na Universidade de Brasília e na Universidade Federal do Paraná; and CURSINO, C. A.; GRAHL, J. A. P.; RAGGIO, I. Z.; SANTOS, J. P. Ensino de português brasileiro para alunos refugiados: uma experiência realizada no projeto PBMIH–CELIN/UFPR. In: GEDIEL, José Antônio Peres; GODOY, Gabriel Gualano de. (Orgs.). **Refúgio e hospitalidade**. Curitiba: Kairós Edições, 2016.

¹¹²⁴ What was a project, turned into a Program – *Política Migratória e Universidade Brasileira (Migratory Policy and Brazilian University)*, with the integration of several departments of the UFPR: Law, Informatics, Psychology, Sociology, Languages, History and the CELIN itself. Under the guidance of Professor José Antonio Peres Gediel, it was created the project called *Refúgio, Migrações e Hospitalidade* (Refuge, Migrations and Hospitality), which managed to quickly gather a number of volunteers, among students and Professors, in order to provide legal assistance for the humanitarian migrants and refugees in the city. The project was soon recognized by the UNHCR, which included it in the framework of the *Cátedra Sérgio Vieira de Mello* (see above). See: FRIEDRICH, Tatyana Scheila et al. *Política Migratória e Universidade Brasileira: a experiência do atendimento a haitianos e outros migrantes na UFPR*. **PÉRIPLoS. Revista de Pesquisa sobre Migrações**, v. 1, n. 1, 2017.

called PBMIH - *Português Brasileiro para Migração Humanitária* (Brazilian Portuguese for Humanitarian Migration).

Another well succeeded initiative was the creation of a network of Brazilian Universities, which committed to promote teaching, research and communitarian activities about refugee law, supported by the UNHCR Office in Brazil. The initiative is called *Cátedra Sérgio Vieira de Mello*, in honor of the Brazilian who dedicated his entire life for humanitarian purposes in the United Nations, and was killed on duty in a terrorist attack in Bagdad (2003). The universities part of the network convene a seminary which aggregates scholars and experts in the realm of refuge and statelessness for substantial debates every year¹¹²⁵.

In addition, an example of a relatively new civil society organization acting in the field is ADUS – *Instituto de Reintegração do Refugiado*, based in São Paulo¹¹²⁶. They manage to provide, through volunteer action, Portuguese classes, professional qualification courses, psychological support, insertion in the job market, instruction for entrepreneurship, and cultural actions. They also have set up a language school where refugees teach English, French and Arabic classes, and a project where they conduct gastronomy workshops¹¹²⁷.

The recent refugee's influx in Brazil sparked social entrepreneurship initiatives either. It is the case of *Linyon*, a social start up whose aim is to help refugees achieve self-sufficiency, integrating them in the labour market and raising awareness from employers for the added value of having international professionals as their staff members. The organization, formed by recently graduated international relations professionals, dedicates to promote cultural diversity as a key to advance creativity and innovation¹¹²⁸.

At the level of public policies, the Brazilian state was compelled to respond to the pressing needs of the new arrivals. For instance, at the regional level, in 2015 was created the State Council on Rights of Refugees, Migrants and Stateless of Paraná¹¹²⁹, whose aim is to assist in the implementation and monitoring of public policies focused on the rights of that population. Similar councils were created across Brazil¹¹³⁰. The opening of an official

¹¹²⁵ For an analysis of the role of the *Cátedra Sérgio Vieira de Mello* in Brazil, see MOREIRA, Julia Bertino. O papel das cátedras Sérgio Vieira de Mello no processo de integração local dos refugiados no Brasil. **Monções: Revista de Relações Internacionais da UFGD**, v. 4, n. 8, p. 81-96, 2015.

¹¹²⁶ The organization developed activities also in Curitiba, under the guidance of Ms. Martha Toledo, who managed to gather volunteers to provide for refugees and humanitarian migrants Portuguese classes, assistance to find jobs and cultural integration events, among other free services.

¹¹²⁷ INSTITUTO ADUS. Available at: <http://www.adus.org.br> Accessed on: 16 Nov. 2017.

¹¹²⁸ LYNION. Available at: <https://www.linyon.work> Accessed on 16 Nov. 2017.

¹¹²⁹ *Conselho Estadual dos Direitos dos Refugiados, Migrantes e Apátridas*. The Council was created by the State Law n. 18.465/2015, and is composed half by representatives of the civil society, half by governmental authorities from different secretaries.

¹¹³⁰ For instance, in 2017 it was created in São Paulo the Municipal Council on Immigrants.

instance to debate the theme with a wider public is salutary, although it does not guarantee by itself that adequate public policies will be adopted.

The fact is that Brazil was not used to receive a significant number of asylum seekers and migrants fleeing natural disasters. In the last years though, the country became a visible destination, but an adequate hosting structure and social integration public policies are yet to be created, in addition to a change of mentality from those who still associate migrants and refugees with poverty and crime. Indeed, it is now that the much-lauded hospitality of the Brazilian people has been (and will keep being) tested in practice.

4.4 Brazilian hospitality in the context of international human mobility

The historian Sérgio Buarque de Hollanda, in his masterpiece *Raízes do Brasil* [Roots of Brazil], famously portrayed the Brazilian character with the distinctive trace of generosity and “hospitality”. The Brazilian contribution to the world would be the cordiality of its people, a virtue recognized by the foreigners who visit the country¹¹³¹. As a matter of fact, by considering the typical Brazilian as a “cordial man”, the author does not make a value judgment related to kindness or good manners, referring instead, to the emotive way the Brazilians treat each other, as well as their extreme informality¹¹³².

In the opinion of the Austrian writer Stefan Zweig, who lived in Brazil in the 1940s, “any newcomer is received warmly, and everything is facilitated in the most helpful manner”. Zweig wrote a book about his impressions on the Brazilian culture and society, and expressed admiration for the mixture of races of the national population, composed along the centuries by the immigration from different continents, without the racial hatred he was used to see in Europe¹¹³³. The miscegenation in Brazil is thoughtful analyzed by the sociologist Gilberto Freyre in the classic of 1933, *Casa Grande & Senzala*¹¹³⁴.

In fact, Brazil has the potential to be a hospitable country for migrants, refugees and stateless persons. It is a multiethnic society, with a long history of receiving migrants from different parts of the world. In the opinion of Almeida, the constant interaction with the differences represents a great contribution from the country, for the construction of a

¹¹³¹ HOLANDA, Sérgio Buarque de; **Raízes do Brasil**. São Paulo: Companhia das Letras, 1995.

¹¹³² Ibid. See the note no. 6, where the author explains this distinction.

¹¹³³ ZWEIG, Stefan. **Brasil, um país do futuro**. Translated by Kristina Michahelles. Porto Alegre: L&PM, 2013, p. 125-130.

¹¹³⁴ FREYRE, Gilberto. **Casa-Grande & Senzala**. Formação da família brasileira sob o regime da economia patriarcal. 51ª ed. São Paulo: Editora Global, 2006.

cosmopolitan law¹¹³⁵. Moreover, it has a diplomacy with a pacifist and humanitarian tradition, which is aware of the emerging importance of the country as a global player and its consequent growing international responsibilities. As seen, the country is already considered an example of protection of refugees in Latin America, “according to the amplitude of its legal protection framework and environment of cooperation between governmental organs responsible for dealing with the institute of refuge, the UNHCR and the civil society”¹¹³⁶.

In addition, it was recently approved in Brazil a new migratory law, which puts the country finally in an advanced position also in respect to reception of migrations in general. The Law no. 13.445/2017 supersedes the outdated Law 6.815/1980, which was incompatible in some points with the 1988 Constitution. The approval of the new law is a result of a long struggle from the relevant actors dealing with the theme. After an advanced draft was presented by an Expert Commission in 2014, and a process of intense social participation which heard different sectors, a bill which was in the National Congress was changed and finally approved, with the support of both the government and the opposition, in May 2017. The Law no. 13.445/2017 has a human rights approach, modernizing the migratory legislation and improving the rules on migrant’s entry, regularization and access to rights and public services in Brazil, as well as establishing public policies for Brazilian emigrants.

