Multiple Nationalities in Refugee Law: Toward a Practical Approach

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Abstract

The 1951 Convention Relating to the Status of Refugees (Refugee Convention), a treaty intended to protect some of the most vulnerable individuals in the world, has resulted in the exclusion of persons from refugee status due to a provision detailing citizenship requirements. According to the Refugee Convention, individuals who hold multiple nationalities must seek the protection of their other state(s) of nationality, or demonstrate why they cannot, before being able to be granted refugee status in another state. This paper will explore this provision of the Refugee Convention and the reasoning behind it, as well as survey issues that have arisen from its application over the past several decades, in order to recommend a more uniform application of the provision with an eye to the object and purpose of the treaty. The state application of Article 1(A)(2) can have serious implications for refugees fleeing the violence in Syria, North Korea, and countless other countries. We must take seriously interpretations of treaty law that are logical in theory, but lead to violations of rights and incongruous decisions in practice. This paper proposes an alternative view of effective citizenship and recommends a particular application of the Refugee Convention and understanding of citizenship.

Keywords: Refugee, Migration, Citizenship, Nationality.

I. INTRODUCTION

The 1951 Refugee Convention, a treaty that protects some of the most vulnerable individuals in the world, has resulted in the exclusion of persons from refugee status due to a provision detailing citizenship requirements. According to the Refugee Convention, individuals who hold multiple citizenships must seek the protection of their other state(s) of citizenship, or demonstrate why they cannot, before being granted refugee status in another state.[1] This article will explore this provision of the Refugee Convention and the reasoning behind it, as well as survey issues that have arisen from its application over the past several decades, in order to recommend a more uniform application of the provision with an eye to protecting some of the world's most vulnerable people.

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1 Convention Relating to the Status of Refugees Article 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention].

First, this paper discusses the relevant provisions of the Refugee Convention, their initial purpose, and the issues that have arisen in their application in the past several decades in particular. Next, this paper will turn to examining the concept of citizenship in international law. This paper will argue that individuals holding a second, but ineffective, citizenship should not be excluded from refugee status on this ground alone. Third, this paper will explore two applications of this provision of the Refugee Convention by different states. These situations illuminate a spectrum of state interpretation of the Refugee Convention. North Koreans applying for refugee status in Australia often have been excluded from refugee status due to South Korea's act of entitling all North Koreans to South Korean citizenship. In addition, East Timorese asylum seekers have been systematically excluded from refugee status due to Portugal's decision to entitle East Timorese to Portuguese citizenship, a remnant of colonial rule. These state applications of the Refugee Convention have led to a non-uniform adjudication of refugee claims of dual nationals.

Using these two situations as a backdrop, this paper will conclude by presenting suggestions for the application of the Refugee Convention. States should adopt a new standard for ineffective citizenship, influenced by our understanding of what citizenship means today. Ineffective citizenship as described in the Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (UNHCR guidance) classifies very few situations of citizenship as such. The term 'ineffective citizenship' for the purposes of exclusion from the Refugee Convention should include situations in which a sovereign forces citizenship on groups with a tenuous 'genuine link' to the sovereign. Moreover, we cannot conflate the ability to acquire citizenship with the possession of citizenship. Third, we must look at the geopolitical realities of certain situations and understand that the imposition of citizenship is inappropriate and ought not to be considered effective. Finally, individuals excluded due to having dual citizenship should never be *refouled*, which means, returned to the country in which they fear persecution. If the individual is being excluded because he or she can seek protection of another state, the individual ought to be sent to the second state in which he holds nationality. Through a highlighting of the issues dual nationals face, as well as that of the lacuna UNHCR guidance leaves with respect to this problem, I hope to fill in the gap and provide guidance to states that will ensure states act in light of the humanitarian purpose of the Refugee Convention.

II. HISTORY OF THE REFUGEE CONVENTION

The newly-established United Nations General Assembly adopted the Refugee Convention in 1951 in response to the atrocities of World War II.[2] Hitler's rule resulted in millions of refugees fleeing their home countries, with no international legal instrument guiding states' responses to these people. In an effort to ensure something like World War II was never repeated, the newly formed United Nations drafted several international instruments,

[2] *Ibid.*

including the Refugee Convention.[3] The Refugee Convention was intended to protect some of the world's most vulnerable people fleeing atrocities and ensure that they would not be forced to return to a place where they were persecuted.[4]

Every treaty is thought to have an object and purpose, which states parties ought not act to frustrate. 'Object and purpose' is a term of art is discussed in the Vienna Convention on the Law of Treaties (VCLT), the international treaty that discusses how states should interpret and carry out treaties to which they are states parties.[5] Though not defined in the VCLT, the term object and purpose is generally understood to mean the 'essential goals' of a treaty.[6] The VCLT notes that a state is "obliged to refrain from acts which would defeat the object and purpose of a treaty" when it is a state party or it has expressed consent to be bound by the treaty.[7] Though debated, the object and purpose of the Refugee Convention is thought to be humanitarian, with an interest in protecting refugees and safeguarding their rights.[8] Therefore, states parties to the Refugee Convention must not act in any way to defeat the humanitarian object and purpose of the treaty.

The Refugee Convention defines a refugee as an individual who:

> [a]s a result of the events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted 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 a fear, is unwilling to avail himself of the protection of that country . . . .[9]

The Convention's 1967 Protocol (Protocol) expanded this definition to include those fleeing from events occurring any time after 1 January 1951.[10] Because no provision other than this temporal extension was added in the 1967 Protocol, I will refer to both the 1951 Refugee Convention and its 1967 Protocol as the Refugee Convention in this paper.

In addition to defining those included as refugees in international law, the Refugee Convention includes several clauses that exclude certain groups of individuals from refugee status. The second paragraph of Article 1(A)(2) excludes from refugee status those with multiple nationalities who can avail themselves of the protection of their second state of nationality, noting that:

> In the case of a person who has more than one nationality, the term 'country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality

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3 *Ibid*.