However, the Brazilian new migratory law does not solve all the legislative gaps. It remains to be addresses some important questions: first, the possibility of creating a civil migratory authority, to replace the current attribution of the Federal Police, whose typical function is to prevent and ascertain the commitment of federal crimes¹¹³⁷. As migrants, refugees and stateless persons are not criminals, they should to be served by public authorities with appropriate qualifications and skills, preferably with knowledge of foreign

¹¹³⁵ ALMEIDA, Guilherme Assis de. Brasil, sustentabilidade, direito cosmopolita. **Revista da Faculdade de Direito**, Universidade de São Paulo, v. 97, p. 569-574, 2002.

¹¹³⁶ LACERDA, Ana Luiza; GAMA, Carlos Frederico P. S. O solicitante de refúgio e a soberania moderna: a identidade na diferença. **Lua Nova**, v. 97, p. 53-80, 2016.

¹¹³⁷ According to Maria Beatriz Nogueira and Maiara Folly, in article published in The Guardian in 15 June 2017, “while having a long-standing reputation as a “welcoming” country, Brazil has never had a federal institution devoted exclusively to migration. As a result, skills and resources are scattered across different ministries”. NOGUEIRA, Maria Beatriz; FOLLY, Maiara. Brazil’s refugee policy needs a radical overhaul in response to Venezuela’s crisis. **The Guardian**, New York, 15 Jun. 2017. Available at: <https://www.theguardian.com/global-development-professionals-network/2017/jun/15/brazil-refugee-policy-needs-a-radical-overhaul-in-response-to-venezuela-crisis> Accessed on: 10 Nov. 2017.

languages¹¹³⁸, to interact with people from different cultural backgrounds¹¹³⁹. The creation of such civil authority depends on a legislative initiative of the federal executive branch.

The second concern relates to the absence of the right to vote. Brazil is to date one of the only countries of Latin America which do not concede migrants the right to electoral participation. The obstruction of direct political participation affects the sense of belonging and prevent people from influencing in the destiny of the community where they live. Such change in Brazil depends on a Constitutional amendment.

Despite the legislative advancement, there are some challenges to overcome in the cultural realm. The racial discrimination is still an issue in the country, and affects not only Brazilians, but also migrants, refugees and stateless of different ethnicities. Black people are specially at risk of suffering discrimination and violence, as concrete episodes demonstrate in the case of Africans and Haitians in different Brazilian cities, especially in the South¹¹⁴⁰.

Another problem to be considered is the xenophobia of part of the Brazilian population. Even if it is considered a welcoming country by foreign *tourists*, as seen during the World Cup and Olympic Games, when it comes to migrants, especially those coming from poorer countries, some people still react reproducing the myths that the immigrant will “steal our jobs”, “be an additional burden for public services, considering they are already bad, even for us”, they will “increase criminality rates” or “infiltrated terrorists will come”¹¹⁴¹. As usual, that kind of paranoia is especially high in times of economic crisis. The popularity of ultra-nationalist discourses seems to be raised, what corresponds with the political landscape in other parts of the world¹¹⁴².

In any case, its advanced law on refugees, the recent reception of Haitians and Syrians through the innovative practice of humanitarian visas, and the adoption of a new migratory law, more in line of the actual human rights obligations to which it is attached, makes

¹¹³⁸ See: MARTIN, Maria. Sem fluência em idiomas, a PF depende de voluntários para atender refugiados. **El País**, São Paulo, 13 May 2014. Available at: https://brasil.elpais.com/brasil/2014/05/13/politica/1400012407_244755.html Accessed on: 13 May 2014.

¹¹³⁹ In any case, the eventual creation of a civil migratory authority would only be possible, according to the Constitution, by initiative of the Executive Federal branch.

¹¹⁴⁰ On 17 October 2015, the Haitian Fetiere Sterlin, 33, as beaten with iron bars and stabbed until the death by ten young men in the city of Navegantes, state of Santa Catarina, in just one example of the many racist and xenophobic aggressions occurred in Brazil since the Haitians started to arrive. SPERB, Paula. Haitiano é agredido até a morte em Santa Catarina. **Folha de São Paulo**, São Paulo, 20 Oct. 2015. Available at: <http://www1.folha.uol.com.br/cotidiano/2015/10/1696121-haitiano-e-agredido-ate-a-morte-em-santa-catarina.shtml> Accessed on: 20 Nov. 2017.

¹¹⁴¹ VENTURA, Deisy; ILLES, Paulo. Qual a política migratória do Brasil? **Le Monde Diplomatique Brasil**, São Paulo, 7 Mar. 2012. Available at: <https://diplomatique.org.br/qual-a-politica-migratoria-do-brasil/> Accessed on: 30 Set. 2016.

¹¹⁴² As known, populist parties and politicians usually associate the internal crises to external threats, and the preferred targets are migrants and refugees, especially (but not exclusively) in Europe and USA.

the country a growing reference of humanitarian policy in regard to international human mobility. In addition, it should not be forgotten the long tradition of receiving migrants along the history, which helped to compose the multiethnic human component of the Brazilian territory, and its rich cultural diversity.

Finally, Brazil will have to construct, based on the new migratory law as a fresh start, appropriate public policies to meet the human rights standards proclaimed. That means investing in reception and social integration initiatives, which go much beyond the mere provision of documents and migratory regularization. There is still a long way until transforming into reality, the equality of treatment between nationals and migrants provided by the Constitution in areas such as health, education and social assistance, as well as investing in transversal policies covering housing, food security, health, education, Portuguese language learning, recognition of qualifications and support for insertion in the labour market. Such rights-based approach tends to produce immediate and long-term benefits for the migrants, refugees and stateless person, as well as for the Brazilian population, which will count on new knowledge, competences, experiences, creativity and cultural diversity, in an increasing interdependent world.

4.5 Statelessness in Brazil

The normative about access to nationality in Brazil is present in the Article 12 of the Federal Constitution of 1988, and until recently, in the Law no. 818 from 1949, revoked by the Law 13.445/2017. In relation specifically to statelessness, the legal provisions were limited, in the former Brazilian migratory law (Law 6.815/1980), to the concession of passport for a “foreigner” stateless and who was of “indefinite nationality”¹¹⁴³. The Decree no. 86.715/1981, which regulated that law (now revoked), added that the stateless person, to obtain a visa for Brazil, should be able to demonstrate that he could return to the country of origin or former residence, or enter in another country, except if exempted by the Brazilian Ministry of Foreign Affairs¹¹⁴⁴. This in practice translated into a kind of safeguard required

¹¹⁴³ Article 55, I, “a”. BRASIL. Law 6.815 of 19 August 1980, defines the legal situation of the foreigner in Brazil, creates the National Immigration Council.

¹¹⁴⁴ BRASIL. Decree n. 86.715 of 10 December 1981. Regulates Law No. 6.815, of August 19, 1980, which defines the legal status of foreigners in Brazil, creates the National Immigration Council, and provides other measures. *Diário Oficial da União*, Brasília, DF, 11 Dec. 1981, Seção 1, p. 23496.

by the state, in order to have a place where to deport or expulse the stateless in the cases provided by the law¹¹⁴⁵.

Even if there was a problem of lack of birth registration years ago, which was eradicated recently¹¹⁴⁶, the question did not lead to statelessness, but to obstacles on the exercise of rights¹¹⁴⁷. In fact, there is today no major cause of statelessness in the country, mainly because anyone born in Brazil is considered Brazilian (*jus soli*)¹¹⁴⁸. But it was not always like that. Around 200,000 Brazilian children were at risk of becoming stateless, after a change in the 1988 Constitution in 1994¹¹⁴⁹. The revision amendment no. 3 of that year stated that, to obtain Brazilian nationality, the child born abroad to a Brazilian parent should reside in Brazil and opt by the Brazilian nationality, requiring it formally in the country¹¹⁵⁰.

The interpretation usually given is that the approval of the amendment was a lapse of the legislator with unintentional consequences. But considering that by the time the country experienced a massive emigration wave, in fact some politicians were concerned that many children born to Brazilian citizens abroad, would be growing without connection with the Brazilian culture and customs¹¹⁵¹.

The constitutional change sparked protests from part of the 3 million Brazilians living abroad, especially the ones who had no intentions to go back to Brazil and/or lived in countries with *jus sanguinis* tradition, such as Germany, Switzerland, Italy and Japan. In Japan

¹¹⁴⁵ One of the premises to which the nationality law obeys, as seen, is giving the state the control of the access of entrance to its territory. Therefore, in order to deny this entrance or to expel the “undesirable foreigner”, the interstate logic requires the information: “where to return this person to?”. In Brazil, the cases of deportation were provided in Arts. 57 to 64 of the former migratory legislation (Law no. 6.815/1980) and refer basically with irregularity of migratory status. The expulsion was provided in Arts. 65 to 75, and gave a broad range of discretionary power to the state, which could expulse the foreigner based on a “threat to national security, political or social order, public tranquility or morality, and the popular economy, or whose procedure renders it harmful to national convenience and interests”. BRASIL, Law 6.815/1980... op. cit.

¹¹⁴⁶ BRASIL. Ministério da Justiça e Cidadania. **Brasil erradica casos de crianças sem registro civil de nascimento**. Available at: <http://www.brasil.gov.br/cidadania-e-justica/2015/11/brasil-erradica-sub-registro-civil-de-nascimento> Accessed on: 27 Sept. 2017.

¹¹⁴⁷ CLARO, C. A. B. Os 60 anos da Convenção da ONU... op. cit.

¹¹⁴⁸ Art. 12, item I, states that are native Brazilians anyone born in the country, even if from foreign parents, except for those on duty for their home country. BRASIL. **Constituição** (1988). Constituição da República Federativa do Brasil. Brasília, DF: Senado, 1988.

¹¹⁴⁹ For a full analysis of the case, see MOULIN, Carolina. Mobilizing Against Statelessness: the case of Brazilian Emigrant Communities. In: HOWARD-HASSMANN, Rhoda E.; WALTON-ROBERTS, Margaret (Eds.). **The human right to citizenship: a slippery concept**. Philadelphia: University of Pennsylvania Press, 2015.

¹¹⁵⁰ Article 12, I, “c” of the Brazilian Constitution, with the amendment n° 3 of 1994, had the following text: “Art. 12. São brasileiros: I - natos: os nascidos no estrangeiro, de pai brasileiro ou de mãe brasileira, desde que venham a residir na República Federativa do Brasil e optem, em qualquer tempo, pela nacionalidade brasileira”. The original text instead, read: “os nascidos no estrangeiro, de pai brasileiro ou mãe brasileira, desde que sejam registrados em repartição brasileira competente, ou venham a residir na República Federativa do Brasil antes da maioridade e, alcançada esta, optem em qualquer tempo pela nacionalidade brasileira. BRASIL, **Constituição** (1988)... op. cit.

¹¹⁵¹ MOULIN, Carolina. Mobilizing Against Statelessness... op. cit. p. 84-85.

alone, a traditional Brazilian emigration destination, the expatriate community counts with more than 200,000 immigrants¹¹⁵². In those countries, the children born to both Brazilian parents would be stateless. They would not have the chance to leave the country of residence legally, nor to visit relatives in Brazil, since they would not have access to a travel document. The only case by which the child of a Brazilian could receive the nationality of the parent, was if at least one of the genitors was working abroad for the Brazilian government¹¹⁵³.

Considering that situation, Brazilian families living abroad created a campaign through the internet, called *Brasileirinhos Apátridas*, with a website to promote awareness about their problem¹¹⁵⁴. Their case attracted attention of the civil society and media. Parents living abroad started to organize meetings, interviews and lobby Brazilian diplomats and lawmakers. Protests took place in several cities around the world, including in front of the UN headquarters in Geneva.

Finally, the movement gained the National Congress when Senator Lúcio Alcântara proposed the amendment 272/2000, approved as Constitutional Amendment 54/2007¹¹⁵⁵, by which the child of a Brazilian mother or father born abroad, would be a Brazilian national, sufficing to be registered in the Brazilian competent consulate. The amendment puts an end on years of uncertainty for the parents who felt connected to their country of origin, and wanted their children to have the chance to share their citizenship, and perhaps move freely to their country of origin in the future.

As noted by Moulin, there were political reasons that allowed the change to pass in the National Congress. By the time, public opinion in Brazil was concerned with the mistreatment of Brazilians abroad, including tourists. Moreover, the political power of emigrants had risen, since “the number of Brazilian emigrants able to vote jumped from 104,660 in 2006 to 200,392 in 2010”¹¹⁵⁶.

¹¹⁵² BRASIL. Ministério das Relações Exteriores. **Censo IBGE estima brasileiros no exterior em cerca de 500 mil**. Available at: <http://www.brasileirosnomundo.itamaraty.gov.br/noticias/censo-ibge-estima-brasileiros-no-externo-em-cerca-de-500-mil/impressao> Accessed on: 28 Jun. 2017.

¹¹⁵³ BRASIL, **Constituição** (1988)... op. cit., Art. 12, I, “b”.

¹¹⁵⁴ The website is still online up to now. BRASILEIRINHOS APATRIDAS. Available at: <http://brasileirinhosapatridas.org/> Accessed on: 28 Jun 2017.

¹¹⁵⁵ The new text as approved is: “os nascidos no estrangeiro de pai brasileiro ou de mãe brasileira, desde que sejam registrados em repartição brasileira competente ou venham a residir na República Federativa do Brasil e optem, em qualquer tempo, depois de atingida a maioridade, pela nacionalidade brasileira”. BRASIL, **Constituição Federal**, 1988.

¹¹⁵⁶ MOULIN, Carolina. *Mobilizing Against Statelessness*... op. cit., p. 87.

Therefore, Brazil has adequate its Constitutional provisions about nationality, avoiding new cases of statelessness from children of Brazilian parents¹¹⁵⁷. The initiative was praised by the UNHCR, which cited the case in its compilation of good practices concerning the Global Action Plan to End Statelessness¹¹⁵⁸.

Additionally, the case of *Brasileirinhos Apátridas* reveals a well succeeded transnational civic engagement, by which persons of the same nationality of origin, virtually connected even if living in different countries, joined the same struggle, with positive results. In the opinion of Moulin,

the experience created a sense of community among Brazilian nationals in foreign territories and highlighted the fact that, despite their different social classes, life circumstances, and countries of residence, many of the problems and restrictions they faced were the same. The movement showed, consequently, the ability of territorially dispersed nationals to enact, collectively, a form of *transnational citizenship* that served their own interests and agendas¹¹⁵⁹.

As a consequence, this relation between national membership and a broader sense of citizenship, which surpasses countries' boundaries, although in this case marked by the search of nationality itself, can be considered as part of the emerging global or transnational citizenship, as studied in the precedent chapter.

It was the Law no. 9.474 from 1997, that is, the National Refugee Act, which first included protection for stateless persons in Brazil, but just in case they are also refugees. It is what stated in Article 1, item II, which requires the person without nationality to be out of his country of habitual residence, and to be uncappable or unwilling to return by force of a well-founded fear of persecution, on grounds of race, religion, nationality, social group or political opinion¹¹⁶⁰. As this definition amounts to the concept of refugee of the 1951 Convention, that means the Brazilian state has recognized in 1997 only the protection of stateless refugees, not stateless persons who did not suffered persecution.

However, Brazil has ratified both the 1954 and the 1961 Stateless Conventions, incorporated in the national legislation in 2002 and 2015 respectively¹¹⁶¹. Consequentially, the

¹¹⁵⁷ GODOY, Gabriel Gualano. Considerações sobre recentes avanços na proteção dos apátridas no Brasil. **Caderno de Debates Refúgio, Migrações e Cidadania**, v. 6, p. 61-72, 2010, p. 68.

¹¹⁵⁸ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Good Practices Paper** - Action 1: Resolving Existing Major Situations of Statelessness, 23 February 2015. Available at: <http://www.refworld.org/docid/54e75a244.html>. Accessed 28 June 2017.