4 *Id.* at Art.33.

5 Vienna Convention on the Law of Treaties (23 May 1969).

6 David S. Jonas & Thomas N. Saunders, "The Object and Purpose of a Treaty: Three Interpretive Methods", *Vanderbilt Journal of Transnational Law*, 2010, Vol. 43, pp.567.

7 *Supra* n 5, at Art. 18.

8 James C. Hathaway & Michelle Foster, "The Law of Refugee Status", *European Journal of International Law,* 2015, Vol. 26, p.54.

9 *Ibid.* at Art. 1(A)(2).

10 1967 Protocol Relating to the Status of Refugees, 31 January 1967.

> if, without any valid reason based on well-founded fear, he has not availed himself of the protection of the countries of which he is a national.[11]

The Refugee Convention excludes those, or allows states to exclude those, who have a second nationality from international refugee protection. This Article of the Refugee Convention does not explicitly state what must happen if a person is determined to be ineligible for international protection.

However, Article 33 of the Refugee Convention notes that states may not *refoule* a refugee to any place where his life or freedom is at risk.[12] This means that a state cannot return a refugee to a place where they are at risk of persecution. If an individual is determined to be ineligible for refugee protection due to his having a second citizenship, a state is still prohibited from returning that person to his home country or a place he would be persecuted. This ensures that refugees will still be protected, even if an individual state is not required to act to protect him.

The British delegate first proposed the language on dual nationality in the drafting of the Refugee Convention, which "reflected the desire of many states to limit their obligations toward refugees".[13] Given the reality of World War II, states wanted to strike a balance between protecting vulnerable individuals and abdicating responsibility for large refugee influxes that they could not support. This clause was aimed at striking just this balance by excluding a group of individuals who could seek protection elsewhere.[14] Moreover, Article 1(A)(2) was included in the Refugee Convention because of the understanding of the role of states at the time. Usually, states "have no general obligation to admit foreigners or offer them protection."[15] Consequently, carving out as narrow an exception to this general premise as possible "required the strictest limitation that there be an initial reliance on national protection."[16] This imposed a new obligation on states in a way that sought to inflict the smallest burden possible.

At the time of the drafting of the Refugee Convention, dual citizenship was not as commonplace as it is today. In 1951, most states had laws banning their citizens from holding nationality in another state,[17] meaning the population potentially affected by this provision of the Refugee Convention was incredibly small. With time, dual citizenship became more common, as many individuals were granted multiple citizenships through either a *jus sanguinis* or *jus soli* theory of citizenship due to increased globalisation.[18] These changing national laws and increased dual citizenship resulted in challenges in the

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11 *Supra* n 1, at Art. 1(A)(2).

12 *Ibid.* at Article 33.

13 Jon Bauer, "Multiple Nationality and Refugees*", Vanderbilt Journal of Transnational Law,* 2014, Vol. 47, p. 917.

14 *Supra* n13, at p. 917.

15 Mark Sidhom, "*Jong Kim Koe v Minister for Immigration and Multicultural Affairs*: Federal Court Loses Sight of the Purpose of the Refugee Convention*", Sydney Law Review*, 1998, Vol. 20, p. 319.

16 *Ibid.*

17 Tanja Brondsted Sejersen, "I Vow to Thee My Countries': The Expansion of Dual Citizenship in the 21st Century," *International Migration Review*, 2008, Vol. 42, p. 534.

18 *Ibid.*

adjudication of refugee claims, the scope and particulars of which could not have been anticipated at the time of the drafting of the Convention.[19]

This has created practical problems for individuals fleeing persecution in their home countries. An individual does not always possess a second citizenship by choice or consent; "Territorial disputes or state succession can result in entire populations acquiring dual citizenship through no doing of their own."[20] Of course, lack of consent or choice on its own is not necessarily indicative of a problematic form of citizenship; most individuals in the world have citizenship at birth due to neither consent nor choice. However, the lack of consent and choice, in addition to actions, or inactions, taken by a sovereign raise questions about certain citizenships that we ought to find ineffective for the purposes of the Refugee Convention.

III. THE CONCEPT OF CITIZENSHIP

In order to understand Article 1(A)(2) of the Refugee Convention, its application, and the problems that abound in its application, it is first necessary to discuss what the term "nationality" or "citizenship" means.[21]

A. *What is Nationality?*

Nationality in international law is "very vague and imprecisely defined."[22] Several international court cases examined the concept of nationality in the twentieth century. In 1923, the Permanent Court of International Justice, the predecessor to the International Court of Justice, advised that nationality is within the purview of the domestic law of states, rather than that of international law.[23] States have wide latitude to determine who its nationals are, while international law places minimal limits on that discretion.[24] However, international law "neither contains nor proscribes certain criteria for acquisition and loss of nationality."[25]

Three decades later, in 1955, the International Court of Justice in *Nottebohm* noted that nationality must be based on "a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[26] This genuine connection suggests that an individual who possesses nationality "is in fact more closely connected with the population of the state conferring nationality than with that of any other state."[27] The idea of a national having a connection to a

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19 *Ibid.*

20 *Supra* n13, at p. 917.

21 For the purposes of this article, I put aside the discussion of the difference of nationality and citizenship and use both terms to refer to the same concept.

22 *Supra* n 15, at p. 321.

23 Nationality Decrees Issued in Tunis and Morocco on Nov. 8th, 1921, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7.) at p. 24.

24 Oliver Dörr, "Nationality*", Max Planck Encyclopedia of Public International Law,* Nov. 2006, para. 4.

25 *Ibid.*

26 Nottebohm Case (*Liechtenstein v. Guatemala*) 1955 I.C.J. No. 18, at 6 (Apr. 6, 1955).

27 *Ibid.*

country of nationality in order for that nationality to be genuine seems to be the only clear requirement for nationality in international law. With dual citizenship, an individual likely will have a strong and significant connection with more than one state. However, it follows that the individual must still have a strong connection with both states in question in order for those citizenships to be genuine.

International human rights treaties address the actions of states in determining whom it calls, or refuses to call, citizens.[28] In 1948, the Universal Declaration of Human Rights was the first non-binding international instrument to address the right to nationality and deprivation thereof. It stated that "'[e]veryone has a right to nationality" and "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."[29] Notably, this treaty imposed a negative obligation upon states, meaning rights upon which they must not infringe, rather than a positive obligation, meaning rights that states must provide. In 1961, the Convention on the Reduction of Statelessness noted that:

> a Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted (a) at birth, by operation of law, or (b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner proscribed by national law.[30]

This treaty took steps toward ensuring individuals will be granted nationality in at least one state. In addition, this treaty imposed obligations on states to act, rather than just to refrain from violating rights.

As it is for each state to determine who are its own citizens, the existence of a domestic law is pertinent as it "creates a *very strong presumption* both that the individual possesses that state's nationality as a matter of its internal law and that that nationality is to be acknowledged for international purposes."[31] As such, these domestic laws and determinations are rejected only "in 'exceptional cases' with the deciding factor being the extent to which the attribution of nationality infringes on the rights of the state."[32] In addition, the domestic determination can be rejected when such a determination violates international treaties, such as those discussed above.

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[28] *Supra* n 24, at para. 6. Many treaties address discrimination in the conferring of citizenship. The Convention on the Elimination of All Forms of Racial Discrimination forbids racial discrimination in the conferring of citizenship. International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966. In addition, the European Convention on Nationality forbids discrimination based on sex and religion. Art. 5(1), European Convention on Nationality, ETS 166 (6 November 1997). The Convention on the Elimination of All Forms of Discrimination against Women, known as CEDAW, requires that states provide women with the same rights to citizenship as men. Art. 9(1), Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979.

[29] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

[30] Art. 1, 1961 Convention on the Reduction of Statelessness.

[31] *Supra* n 15, at p.321 (emphasis in original).

[32] *Ibid.*

The definition of nationality is important because nationality carries with it certain legal consequences, "which are basically an expression of the fact that by virtue of its nationality the individual is attached to a State, more than to any other."[33] Nationality has particular legal consequences for the individuals who possess it with regard to jurisdiction, admission, and diplomatic protection.[34] Jurisdiction refers to the ability of a state to exercise its power to call its nationals to its courts, and serves as the basis for the ability of states to protect their own nationals.[35] The duty of admission refers to a state's obligation to allow those holding its citizenship to enter its borders.[36] Lastly, diplomatic protection refers to a state's ability to hold another state responsible for the violation of international law that affects its citizens; in other words, this refers to a state's protection of its citizens through diplomatic measures.[37]

In addition, a state grants its nationals certain rights that it does not grant to non-nationals. Scholars have considered citizenship to determine "the scope of application of basic rights and obligations of states vis-à-vis other states and the international community."[38] Moreover, nationality is a requirement for the domestic "exercise of political rights and claims to protection and correlate duties, such as military or civil service obligations, which may, however, vary according to national law."[39] Thus, an individual can be said to be a national of a state in which he can exercise certain rights and is bound by obligations consistent with nationality in that state.

Generally, citizenship requires a genuine link between the individual and the state in question. Accordingly, "[t]he lack of a genuine link has been invoked as a reason against the granting of citizenship status . . . and as a justification for deprivation."[40] Conversely, "genuine links can also be invoked positively as a reason for awarding citizenship or as a reason against its deprivation."[41] There is no conclusive explanation of what constitutes a genuine link, though several scholars, treaties, and domestic courts have contended with this concept.

B. *What is Ineffective Nationality?*

The question of a genuine link between an individual and a state has also been raised when addressing the concept of ineffective nationality, or nationality in name only. Ineffective nationality stands in contrast with effective nationality, or one that affords the individual the protection of the sovereign; ineffective nationality does not afford the holder any such rights and is not regarded as a genuine nationality in light of this fact.

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33 *Supra* note 24 at para.42.

34 *Ibid.*

35 *Ibid.* at paras. 43-49.

36 *Ibid.* at paras. 50-51.

37 *Ibid.* at paras. 52-58.

38 *Supra* n 27, at p. 1.

39 *Ibid.*

40 Rainer Baubock & Vesco Paskalev, "Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation", *Georgetown Immigration Journal*, 2015, Vol. 30, pp.100-01.

41 *Ibid.* at pp.100-01.

The UNHCR guidance suggests that only effective nationalities should be considered to be nationalities; ineffective nationalities should not exclude an individual from international refugee protection;[42] Further, the UNHCR guidance distinguishes "between the possession of a nationality in the legal sense and the availability of protection by the country concerned."[43] In cases where the nationality in question "does not entail the protection normally granted to nationals," that nationality may be deemed to be ineffective, meaning one that does not constitute a legitimate nationality.[44] The United Nations High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook) notes that "as a rule, there should have been a request for, and refusal of, protection before it can be established that a given nationality is ineffective."[45] The individual must have requested and been refused protection of a state before that nationality is deemed ineffective.[46] If an individual holds a second nationality that is deemed ineffective, that individual would not be excluded from refugee status. However, under all other circumstances, the nationality of an individual is considered to be effective nationality and bars an individual from being granted refugee status according to the Refugee Convention.

Domestic courts have also considered the question of ineffective nationality. For example, in deciding whether Portuguese nationality is effective, Federal Courts in Australia have considered factors such as:

> whether Portugal would offer [an individual] protection in Australia or only in Portugal, whether he was reasonably able to travel to Portugal to obtain protection, whether he would be admitted to Portugal on arrival, and the administrative procedures [an individual] would need to undertake to satisfy the Portuguese authorities as to his Portuguese nationality.[47]

However, there is no clear list of criteria in international law that guides a national court or legislature in determining when a nationality ought to be deemed ineffective.