¹¹⁵⁹ MOULIN, Carolina. Mobilizing Against Statelessness... op. cit.

¹¹⁶⁰ BRASIL. Article 1, II. Law 9.474/1997... op. cit.

¹¹⁶¹ Decree 4.246/2002 enacted the 1954 Convention relating to the Status of Stateless Persons, while Decree 8.501/2015 enacted the 1961 Convention on the Reduction of Statelessness.

1954 Convention imposes a duty of the state to recognize the stateless, conceding to the person in this condition, at least the same rights of the migrants in general¹¹⁶². That is why, although the country did not recognize statelessness in a specific law, it had already the obligation to do so, since 22 May 2002, date of publication of the decree promulgating the 1954 Convention¹¹⁶³. According to Godoy, stateless residents in Brazil are identified by the government, which gives them travel documents and guarantee the same rights and duties as regular migrants¹¹⁶⁴.

The information provided, under request, by the Ministry of Justice, only mentions Art. 58 of the Decree no. 86.715/1981, by which the Federal Police had the duty to register as stateless any foreigner whose travel document omitted his nationality, that is, in case of “absence of nationality”¹¹⁶⁵. However, until the middle of November 2017, the federal government had not adapted to the international norms, creating at the administrative level an appropriate mechanism to determine the condition of stateless of an individual.

In the meantime, the text of the 1954 Convention was used as basis for the Brazilian judiciary to recognize the status of stateless of Mr. Andrimana Buyoya Habizimana, who came from Burundi and arrived in Brazil from South Africa, hidden in a cargo ship. He requested the status of refugee, what was denied by Brazilian authorities. Burundi then informed he was not national of that country, and South Africa did not accept his deportation. He remained in a legal limbo, until finally the Federal Justice obliged the Brazilian state to confer him the status of stateless in 2011, based on the 1954 Convention and the constitutional principle of human dignity¹¹⁶⁶. That is a paradigmatic decision, which came to fill an important legislative gap, and at the same time raises awareness of the law operators for the possibility and the need to apply the text of international human rights treaties ratified by the country, independent of internal legislative inaction.

In November 2010, representatives of several governments of Latin America gathered in Brasilia, for the occasion of the 60 years of the UNHCR, and approved the Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas. The document urged the countries to accede to the international instruments on statelessness,

¹¹⁶² UN GENERAL ASSEMBLY. Convention Relating to the Status of Stateless Persons... op. cit. Art. 7, item I.

¹¹⁶³ BRASIL. Decree n. 4.246 of 22 May 2002. Promulgates the Convention on the Status of Stateless Persons. **Diário Oficial da União**, Brasília, DF, 23 May 2002, Seção 1, p. 5.

¹¹⁶⁴ GODOY, Gabriel Gualano. Considerações... op. cit., p. 68.

¹¹⁶⁵ Information provided by request of the author, through the Law of Access of Information (Law no. 12.527/2011), with the official response of the Brazilian Ministry of Justice dated 29 June 2017.

¹¹⁶⁶ BRASIL. Tribunal Regional Federal. (5. Região). **Apelação/Reexame necessário 200984000065700**, Relator: Desembargador Federal Bruno Leonardo Câmara Carrá. Recife, 29 September 2011.

reviewing their national legislation to prevent and reduce situations of statelessness, and adopt comprehensive mechanisms for birth registration¹¹⁶⁷.

As a development in this direction, a draft of legislative proposal to establish a mechanism for determination of the condition of stateless was elaborated in 2011 by Luiz Paulo Barreto, then Secretary-Executive of the Ministry of Justice. The draft bill had several guarantees for the protection of stateless persons, and presented a definition of stateless person which included those who did not have effective nationality, called *de facto* stateless¹¹⁶⁸, broader therefore than the definition of the 1954 Stateless Convention¹¹⁶⁹.

Another proposal was presented in 2014 by the National Secretary of Justice, Paulo Abrão, as result of a collaboration with the UNHCR in Brazil. The law project established rights and duties for the stateless in the country, and designated the CONARE as appropriate organ to decide about the stateless determination. It stated that it would be considered stateless anyone who was not national of other state, or who could not proof the nationality by other means¹¹⁷⁰. But none of the proposals arrived to be voted by the National Congress.

In December 2014, for the occasion of the 30th anniversary of the 1984 Cartagena Declaration on Refugees, Governments of Latin America and the Caribbean met in Brasilia for a Ministerial Meeting, called Cartagena+30, where 28 countries and three territories adopted by acclamation the Brazil Declaration and Plan of Action¹¹⁷¹. The event provided momentum for pressing the states on legislative reforms, in order to enhance the protection of refugees and stateless in the countries of the continent. The Brazil Declaration brings an entire chapter dedicated to statelessness¹¹⁷², with the intention of promoting cooperation between governments, the UNHCR and civil society, for implementing actions to prevent stateless, protect stateless persons and solve the existing cases of statelessness¹¹⁷³.

¹¹⁶⁷ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). **Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas**, 11 November 2010. Available at: <http://www.refworld.org/docid/4cdd44582.html> Accessed on: 14 Nov. 2017.

¹¹⁶⁸ See the existing debate on the concept of *de facto* statelessness in the section 2.2.1.

¹¹⁶⁹ GODOY, Gabriel Gualano. *Considerações...* op. cit, p. 71.

¹¹⁷⁰ Available at: <http://www.acnur.org/portugues/noticias/noticia/governo-do-brasil-anuncia-projeto-de-lei-para-protoger-pessoas-sem-patria/> Accessed on 10 Nov. 2017.

¹¹⁷¹ To a comprehensive analysis of the advancements contained in this Declaration concerning the eradication of statelessness, see MONDELLI. Juan Ignacio. La erradicación de la apatridia en el Plan de Acción de Brasil. **Agenda Internacional**, v. 22, n. 33, p. 129-148, 2015.

¹¹⁷² Chapter six of the Brazil Declaration. REGIONAL REFUGEE INSTRUMENTS & RELATED, **Brazil Declaration and Plan of Action**, 3 December 2014. Available at: <http://www.refworld.org/docid/5487065b4.html> Accessed on: 14 Nov. 2017.

¹¹⁷³ The main actions provided are that the states: accede to both the 1954 and 1961 Stateless Conventions; harmonize internal legislations and practices on nationality with international standards; facilitate universal birth registration; establish effective statelessness status determination procedures; adopt legal protection frameworks that guarantee the rights of stateless persons; Facilitate naturalization; confirm nationality, for example, by facilitating late birth registration, providing exemptions from fees and fines and issuing

In 2016, the Decree no. 8.757/2016 facilitated the naturalization of migrants in Brazil, by revoking a series of requirements, such as demonstrating that the person speaks Portuguese by reading parts of the Constitution in front of a Judge, but most importantly, by removing the requirement that the immigrant renounce his former nationality, in order to receive the Brazilian one, avoiding the risk of statelessness¹¹⁷⁴.

It remains in force, however, an unjustifiable Constitutional norm, which determines the loss of the Brazilian nationality, for those who acquire another nationality. The two exceptions are the recognition of an original nationality (such as decurrent from *jus sanguinis*); or the imposition of naturalization by the foreign law, for the Brazilian resident being able to remain in the territory, or exercise civil rights in the country concerned¹¹⁷⁵. Apart from those exceptions, the mere possibility of loss of Brazilian nationality by acquiring another, is incompatible with the increasing acceptance, all over the world, of the condition of multiple national, which brings no burden for the state, and it is a matter of personal autonomy and identity of the individual¹¹⁷⁶. Moreover, statelessness can result if by any reason, the new nationality is lost, until the Brazilian one is reacquired.

In any case, the high-level events mentioned above, as well as the leading role of Brazil in their organization, in partnership with the UNHCR Office in the country, have certainly influenced the inclusion of statelessness in the new migratory law, approved in 2017, as studied below.