In addition, scholars have weighed in on the concept of ineffective nationality. James Hathaway, a leading scholar on refugee law, argues that in order for nationality to be effective, rather than formal, a state must be "willing to afford protection against return [of the individual] to the country of persecution."[48] In addition, Hathaway notes that "[w]hile it is appropriate to presume a willingness on the part of a country of nationality to protect in the absence of evidence to the contrary, facts that call into question the existence of a

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42 United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status,* December 2011, para.107.

43 *Ibid*.

44 *Ibid.* at para. 107.

45 *Ibid.*

46 *Ibid.*

47 *Supra* n15, at p. 325.

48 James C. Hathaway & Michelle Foster, *The Law of Refugee Status,* 2nd Ed., Cambridge University Press, 2014, p.59.

basic protection against return must be carefully assessed."[49] Here, he raises the question of whether other criteria ought to be considered when determining whether an individual holds nationality in fact or in name only.

UNHCR guidance, state practice, and scholarly opinions touch on the idea of ineffective nationality, but refer to it only as including a state refusing to grant protection to an individual when that protection is sought. However, this is a very limited category of problematic citizenships that would be considered ineffective, leaving all other citizenships to be effective despite the problems they may have.

While various tests can be used, it seems that a citizenship is deemed ineffective where the state cannot provide rights and protections to that person both in and outside its territory, where the individual may have to go through extensive procedures to be categorised as a citizen with the country, and where the state has refused help once sought. This begs the question: is this the only time we ought to consider a nationality ineffective, or ought the principle be expanded in order to adequately capture the system of protection the Refugee Convention sought to establish with an understanding of modern-day political realities? Given today's political realities, other considerations ought to be made when deciding whether a citizenship is effective.

IV. STATE INTERPRETATIONS OF ARTICLE 1(A)(2)

Because states are the primary entities adjudicating refugee claims,[50] it is important to survey how states interpret and apply the dual nationality provision of the Refugee Convention. Below are two examples of state practice surrounding this principle of the Convention, which present a spectrum of state practices. Each of these is intended to be illustrative, though not conclusively representative of the models of this provision as used by all states.

A. Australia's Interpretation for East Timorese

East Timorese encountered substantial problems in applying for refugee status in Australia. From about 1515 until 1975, Portugal held East Timor as a colony.[51] In 1975, Portugal began to decolonise East Timor, leading Indonesia to invade and annex the land.[52] Australia formally recognised this annexation in 1979.[53] However, the native East Timorese rejected Indonesia's claim to sovereignty.[54] There was a particularly violent period of several months in 1999 where Indonesia "deliberately engineered

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49 *Ibid.* at p. 59; *Supra* n 15, at p. 325.

50 In some countries, such as Egypt, UNHCR is the body adjudicating claims of refugees.

51 Christine Chinkin, "East Timor: A Failure of Decolonization*"*, *Australia Yearbook of International Law,* 1999, Vol. 20, p. 37.

52 Barbara Ann Hocking & Scott Guy, "East Timor as a Case Study on the Emergence of International Humanitarian Law in the Australian-Pacific Region*", Asia Pacific Yearbook of International Humanitarian Law*, 2006, Vol. 2, p.74.

53 Ryszard Piotrowicz, "Refugee Status and Multiple Nationality in the Indonesian Archipelago: Is There a Timor Gap?*"*, *International Journal of Refugee Law,* 1996, Vol. 8, p. 320.

54 *Ibid.*

civil disorder."[55] Conflict between the native peoples and the Indonesian forces resulted in clashes and political persecution, which led some East Timorese to seek asylum in surrounding countries, including in Australia.[56] During this period of Indonesian control, Portugal rejected Indonesia's claim over the land and insisted that East Timorese should be entitled to seek self-determination.[57]

Portuguese law suggests that those born in East Timor before 1976 are entitled to Portuguese citizenship. Article 4 of the Portuguese Constitution of 1976 noted that "all persons are Portuguese Citizens who are considered as such by law or under an international convention."[58] According to Portuguese citizenship law, those born "of a Portuguese mother or father born in Portuguese territory" are "Portuguese by origin".[59] Consequently, those born to a local mother or father in East Timor before Portugal's exit from East Timor would be Portuguese by origin. In addition, those born "of a Portuguese mother or father born abroad [who] have their birth registered at the Portuguese civil registry or [who] declare that they want to be Portuguese" are likewise categorised as Portuguese by origin.[60] According to this law, individuals born after Portugal's exit from East Timor could be considered entitled to Portuguese citizenship if their parents registered their birth or if they declared their desire to be Portuguese. Under this law, affirmative steps are required in order for a person born in East Timor after 1975 to be granted Portuguese citizenship. In addition, those born in Portuguese territory to a foreign father were also entitled to Portuguese citizenship.[61] As discussed above, until 1975 East Timor was Portuguese territory, and all those born in East Timor were entitled to Portuguese citizenship. However, it is important to note that those born in East Timor before Portugal's exit are *entitled* to Portuguese citizenship automatically, though not *granted* this status automatically.[62]

This previously has raised interesting questions in the context of East Timorese applying for refugee status in Australia. In the 1990s, the Australian government took the view that East Timorese ought to seek the protection of Portugal and be refused before being entitled to apply for refugee status elsewhere.[63] In one notable case, the Refugee Review Tribunal examined the refugee claims of three children born in East Timor between 1973 and 1976. The Tribunal found that there was a continuing link between Portugal and the people of East Timor before the Indonesian invasion, and concluded that Portugal could lawfully and reasonably treat the East Timorese as its citizens.[64] It

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55 *Supra* n 52, at p.74.

56 *Supra* n 53, at p.320.

57 *Supra* n 52, at pp.75-76.

58 Constitution of Portugal (1975), Art. 4.

59 Portuguese Nationality Act, Law 37/81, Art. 1(1)(a) (2006).

60 *Ibid.* at Art. 1(1)(c).

61 Law No. 2098 (July 29, 1959), Clause 1(I)(I) (Port.)

62 "Portuguese Nationality Law"*, World Heritage Encyclopedia,* http://www.worldlibrary.org/articles /portuguese_nationality_law. Site accessed 9 August 2018.

63 Kerry Carrington et al., "The East Timorese Asylum Seekers: Legal Issues and Policy Implications Ten Years On*", Information, Analysis and Advice for the Parliament*, 2002-2003, Vol. 17 https://www.aph.gov.au/binaries/library/pubs/cib/2002-03/03cib17.pdf. Site accessed 20 January 2019.

64 Refugee Review Tribunal, RRTA 1190 (29 May 1995).

noted that the international community recognised Portugal as the administrator of East Timor, and until 1975 Portugal was in control of East Timor.[65] Consequently, the Tribunal found that the two children born in 1973 and 1975, respectively, were Portuguese citizens, while the child born in 1976 after Indonesian annexation of East Timor was not since Portugal lacked control over East Timor at the time the child was born.[66] In this case, those children who were Portuguese citizens were not entitled to refugee status, while the youngest child was entitled to refugee status.[67] The Tribunal recognised that these children may not be able to establish Portuguese citizenship, but that they were required to attempt to do so before Australia would provide refugee protection to them.[68]

One year later, the Refugee Tribunal considered Article 1(A)(2)'s citizenship provision and concluded that East Timorese were Portuguese citizens. The defense argued that East Timorese are only conditionally eligible for Portuguese citizenship and are required to apply and produce a lot of paperwork in order to obtain this citizenship.[69] In addition, the defense argued that the individual applying for refugee protection did not want to become a Portuguese citizen and could not be compelled to try to adopt Portuguese citizenship.[70] The Tribunal rejected this argument, stressing that there was a genuine connection between the applicant and Portugal at his birth when Portugal administered East Timor, and rejecting the applicant's desires regarding Portuguese nationality as irrelevant.[71] The Tribunal consequently rejected the individual's application for refugee status in Australia due to his having Portuguese citizenship.

The Australian Government maintained that East Timorese born during the Portuguese administration of the area are Portuguese citizens and therefore not entitled to refugee status in Australia.[72] This is the case regardless of the actions or desires of the applicant, and regardless of his or her connections, or lack thereof, to Portugal.[73]

The Federal Court of Australia overturned this presumption of Portuguese citizenship in three separate court cases. In *Jong Kim Koe* in 1997, the court stated that while the individual was granted Portuguese citizenship upon his birth in 1973 in East Timor, the Tribunal must consider whether that citizenship is effective or not.[74] The Court stated that the Tribunal should use factors such as whether the individual could enter Portugal legally without a visa, whether he could be deported to East Timor, and whether he would have to engage in a long process to acquire an identity card.[75] The Court noted that only where a

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65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

69 Refugee Review Tribunal, RRTA 220 (7 February 1996).

70 *Ibid.*

71 *Ibid.*

72 James Cotton, "East Timor and Australia: Twenty-five Years of the Policy Debate", *Nautilus Institute,* Sept. 21, 1999, http://nautilus.org/napsnet/napsnet-special-reports/east-timor-and-australia-twenty-five-years-of-the-policy-debate/. Site accessed 10 September 2018.

73 *Ibid.*

74 *Jong Kim Koe v Minister for Immigration & Multicultural Affairs* 306 FCA (2 May 1997) (Austl.).

75 *Ibid.*

citizenship is determined to be effective can it be used as a bar from refugee protection.[76] In *Lay Kon Tji* in 1998, the Court held that "…'effective nationality' is a nationality that provides all of the protection and rights to which a national is entitled to receive under customary or conventional international law."[77] The Court determined that the Portuguese citizenship that East Timorese have is ineffective, due to the fact that if an East Timorese person does not wish to be Portuguese he will not be afforded the same protections as other Portuguese citizens.[78] In addition, if an East Timorese person is deported to Portugal, he likely would not be given the same protections as Portuguese citizens until he undertakes a process to obtain citizenship documents.[79] In 2000, the Federal Court again overturned a Tribunal decision in *SRRP and Minister for Immigration and Multicultural Affairs*. The Court noted that Portugal does not offer effective protection to East Timorese individuals in the form of travel documents or right to freely enter the country.[80] Because Portugal does not provide East Timorese with rights or protections against being returned to East Timor, the Court determined that this citizenship was ineffective.[81] The Court again concluded that ineffective citizenship cannot prohibit refugee protection.[82]

In response, Australian Government passed a law in 1999 stating that only the domestic law of the country concerned can be used in determining the citizenship of an individual.[83] In an effort to limit the reach of the decisions of the Full Federal Court, the legislature passed a far more restrictive approach to second nationality analysis.[84] This Border Protection Legislation allowed the Tribunal to reject applications for refugee status, and allowed the government to deport individuals to East Timor after their applications for refugee status were rejected.

In 2002, soon after these cases and the passage of the Border Protection Legislation, East Timor achieved independence from Indonesia. This resulted in an extreme decrease in East Timorese asylum seekers entering Australia.[85] In addition, the change in circumstance meant that Australia began to review these cases in a different light. After 2002, Australia was able to justify the repatriation of most applicants from East Timor because they feared persecution from Indonesian forces, who were no longer present in the country.[86] However, Australia's approach to the citizenship analysis has continued to affect other groups of refugees.

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76 *Ibid.*

77 *Lay Kon Tji v Minister for Immigration & Ethnic Affairs* 1380 FCA (Oct. 20, 1998) (Austl.).