4.5.1 The new legal framework for stateless persons in Brazil

The discipline of statelessness in Brazil has just changed completely, with the new migratory legislation (Law no. 13.445/2017), which finally revoked the “Statute of the Foreigner”¹¹⁷⁷. Two innovations are especially important for the purpose of this work. The first is the introduction of a new kind of visa for “humanitarian hosting” (*acolhida*

appropriate documentation; and facilitate the restoration or recovery of nationality through legislation or inclusive policies. REGIONAL REFUGEE INSTRUMENTS & RELATED, **Brazil Declaration and Plan of Action**, 3 December 2014. Available at: <http://www.refworld.org/docid/5487065b4.html> Accessed on: 14 Nov. 2017.

¹¹⁷⁴ BRASIL. Decree n. 8.757, 10 May 2016. Amends Decree no. 86.715, from December 10, 1981, to dispose about the legal situation of the foreigner in the Federative Republic of Brazil. Available at: http://www.planalto.gov.br/ccivil_03/ Ato2015-2018/2016/Decreto/D8757.htm . Accessed on: 20 Set. 2017.

¹¹⁷⁵ BRASIL. **Constituição** (1988). Constituição da República Federativa do Brasil. Brasília, DF: Senado, 1988, Art. 12, par. 4, II.

¹¹⁷⁶ See the sections 1.2.3 and 3.4.1 for a thoughtful analysis of the subject.

¹¹⁷⁷ As it was called the former migratory Law no. 6.815/1980, from the time of the military dictatorship.

humanitária)¹¹⁷⁸. The visa will be granted for those “*stateless* or nationals of any country in situations of serious or imminent institutional instability, armed conflict, major disaster, environmental disaster or serious violation of human rights or international humanitarian law”¹¹⁷⁹.

This completely innovative migratory solution has its roots, as studied above, in the recent practice of the Brazilian state to concede a special visa for humanitarian purposes, initially for the Haitians victims of a devastating earthquake in 2010. The *humanitarian visa* has helped to regularize the migratory situation of many Haitians who came to the country, allowing them to have access to work and essential public services. The initiative of the Brazilian government was then extended to people of Syrian origin in 2013, due to the lasting civil war in course in their country. In their case, the visa was conceded in Brazilians consulates around the Middle East, allowing them to fly legally to Brazil, and once in the country, apply for refugee status.

The fact that the word “stateless” was included in the provision of this “new” kind of visa, means that any stateless person in a situation of serious or imminent institutional instability, armed conflict, major disaster, environmental disaster or serious violation of human rights or international humanitarian law, will be able to apply for the *humanitarian visa*¹¹⁸⁰, marking an important form of complementary protection.

The second crucial change introduced by the Law no. 13.445/2017, is the inauguration of an entire section about “protection of the stateless people and reduction of statelessness”¹¹⁸¹, finally giving the Brazilian legislation a dedicated normative for the stateless present or willing to live in the country. According to the Federal Police, until August 2017 there were 1,649 stateless persons with permanent residence in Brazil, 2 stateless refugees, one stateless with temporary residence and one “provisory”, totalizing 1,653 individuals¹¹⁸². Another 1,039 stateless persons had their register canceled by decease, 284 were naturalized as Brazilians and 31 are waiting for naturalization¹¹⁸³. It is worth mentioning that these

¹¹⁷⁸ The term “acolhida” in Portuguese refers to host, receive in a hospitable way.

¹¹⁷⁹ Article 14, par. 3. BRASIL. Law n. 13.445 of 24 May 2017. Institutes the Migration Law. **Diário Oficial da União**, Brasília, DF, 25 May 2017, p. 1.

¹¹⁸⁰ That would include, for instance, the Rohingya population from Myanmar, most of which are stateless, and who have been victims recently of fierce persecution in the country. Thousands have fled to Bangladesh, becoming refugees, what does not affect their stateless condition.

¹¹⁸¹ BRASIL. Law no. 13.445/2017.... op. cit.

¹¹⁸² The Federal Police does not specify what they understand as “provisory”. Information provided by request of the author, through the Law of Access of Information, with the official response of the Brazilian Federal Police dated 29 August 2017.

¹¹⁸³ Information provided by request of the author, through the Law of Access of Information, with the official response of the Brazilian Federal Police dated of 29 August 2017.

numbers do not mean that an appropriate identification procedure of statelessness were applied by the Brazilian authorities. As informed by the Department of Migrations of the Ministry of Justice, such a procedure was not in place until 29 June 2017¹¹⁸⁴.

Therefore, the country does not have an administrative stateless determination procedure to date¹¹⁸⁵. This corresponds to the fact that the former migratory legislation was completely silent about the stateless condition in the country. In fact, now that the legislation deals with statelessness, the law will have to be followed by appropriate administrative measures¹¹⁸⁶. The new migratory law states in its Article 26 that “regulation shall provide for the special protection institute of the stateless person, consolidated in a simplified naturalization process”¹¹⁸⁷, which means there is a positive obligation for the legislator to create an infra-legal rule tackling the question. Such act should discipline the whole procedure, and must be built with clear procedural rules and adequate safeguards, as seen in the section dedicated to the subject¹¹⁸⁸.

Thus, the new Brazilian Migration Law brings the question of statelessness to a new phase in the country. With its entry in force, stateless persons can benefit from the rights guaranteed in the law, while waiting for the response of the application for recognition of the situation of statelessness. The text guarantees for the applicants, the same “protective mechanisms and of social inclusion facilitation” of the 1954 Stateless Convention, in addition of those provided under the 1951 Refugee Convention, and the National Refugee Act (Law no. 9,474/1997)¹¹⁸⁹.

In addition, stateless persons resident in Brazil are provided, under the new law, with all the rights applicable to migrants in general, without discrimination in relation to nationals, which include appropriate documentation, access to public education and health, social assistance and social security, access to justice, right to work legally and enjoy labour rights,

¹¹⁸⁴ Information provided by request of the author, through the Law of Access of Information, with the official response of the Department of Migrations of the Ministry of Justice dated of 29 June 2017.

¹¹⁸⁵ This thesis was written until the middle of November 2017, and even being aware of the existence of a draft decree which regulates the new Law 13,445/2017 in the process of being approved, the author chose to leave it out of the work by constraints of time, and because it will demand a careful analysis after its approval.

¹¹⁸⁶ According to Mondelli, in 2011, during the Intergovernmental Event at the Ministerial Level on Refugees and the Stateless Persons, held in Geneva, the representatives of Brazil, Costa Rica, USA, Peru and Uruguay have pledged to adopt statelessness status determination procedures. MONDELLI. Juan Ignacio. **La erradicación...** op. cit.

¹¹⁸⁷ BRASIL. Law no. 13.445/2017.... op. cit.

¹¹⁸⁸ See the section about stateless determination procedures (2.6.2).

¹¹⁸⁹ BRASIL. Law no. 13.445/2017.... op. cit.

freedom to remain, leave, circulate and return to the national territory, and right to family reunion¹¹⁹⁰.

Furthermore, the new Brazilian legislation advances a simple and durable solution for turning a stateless person into a full citizen of the country. According to Article 26 and its paragraphs, the procedure for recognition as stateless intends to verify, in the first place, if the person is a national of any state under its law. For that purpose, all information and documents from the applicant and other national and international organizations can be considered. Once recognized the situation of statelessness, it will be automatically offered for the applicant the possibility of acquiring the Brazilian nationality, through naturalization. In the case the stateless accepts this solution, the naturalization should occur in up to 30 days¹¹⁹¹. The inclusion of this deadline is welcome, since the person concerned will not have to wait indefinitely for the state to take action, what could be the case otherwise.

If the stateless person opts for not naturalizing in the country, permanent residence should be granted by the migratory authority. That means the individual will be able to stay in Brazil lawfully in the condition of a stateless person, what is especially useful in the case of those who are waiting to receive another nationality in a third country. From the negative decision on the application for recognition as stateless, the applicant can lodge an appeal, and if confirmed the denial, it is prohibited the devolution of the person to where his life, personal integrity or liberty is at risk. The loss of the condition of stateless includes the case of renounce, proof of falsification of the documents used for the application of recognition as stateless, or the existence of facts which, if known by the time of the recognition, would have taken to a negative decision¹¹⁹².

In sum, the approval of a specific statelessness regulation in Brazil configures a very important advancement on the subject, turning the country into a place where people in this situation can count with clear rules, and appropriate solutions for addressing their case. Even if there are few stateless in Brazil to date, nothing precludes the possibility that stateless persons living in other states consider coming to Brazil for benefiting from the protection of the new law, once the statelessness determination procedure is in practice.

If on the one hand, this is compatible with the hospitality spirit build lately in the South American country, on the other, stateless persons will have to consider all the aspects

¹¹⁹⁰ Ibid.

¹¹⁹¹ Ibid.

¹¹⁹² BRASIL. Law no. 13.445/2017.... op. cit.

of such an endeavor, especially the lack, for now, of appropriate social integration policies for immigrants in general.

Moreover, migrations in general are moved also by economic demands, which includes the considerations, by the immigrants, of the opportunities offered in the prospective host country. Since Brazil is not in its best shape in the moment, it seems unlikely that a boom on the number of stateless persons come to the country, just to access the facilitated naturalization procedure, or even to remain as recognized stateless. However, this is not impossible to occur in the future, and in any case, if something similar happens, Brazilian citizens have nothing to lose. Their state would be contributing with its share for helping to solve an international issue with dramatic human consequences, which leaves entire families in a legal limbo, while the new arrivals could bring new competencies, experiences, and cultural diversity. Instead of a great number of newcomers, in a first moment is more likely that stateless persons already resident in the territory will access the procedure to regularize their situation, gaining therefore legal recognition and the chance to have, maybe for the first time in their life, a country to call their own, with the entitlements of rights and participation that citizenship brings with it. In this sense, their existence would not be in the shadow anymore, and they will be able to study and work legally, as well as to integrate in equality of conditions with other Brazilian citizens.

In addition, the Brazilian foreign policy would benefit from the image of a state which gives example among its peers, improving the hosting conditions for stateless persons, in line with what is already required by international law, reinforcing its position as an emerging power with humanitarian vocation, in a world full of contradictions.

FINAL CONSIDERATIONS

Nationality is attributed by the states, on discretionary basis, since the emergence of the nation-state, attached to the monopoly of the states on controlling who belongs to the polity. However, this confinement of people to a determined piece of territory, and the difficulties caused when someone do not possess this legal tie with a state, is being challenged by the increasing international human mobility, and intensified by phenomena such as regionalization and globalization.

While in the period between Wars, there was an attempt to identify the states, from an ethnical point of view, with existing nationalities, after the end of the Second War, the world was astonished by the consequences of the radicalization of such impossible endeavor. The human was reduced to mere object, as demonstrated by Hannah Arendt, and the human dignity had to be urgently recovered, leading to the creation of internationally recognized human rights, and a legal framework for the protection of refugees and stateless persons.

In the case Tunis and Morocco Nationality Decrees, from 1923, the Permanent Court of International Justice established the possibility that nationality could be regulated by international law. Nationality by the time was, and it is still today, considered part of the reserved domain of the states, but the decision made clear this is due to the own development of international relations, nothing precluding a change in this state of affairs in the future.

Indeed, after the mass denationalizations of the first part of the twentieth century, the creation of the United Nations, and the adoption of the Universal Declaration of Human Rights, a right to nationality for everyone was clearly established. Although this right has a recipient, it does not entail an obligation, on the part of the states, to confer nationality to anyone. Here begins the whole difficulty for the solution of statelessness, considering the incapacity of the international community to reach a formula which connected those two ends: the right to a nationality from the one side, and a correlated duty from the states to concede it, from the other.

The statelessness phenomenon is entwined with the plight of refugees, with a clear difficulty from the state actors and the United Nations to differ them clearly in the beginning. That was also result of the idea, current at the time, that all refugees were *de facto* stateless. The protection of those *de jure* stateless had to wait, being built three years later than the 1951 Convention on refugees, with the 1954 Convention relating to the Status of Stateless Persons. The debate on the need of some form of protection for *de facto* statelessness continues up to date, with the UNHCR recommending its adoption by the states, but nothing

in international law requiring it. Some states include this protection in their statelessness determination procedures, although remains unclear its effects in relation to third countries, especially for the country of the “ineffective nationality”.

The research identified a series of causes of statelessness, from conflicting nationality legislations, to different kinds of discrimination, especially against the women, arbitrary deprivation of nationality and difficulties resulting from state successions. As seen, a special attention is given by international law for childhood statelessness, since avoiding that a child is born stateless is one of the most effective measures to reduce drastically its incidence. Children can suffer in particular with the effects of their parents’ migratory status, considering they can inherit their stateless condition. Therefore, adequate nationality legislation is necessary to cover any gap that may result in statelessness, including not allowing children to suffer the consequences of restrictive migratory and nationality policies applicable to their parents.

In fact, there is a close relation between migrations and statelessness, as well as the condition of refugee and of stateless, which can sometimes overlap. It is important however, to distinguish and identified separately those two situations, since the mechanisms of protection are different. The refugee protection under international law is more extensive, covering the prohibition of *refoulement*. Thus, every stateless shall have the chance to apply for refugee status if it is the case, independently from its stateless condition.

The study of the consequences of statelessness brought some important reflections. Apart all the hardship brought to stateless individuals, mainly caused by the lack of access to essential rights and public services, they can remain in a permanent limbo, when not even deportation is possible, as a result of the fact that no state would accept to receive them back. This leads to protracted situations of detention, risking to make those persons “disappear” into the cracks of the national legal systems, to which they do not exist.

Regarding the responses built in international law to the question of statelessness, we should acknowledge the role of the 1954 Convention on the Status of Stateless Persons on creating a legal status for those individuals, although in the lack of Stateless Determination Procedures, ought to be adopted individually by each state, the Convention loses much of its efficacy. With the 1961 Convention on the Reduction of Statelessness, the international community lost the opportunity to eliminate the problem of statelessness, since the draft prepared by the ILC on the “elimination” of statelessness was discarded. Since then, the difficulty is to convince the states to adhere to the Convention, which still counts with a reduced number of ratifications.

We conclude that the efforts existent on international law to deal with the question, are having their effectivity tested by an overarching strategy draw by the UNHCR to promote the accession to the two Conventions, as well as to create awareness for the solution of the main causes of statelessness and protect stateless persons. The Global Campaign to End Statelessness, launched in 2014, has been a powerful tool to address the issue, both by presenting statelessness in a clear fashion for a broader public opinion, as by elevating the question to a higher political level, what has been creating positive reactions by many states. The ascension to the conventions has in fact increased, and nationalization campaigns are slowly taking place, all over the world.

Despite the success so far of the campaign, we question if the solutions made available up to date are sufficient, as it seems that the conventions above mentioned were built not only under the Westphalian nation-state paradigm, but to respond to concerns related mainly to the first part of the twentieth century. In fact, many elements which emerged after the Second World War, have been pressing the topicality of the absolute discretion of the states on nationality attribution. Globalization, the human rights protection systems and the rise of the individual personality in international law, the regional integration of states, the work of non-state actors and the intense international human mobility nowadays, seem to be factors which lead the debate on nationality to another level, bringing the thicker notion of citizenship, which by its turn, seems to be transforming, detaching from the state, to be gradually internationalized.

As demonstrated by Saskia Sassen, the state has been denationalized, but not (only) in the typical account which considers the influence of external factors, such as economic financial institutions or speculative foreign investments. It has been denationalized from within, as a result of the engagement of most governments and companies in international negotiations at various levels, which requires highly specialized human resources, as well as intercultural and language abilities. Countries have been denationalized also by the incorporation of transnational struggles, designed collectively by state and non-state actors, in the realms of human rights protection and environmental concerns, which are being increasingly inserted in the global political agenda. For instance, to implement the human rights conventions to which it adhered, the state has to be able not only to internalize those documents, but also to incorporate their requirements into the national legal framework, creating legislation to meet the standards set out internationally, with its own participation.