78 *Ibid.*

79 *Ibid.*

80 *SRPP and Minister for Immigration and Multicultural Affairs* AATA 878 (5 October 2000) (Austl.).

81 *Ibid.*

82 *Ibid.*

83 Border Protection Legislation Amendment Act 1999, Item 91N(6) (Austl.).

84 Andrew Wolman, "North Korean Asylum Seekers and Dual Nationality*", International Journal of Refugee Law,* 2012, Vol. 24, p. 813.

85 *Supra* n 63, at p. 15.

86 *Ibid.*

B. The UK's Interpretation for North Koreans[87]

The Democratic People's Republic of Korea, otherwise known as North Korea, is consistently considered to be one of the worst human rights violators in the world.[88] The Government has employed such tactics as arbitrary arrests and detentions, restricted media and civil society, and enforced disappearances.[89] This systematic violation of the rights of North Korean nationals resulted in 'tens of thousands of North Koreans' fleeing to nearby states.[90] Most first make their way to China and later move to other countries, with many going to South Korea.[91] However, for various reasons, many instead move from China to other countries to apply for refugee status there.

South Korean law seems to indicate that North Koreans are given automatic citizenship to South Korea. The 1948 South Korean Constitution states that the territory of South Korea "shall consist of the Korean peninsula and its adjacent islands," which includes the territory currently known as North Korea.[92] The South Korean Nationality Act states that anyone born to a parent who holds South Korean nationality, or born on the Korean peninsula, holds South Korean nationality.[93] Scholars, courts, and other states "have accepted that, in principle, provided an individual born in North Korea is not descended from two foreign (non- North or South Korean) parents, he or she would also be a South Korean national from birth."[94]

In order to be protected by South Korea and to formally be recognised as South Korean, an individual must apply for protection at a South Korean diplomatic or consular mission abroad.[95] The head of the respective mission will inform the Minister of National Unification and the Director of the Agency for National Security Planning.[96] The Minister will then make a decision on the admissibility of the application and subsequently inform the head of the relevant diplomatic or consular mission.[97] Once the decision has been made and the relevant individuals informed, the individual will be provided protection and identity documents.[98] The law states no time limitation on how long this process may take.

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87 In addition, Australian Refugee Review Tribunals "have regularly claimed that North Korean asylum applicants are, in fact, already South Korean nationals, and therefore do not meet the criteria for being considered refugees under article 1(A)(2) of the Refugee Convention." *Supra* n 84, at p. 799.

88 "World Report 2017: North Korea*"*, *Human Rights Watch,*12 January 2017, http://www.refworld.org/docid/587b582b13.html. Site accessed 15 September 2018.

89 "North Korea 2016/2017"*, Amnesty International,* 2017, https://www.amnesty.org/en/countries/asia-and-the-pacific/north-korea/report-korea-democratic-peoples-republic-of/. Site accessed 16 September 2018.

90 "A Case for Clarification: European Asylum Policy and North Korean Refugees*"*, *European Alliance for Human Rights in North Korea,* Jun. 13, 2015, Vol. 7, https://www.eahrnk.org/articles/policy-and-research/a-case-for-clarification-european-asylum-policy-and-north-korean-refugees. Site accessed 20 September 2018.

91 *Ibid.*

92 Art. 3, 1948 Daehan Minkuk Hunbeob [Hunbeob] [Constitution], (July 17, 1948) (S. Kor.).

93 Art. 3 Nationality Act, (amended Dec. 13, 1997) (S. Kor.).

94 *Supra* n 83, at p. 799.

95 Art. 7, North Korean Refugees Protection and Settlement Support Act, 21 January 2014.

96 *Ibid.*

97 *Ibid.* at Art. 8.

98 *Ibid.*

However, the South Korean Act on the Protection and Settlement Support of Residents Escaping from North Korea "limits protection to North Korean escapees in three different ways."[99] First, Article 3 states that protection will only be provided to Koreans "who have expressed their intention to be protected by the Republic of Korea."[100] This means that North Koreans who do not wish to live in or be considered citizens of South Korea will not be afforded the protection of South Korea. Second, North Koreans must not have 'earned their living' for 'a considerable period' in another country after leaving North Korea.[101] The government of South Korea has explained this to mean anyone who has lived outside of North Korea for a long period of time without approaching South Korean officials is ineligible for protection.[102] The exact amount of time after which an individual is no longer eligible for protection is not specified, nor has any government official clarified this. After such a time period, North Koreans are no longer entitled to protection by South Korea. Third, those who are deemed "unfit for the designation as persons eligible for protection" are excluded from South Korean nationality.[103] A South Korean government official has noted that certain categories of individuals, such as 'bogus defectors' as well as "persons who have committed murder, aircraft hijacking, drug trafficking, and terrorism" are excluded as unfit for protection.[104] The official and the government of South Korea have not clarified further what constitutes a 'bogus' defector.

The United Kingdom (UK) adjudicates many claims of North Koreans, finding that they hold South Korean nationality and are therefore ineligible for refugee status elsewhere.[105] In *KK and Ors*, the Tribunal evaluated the claims of three North Korean nationals.[106] The tribunal accepted that the individuals had a well-founded fear of persecution in North Korea.[107] However, the Tribunal rejected the idea of effective nationality, concluding that "for the purposes of the Refugee Convention, where a person already has a nationality (even if he has no documents to that effect) that is the end of the matter: he is a national of the country concerned."[108] The Tribunal concluded that North Korean individuals born of North Korean parents are South Korean nationals at birth and therefore ineligible for protection as refugees elsewhere.[109] In making this determination, the Tribunal relied on the UK Home Office report, which serves as guidance

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99 *Supra* n 83, at p. 799

100 *Supra* n 95, at Art. 9.