In fact, the human rights protection at international level is based on personhood, regardless of the nationality of the individual, hence including those who have no nationality

at all. This leads to the need of respecting the human rights of anyone present in the national territory, regardless of migratory status. Although some development has been observed on the domestic concession of many rights to non-citizens, it is important to acknowledge that citizenship of a state is still vital for conferring the individuals full rights, political participation and a sense of belonging to a community. Which does not preclude new forms of attachment and membership, some of which are also able to confer rights.

It is the case of some regional integration processes, such as the supranationality created in the ambit of the European Union. Indeed, the Maastricht Treaty created a regional, European citizenship, which includes additional rights for its holders, who are basically the same citizens of the member-states of the Union. The problem is that, at the same time that it lifts the internal borders, the EU started to erect higher external borders, with the aim to exclude those who are not part of the community, not by case called informally “extra-communitarians”. With the outbreak of the Syrian Civil War, in addition to the already pressing migratory demand, and the asylum seekers coming from Afghanistan, Iraq and Sub-Saharan countries, the Mediterranean region embarked in a major humanitarian crisis, especially caused by the lack of political will of some European states, and a general inability from European leaders and institutions, to address the crisis in a coordinated manner.

In the South American continent, departing from the Mercosur, the states have been attempting to create a South American citizenship. The Mercosur Residence Agreement adopted in 2008 is an important step in this direction, although it relates basically to the right of residence and work. Many other issues, such as the access to welfare services; the right to vote in local elections; the scope of family reunification; and the protection against expulsion, remain to be addressed.

In sum, regional integration brought a new form of membership, creating a communitarian citizenship in the case of Europe, which although not overcoming the state sovereignty, represents a supranational effort to solve collectively common problems. In addition, it is capable to make the national citizen, through educational and cultural exchanges, recognize in the neighboring citizen common goals and aspirations, despite the cultural and linguistic diversities.

In any case, those regional mechanisms ought not be used to discriminate or ignore those from outside. Instead, it should be acknowledged the increasing interdependence and interconnectedness of states and peoples on a global scale. In this sense, the conflict of today in another continent, can be the asylum seekers of tomorrow knocking our doors, and the same happens with the striking global inequality, since poverty and the lack of opportunities

in developing countries compels people to leave their homes, in search of a better life in countries of the North.

As a matter of fact, the border control is relatively recent, with the use of passports and visas dating from the beginning of the last century. Today, any attempts to simply “close the borders” are deemed to fail, considering their intrinsic porosity, and most of all, the determination that makes individuals in need reaching, on way or another, the desired destination to work, study, meet family members or run away from armed conflicts, persecutions and natural disasters. Indeed, international migrations cannot be avoided, and the states do best by jointly learn to look at their roots causes, coordinating their migratory policies on the basis of human rights standards, and gradually setting a global framework to promote regular channels of safe and regular migration, instead of letting the people smugglers do their job. A sound international development cooperation, able to generate inclusive and sustainable development in the least developed countries, is a way of tackling the migratory demand.

This relates to citizenship, in the sense that permanent migrants should be able to acquire the nationality of the country of residence, accessing rights and being allowed to participate in equality of conditions, with the associated benefits related to the rich exchange driven by the human diversity. In fact, multilingual competencies and intercultural sociability are both factors increasing valorized in our globalized world, and the international human mobility is likely to contribute to an increasing exchange of knowledge and world views, fostering creativity and innovation on local communities, as already happens in multicultural, global cities like London, New York, Paris, Melbourne or Singapore.

The national citizenship maintains its importance, since it is usually through the states that citizens have access to rights. Nevertheless, the concept of citizenship has been expanding with the elements studied above. And the main finding relates to the detachment of the concept citizenship, from the notion of national identity. Indeed, when people live for a longtime abroad, or migrate definitively, or yet, have a career in an international organization, which require them to change country all the time, although never losing their original cultural identity (represented for instance by their mother tongue), they might learn how to live and appreciate different identities, being subject to an assemblage of those identities, built in relation with the Others they meet on the way. This cosmopolitan citizen already exists, and is been forged by the migrants, refugees and stateless persons throughout the world. The cosmopolitan citizen, by its exposure to the cultural differences and needs of

adaptation, has no doubt a lot to contribute in terms of tolerance and how to learn from the human diversity.

Since the Northern countries have been receiving for decades immigrants from many different countries, they have been transforming into truly multicultural territories, where any attempt of cultural homogenization turned into an impossible endeavor. In fact, it is increasingly common binational marriages, and many kids in Europe, Australia, Brazil or Canada (to mention a few), are already growing up in intercultural homes, speaking two or three languages since alphabetization. Thus, the paradox is that even considering citizenship remains mostly national, multiple forms of transnational or non-national memberships are taking place. Hence the need to expand non-citizens' rights, as well as facilitating naturalization and recognizing multiple nationality, in order not to bring unnecessary difficulties for the individuals and families fruit of the human globalization.

After the decolonization process, more voices from below started to organize, and new struggles for collective identities were raised. The multiethnic composition of many states became more evident, there was an organized fight against racism, the feminism came to question the patriarchal customs, and other claims took place, pointing to the pluralism of identities and the complexity of the human diversity. Many of those identity groups keep in search of recognition, and as others emerge, they all reveal possibilities of interaction, redefinition, adaptation and transformation. In sum, the nationally based citizenship was weakened by the appearance of additional forms of belonging and new collective commitments, under, above and beyond the nation.

As demonstrated along this thesis, the feeling of belonging to a political community, among citizens and non-citizens, do not pass necessarily through an inherited national culture, but it is forged together through the equal access to rights and participation. In fact, the complexity of the international human mobility has been pushing international law mechanisms to have a stake on guaranteeing the human rights of non-citizens, surpassing the once untouched reserved domain of the states in relation to citizenship. The point is that it is increasingly difficult to sustain the congruence between state and nationality, since in democratic countries, what matters are the possibilities of political participation, and the adequate enjoyment of fundamental rights. Whoever is present in the territory is covert by universal human rights norms, and the sense of identity pertains to the individual private sphere, and thus shall not be regulated by the state, if only to allow its citizens to pertain simultaneously to other nationalities. In sum, the notion of citizenship is expanding, since it has been internationalized, to the extent that rights are provided from other sources besides

the state, and the human mobility subjects people to more fluid identities, including by influence of the boom on the worldwide virtual connectivity.

Hence the idea of an emergent human right to citizenship, which goes beyond the abstract right to nationality already existent, since it would entail a right of access to locally recognized fundamental rights, as well as to political participation in the community of residence. This right would be exercised, in any case, inside a national jurisdiction and through national citizenship, which is still indispensable for the provision of rights, and where the democratic framework works. In any case, as the national state is losing its prominence in international law and politics, the citizenship is assuming denationalized forms, acknowledging new modes of attachment. At the same time, citizenship from a state is maintained and deemed as necessary, but not related to patriotic elements, and not excluding the possibility of multiple belongings.

In this sense, the study identified a growing acceptance of multiple nationality, which while being once rejected, is now increasingly seen as something related to personal identity and individual autonomy. Moreover, non-citizens which are long term residents of a state, are having the recognition of rights transcending their migrant condition, since the human rights case law points to an overall human protection, regardless of migratory status. In other words, rights which were typically granted for citizens are also conceded to non-citizens, on international grounds.

That lead the research to uncover the foreign literature which is talking about a postnational, transnational or global citizenship. As citizenship has no absolute meaning, being instead transforming and subject to constant renegotiations and turnovers along the history, in the current stage, all the global changes mentioned are affecting its content, by connecting the individuals with non-national forms of membership. It is the case indeed, of the migrant stateless, asylum seekers and refugees, who legally do not belong, or had to leave their nation behind in search of new ties of protection. Their quest is not for a new identity, considering they will not abandon their own culture. Rather, they seek a host country which accepts to receive and include them, allowing their presence to turn into more than temporary bodies, but subject of rights treated with equal respect and consideration, and if they choose to, conceding them the possibility of becoming full citizens of the new polity. Hence the importance of the institute of naturalization today, which, similarly to multiple nationalities, is being object of regulation by the international law, in order to create certain standards, which equate the access to citizenship, without arbitrary or discriminatory eligibility criteria.