101 *Ibid.*

102 "The situation of citizens of the Democratic People's Republic of Korea (North Korea) who approach embassies of the Republic of Korea (South Korea) in Canada or in other countries to request citizenship", *Immigration and Refugee Board of Canada,* Jun. 3, 2008, https://irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=452042. Site accessed 3 November 2018.

103 *Ibid*.

104 *Supra* n 102.

105 The U.K. interestingly denied refugee status to a Jewish refugee in 1991, stating that they could seek status in Israel. *Supra* n 53, at p. 336.

106 *Supra* n 83, at p. 806.

107 *KK and Ors v Secretary of State for the Home Dept*., para.6, [2011] (UK).

108 *Ibid.* at para. 82.

109 *Ibid.* at paras. 84-85.

for adjudicators of refugee claims.[110] This report notes that "an application for asylum owing to a fear of persecution in North Korea is, therefore, likely to fall for refusal on the basis that the person . . . could reasonably be expected to avail himself of the protection of another country where he could assert citizenship," namely South Korea.[111] However, the Tribunal held that because these three individuals were "outside Korea for more than ten years," they would be treated as individuals who lost their South Korean citizenship and therefore were entitled to refugee protection in the UK.[112]

The UK takes the position that all North Koreans who fled the peninsula within the last ten years are South Korean citizens, and therefore ineligible for refugee protection. The country has refused to engage with an analysis of effective nationality. According to the UK government, once an individual has a right to a second nationality, he must seek protection from this state before seeking international protection in the UK. This is the case regardless of the process required to formally obtain this nationality, the likelihood of the process being successful, or the desire of the individual to engage in that process and receive protection from this second state. This refusal to engage with an effective nationality analysis has led to the UK's denial of nearly all claims of North Koreans fleeing persecution.

V. RECOMMENDATIONS FOR THE APPLICATION OF ARTICLE 1(A)(2)

The purpose of the Refugee Convention is to protect refugees and ensure international cooperation in doing so. Each of the above examples features a denial, or an attempted denial, of refugee status for an entire population because of an imposed dual nationality. However, these policies can have individual impacts on applicants who hold dual nationality through, for example, parentage or lineage. These examples demonstrate the disturbing implications that arise from a literal application of a provision in the Refugee Convention. In the 1950s, less than ten countries allowed dual citizenship.[113] At that time, few individuals were able to hold dual citizenship, and none of the laws explained above existed. Today, two thirds of states allow dual nationality, accounting for slightly under half of the world's population being entitled to dual citizenship.[114] The past 68 years have seen mass decolonisation, political crises, and globalisation that could not have been foreseen at the time of the drafting of the 1951 Refugee Convention. The law

110 *Country Information and Guidance: North Korea: Opposition to the Regime*, U.K. Home Office (Oct. 2016), http://www.refworld.org/pdfid/57f63cd94.pdf. Site accessed 14 November 2018.

111 *Ibid.* at sec. 2.2.9.

112 *Supra* n107, at para. 91. Australia also has a history of denying North Koreans' asylum claims. Upon denial, many of these individuals are sent to China, a country known to return North Koreans to their home country. Roberta Cohen, "China's Forced Repatriation of North Korean Refugees Incurs United Nations Censure", *Brookings,* July 7, 2014, https://www.brookings.edu/opinions/chinas-forced-repatriation-of-north-korean-refugees-incurs-united-nations-censure/. Site accessed 22 January 2019.

113 *Supra* n 17, at pp. 531, 534.

114 Youyou Zhou, "Are rich countries more likely to allow dual citizenship?", *Quartz,* 20 September 2018, https://qz.com/1342183/are-rich-countries-more-likely-to-allow-dual-citizenship/. Site accessed 29 January 2019.

and our interpretation of ineffective citizenship must adapt to our current world in order to achieve the goal of the Refugee Convention: protecting the world's most vulnerable.

The Refugee Convention should not be used to deny refugee claims based on the exercises of sovereignty of certain states, or based on citizenship that is in fact ineffective. The differing applications of Article 1(A)(2) create confusion and problems for refugees seeking protection from persecution and lawyers who undertake to represent them. Refugee law affects individuals and should be accessible and understandable to the people it will affect. There should be a uniform application of Article 1(A)(2) regardless of the country of asylum of the applicants. However, this uniform application must be informed by our current global climate and must have a focus on protection of the world's most vulnerable people who are seeking safety.

In order to remedy the issues that arise in situations such as those described above, a new standard for ineffective nationality should be adopted to ensure individuals are not denied refugee protection simply because of one state's exercise of sovereignty. In addition, regardless of the standard for ineffective citizenship employed, states must refrain from *refouling* individuals who would satisfy the definition of 'refugee' but for a second citizenship.

A. *New Standard for Ineffective Citizenship*

As discussed above, the current standard for ineffective nationality requires that an individual seek protection of a state and be denied this protection. Only then can a nationality be said to be ineffective, thereby allowing an individual to seek refugee protection elsewhere. However, this standard is far too inflexible given the situations discussed above.

However, there are additional situations in which citizenship should also be seen as ineffective. First, an evaluator of the citizenship must look beyond simply the laws of the state in determining whether a citizenship is effective. Citizenship is not contained in the laws of the country alone; international law suggests that a genuine link must exist between the individual and the country. As noted, there are obligations individuals have to their countries of nationality, as well as rights those individuals are guaranteed by the state. For example, an individual must have access to protection of their state of second nationality even outside of that state, have the ability to vote, be required to serve in an army, or be required to pay taxes. When individuals are not granted these rights and are not bound by these obligations, we cannot say the individual holds citizenship of that country.

National laws alone, absent other rights and protections that typically are afforded to nationals, cannot suffice to denote citizenship. Using an example above, because South Korea cannot and does not provide protection for North Koreans outside its borders, does not grant this citizenship automatically, and can deny citizenship to an individual for various reasons, this ought not be considered an effective citizenship. The rights and protections normally afforded to nationals must be granted to individuals in order for them to be considered citizens. North and South Korea certainly have a shared history and a close historical link. However, the link between individual North Koreans and South Korea is tenuous at best. South Korea hopes for a unified Korea where all North

Koreans would be citizens of this state. However, this certainly cannot be understood to be enough of a link to constitute a genuine link for the purposes of citizenship.

Consequently, we should not conflate the availability of citizenship with citizenship itself. The countries above each claim entire groups of people as their citizens yet do not provide documents, rights, or status to these individuals until they arrive in the country in question. This can best be understood as an inchoate right. An individual must provide documentation and proof, approach an embassy, and engage in a process to receive protection from the state in question. This is not a right in itself, but an inchoate right; one that may develop into a full right to citizenship, but is not as it stands a right to citizenship. While every North Korean *may* acquire South Korean nationality, this does not mean that every North Korean *is* a South Korean national.

This conflation between an inchoate right and an actual right is a particularly troubling premise to accept when conflicts exist between the law of the state of origin and that of the state of second citizenship of the individual. Many countries do not allow their citizens to hold a second citizenship; Indonesia and North Korea are two such countries.[115] How can the law of the applicant's country of origin be reconciled with the law of the country of alleged second citizenship when this is the case? Certainly, an adjudicator cannot only consider the law of the applicant's country of second citizenship and completely disregard the domestic law of the applicant's country of origin. If a country prohibits dual nationality for its citizens, those citizens cannot be understood as having held a second nationality since birth. For example, because North Korean law prohibits dual citizenship, North Korean citizens escaping the regime cannot be understood as having South Korean citizenship since birth. They must instead be understood to hold an inchoate right to citizenship, or an ability to acquire South Korean citizenship upon review of application to South Korea. This would mean that North Koreans do not hold a second nationality and should not be excluded from refugee status on this basis alone. This important distinction must be considered in a determination of effective citizenship.

In addition, states must look at the geopolitical realities to understand why the imposition of certain citizenships is inappropriate and should not prevent an individual from receiving protection as a refugee. When a citizenship arises from conflicts between sovereigns, such as between North and South Korea, or after a period of decolonisation, as is the case with East Timor, and forced upon individuals, states must not accept this as effective. In each of the examples, domestic laws that force citizenship upon another weaker or unrepresented population is problematic. Each of these is an exercise in sovereignty that largely remains unchallenged in the international sphere. One of the few areas in which this arises is in the adjudication of refugee claims. This is especially problematic when the persecution the individual is fleeing from is a direct or indirect consequence of the colonisation by that state. An individual would then be forced to seek the protection of the state that acted as a catalyst for their persecution. Forced nationality

[115] See, as example: "List of Countries that Allow or Disallow Dual Citizenship", http://dlgimmigration.com/united-states-citizenship/list-of-countries-that-allow-or-disallow-dual-citizenship/. Site accessed 25 September 2018.

in this instance, when the individual seeks to divest himself of this citizenship, ought not to be considered effective.

Therefore, in order for a citizenship to be effective, the individual must actually be treated as a citizen of the country, with all the rights and obligations that accompany that status according to domestic law. In addition, there must be a genuine link between the individual and the state and the individual must actually hold the citizenship, not merely be entitled to hold the citizenship, in order to be denied protection as a refugee. Lastly, forced citizenship in certain circumstances, such as when it is a result of conflict between states or when a colonising state imposes it on the local population, ought not to be considered effective.

B. *Eye to Non-Refoulement*

The object and purpose of the 1951 Refugee Convention is the protection of individuals from persecution in their country of origin. According to the VCLT, those that are states parties to the 1951 Refugee Convention must not act to frustrate that purpose. States parties must act in accordance with Article 33 of the Convention and therefore must not return refugees to their country of origin, or to countries that may later return them to their country of origin.[116]

Regardless of a determination of the individual's second citizenship, they ought never to be returned to their country of origin or to a third country that could later return them to their country of origin. Individuals who hold a second citizenship but who otherwise would satisfy the definition of 'refugee' in the 1951 Refugee Convention should be sent to their country of second citizenship rather than returned to their country of origin or returned to a neighboring country. The individuals above fit the definition of 'refugee' in that they are outside their home country owing to a well-founded fear of persecution because of political opinion, nationality, race, religion, or membership in a particular social group. These individuals must be transferred to their second country of nationality. It is inappropriate and frustrates the object and purpose of the 1951 Refugee Convention to return an individual to his country of origin in order that he can approach his country of second citizenship.

VI. CONCLUSION

This paper has discussed the principles of nationality and ineffective nationality. Each of the states above applies the principle differently, leading to different conclusions about what constitutes ineffective nationality, and whether that analysis is necessary in an adjudication of a refugee claim. The term ineffective citizenship should consider the realities of today and a deeper analysis ought to be made of effective citizenship for the purposes of refugee claims. In making this determination, states should consider the links between the individual and the state, including the rights and obligations that the individual has. In addition, the adjudicator of a claim must separate an inchoate right to citizenship,

[116] *Supra* n 1, at Article 33.

or the availability of citizenship, from citizenship itself. Moreover, citizenship imposed on entire populations in certain circumstances ought not to be recognised as effective, since they are the result of peculiar exercises in sovereignty. Regardless of the considerations adopted, individuals must never be returned to their country of persecution, or a transit country that will later return them to their country of persecution.

Adopting these new considerations in determining the effectiveness of a citizenship will allow states to act in accordance with the object and purpose of the Refugee Convention and will prevent states from escaping responsibility to protect vulnerable individuals. With a concept as undefined as ineffective citizenship, states must ensure they are acting in accordance with the object and purpose of the treaty and adjust their understandings of the term as world perspective on, and individual rights to, dual nationality shift.