From another perspective, a true global citizenship is likely to be developed in the future, if and when a more democratic global governance is built. Until then, it has been constructed by the hands of transnational NGOs and intergovernmental organizations, which try to overcome the narrow “national interests” defended by the states, shifting the debate to the need of protecting the common interests of the humankind. In fact, those organizations are set up to fight for causes, such as the refugee protection or the climate change, regardless of nationality. That means that all the personnel directly involved with this kind of work is already putting in practice a form of global citizenship, participating of one or more global networks dedicated to impact and address the most compelling world problems, which clearly transcend national boundaries.

In the same strand, although not a object of research in this work, global governance and the study of democracy under international law are entwined subjects to be further explored, departing from the knowledge produced in this piece, since the study of open forms of transnational citizenship helps to clear the path towards a fairer and more inclusive global governance, committed to the international development cooperation, political coordination in key areas to avoid conflicts and foster joint problem solving, as well as creating sound and effective humanitarian action.

It is important to note that to submit the existence of an emerging global citizenship does not mean to subscribe to a broad cultural homogenization. Citizenship presupposes, in our view, a sense of rights, participation and belonging, which ought to entail a commitment for tackling collective problems, such as human rights violations, extreme poverty, social inequality, armed conflicts and so on. That commitment, elevated to a global level, means to pertain to wider joint efforts, comprehended by transnational networks and international institutional arrangements, whose aim is to progressively handle global challenges, without devaluating in any sense the regional and local cultures, as well as the intrinsic diversity of the human experience.

Which means that postnational forms of citizenship cannot be understood as related to the economic globalism represented by the unfettered reach of multinational companies, nor the individualist consumerism characterized by simply purchasing imported products, doing international tourism or enjoying mainstream pop culture. Instead, an expanded notion of citizenship takes advantage of the interconnectivity to contribute to the free circulation of cultural products around the globe, allowing the dissemination of knowledge and innovation, the intercultural exchange of ideas by cross-national groups, the trading of artwork and

enjoyment of culturally diverse spectacles, and the enhancement of the global movement of peoples carrying their own cultural identity.

The main obstacle identified, which tries to avoid the development of this citizenship at a global level is nationalism. Although we chose not to explore it in a dedicated topic, since it was considered a collateral theme which would extrapolate the object of study, when the analysis entered in the debate over the discrimination against non-citizens, it was inevitable to realize that actual tendencies in the global political landscape walk in direction of the reinforcement of the national borders, the diffidence towards the Other, and the discourse against the immigration. In fact, the return of terrorist attacks in the heart of Western capitals, as well as the election of populist leaders in democratic countries, have brought back the security concern to the top of the political agenda.

Reflecting on the theme, we arrived to the conclusion that some of these setbacks, can be related to a general lack of appropriate knowledge about the historical and legal meaning of human rights, as well as a political apathy, and by consequence, individual lack of empathy, in relation to the difficulties concerning other people. The atomization of the individual and the ephemeral character of human relations in contemporaneity, so well explored by the scholars of postmodernity, in addition to the economic and ethical crisis, seems to affect public life by distancing many people from any political participation, making them give up or outsource the effective exercise of citizenship.

One of the main contributions of this work, after studying nationality under the architecture of the Westphalian world order, is to propose the detachment of the nation from the state. That means recognizing that the citizenship linked to a state, should be independent of ethnicity, traditions, costumes, languages and affiliations. In this sense, the patriotic appeal or exaltation of the national culture does not serve to provide rights, guarantee equal participation, and not even to give a sense of belonging for everyone, since identities today are plural and can be built on the basis of new sources and variable relations. The stateless resident, long-term migrant and recognized refugee, maintain cultural and psychological ties with their homeland, and can be plenty included as citizens of the host state, without any loss to the country. Their social and cultural integration will depend on many factors, including the public policies adopted and their own will, but that should not interfere on their treatment with equal consideration and respect under the law. Their transformation into citizens can occur along the time, but naturalization practices could not, for instance, demand an excessive burden or discriminatory requirements, such as applying civic tests, which can characterize attempts of cultural assimilation.

Moreover, as citizenship comprehends not only a legal meaning, but also political (rights), sociological (participation) and psychological (sense of belonging), the work searched ways of guaranteeing that its content is informed by a pluralist approach, capable of creating inclusion, solidarity and conviviality. The outcome is that a society aiming to avoid discrimination and violence ought to invest in an ethical education, capable of working human values such as tolerance and trust, with a profound respect for diversity. Most of the values useful for this endeavor were exhaustively discussed internationally and encapsulated under the name of human rights (and called internally fundamental rights), clearly able to be contextualized and applied according to the local culture and contingencies. Departing from that minimum ethical, lowest common denominators are possible to be forged collectively, resulting in an open civility which places the individual in a position of understanding that, although differing on political means, the members of society can be bound by common goals to be democratically pursued.

It is such the evidence that nationality alone is not able to confer the individuals what they need in terms of political belonging, that the literature studied points to the gradual emergence of an international right to citizenship. This right would go beyond the abstract right to a nationality, and all the legal attempt to avoid statelessness, to require from the states an effective duty to confer citizenship for the individuals present in their territory, under certain circumstances. That account is demonstrated by a trend on attaching increasingly the notion of citizenship to a civic or territorial conception, in which the right to “any” nationality turns into a right to a “particular” nationality. Which means that the “ties that binds” should not depend only on the absolute discretion of the states to attribute nationality, but instead starting to be recognized, on an individual basis, the “genuine links” eventually existent with the polity, which may legitimate the person inclusion as a full member. This view is more in line with the contemporary international law, not only with reference of the emerging norms which point to a right to hold multiple nationalities, and the limitation of discretion on naturalization requirements, but mainly, with the construction of the human rights in the last seventy years. Nationality leaves gradually the exclusive domain of the states, to give space to the recognition of citizenship, departing from the individuals and their relations.

The research focused in the final chapter, in studying the case of the Brazilian framework on statelessness. The intention was to show that, in all this renewed international discussion about the subject, Brazil has much to contribute, since it has been dealing differently, in the last few years, with the growing migratory demand, the reception of

asylum seekers, and finally, the very recent construction of a completely new regulation of statelessness.

As the Brazilian hospitality is almost considered a cultural heritage, as demonstrated as demonstrated by some historians and in the opinion of many foreigners, we used the lens of this philosophical category to put together the recent events in terms of migratory policies, analyzing the way the Brazilian state, the academy and the civil society dealt with them, in addition to the fundamental role of the UNHCR.

The outcome reveals some successful efforts, in different levels, to respond to the arrival of the newcomers, including innovative policies, such as the creation of an *ad hoc* humanitarian visa for the Haitians and Syrians. Moreover, the activism of social actors was fundamental to push the National Congress to finally approve a new legislation for international migrations in Brazil, superseding the authoritarian and outdated former law.

Based on a human rights approach, the new Law no. 13.445/2017 not only removed unjustifiable internal restrictions for migrants, and improved considerably the position of the country on such a crucial theme today, but created an unprecedented regulation of statelessness in the country. It aims to reduce the incidence of statelessness and protect stateless persons, and with that aim promises to create a stateless determination procedure, which will facilitate the naturalization of stateless persons resident in the country.

The innovation is no doubt a major step forward for the eradication of statelessness in the Americas. With a dedicated regulation for tackling the question, Brazil does justice to its tradition of hospitality, adding to its advanced refugee law and now a decent migratory legislation, the offer of protection also for those who belong nowhere, opening the possibility for them to embark on the national venture, with all its associated benefits and the country's beauties, but also with its huge challenges and contrasts. We only hope that the regulation of the law, as well as the administrative measures necessary to implement it, are appropriately designed and efficiently provided.

Finally, this thesis had the objective to problematize the question of statelessness, beyond the consolidated international law mechanisms for its solution, to arrive to the conclusion that the cracks of the legal systems, which lead to this condition of invisibility, can take us to a new form of seeing the question of nationality, not attached only to the national states, but by acknowledging all the changes to which the world has gone through, search for a view of citizenship that is more in line with each one's personal aspirations and human needs.

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