COMPARATIVE PERSPECTIVES ON ARBITRARY DEPRIVATION OF NATIONALITY AND REFUGEE STATUS

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Abstract The question of whether arbitrary deprivation of nationality constitutes persecution for the purposes of a determination of refugee status has received increased attention in recent jurisprudence. However, no systematic argument has been made to date on the ordinary meaning of words, context, object and purpose of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees as it applies to stateless refugees. This is an important question because the absence of determination procedures and a protection regime specifically for stateless persons in many jurisdictions makes refugee and/or complementary protection the only options. This article examines existing landmark judicial decisions worldwide, relevant UN documents, and academic writing on whether arbitrary deprivation of nationality, either on its own or when taken with other forms of harm, amounts to persecution within the meaning of Article 1A(2) of the 1951 Refugee Convention, and if so on what grounds. It concludes by suggesting when (arbitrary) deprivation of nationality should lead to a finding of persecution, based on good practice, and points to a global consensus on a new rights perspective concerning nationality.

Keywords: comparative jurisprudence, human rights, international law, international refugee law, statelessness.

I. INTRODUCTION

The question of whether arbitrary deprivation of nationality constitutes persecution for the purposes of a determination of refugee status has received increased attention in recent jurisprudence. However, no systematic argument has been made to date on the ordinary meaning of words, context, object and purpose of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (hereinafter 1951 Refugee Convention),[1] as it applies to stateless refugees.[2] This is an important question because, in addition

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[1] 189 UNTS 150.

[2] This is in contrast to refugees with a nationality. eg GS Goodwin-Gill, 'The Search for the One, True Meaning…' in GS Goodwin-Gill and H Lambert (eds) *The Limits of Transnational*

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to the imperatives of refugee protection, the absence of determination procedures and a protection regime specifically for stateless persons in many jurisdictions makes refugee and/or complementary protection the only options.[3]

The 1954 Convention relating to the Status of Stateless Persons (hereinafter 1954 Stateless Persons Convention)[4] and the 1961 Convention on the Reduction of Statelessness (hereinafter 1961 Statelessness Convention)[5] together form the foundation of the international legal framework to address statelessness.[6] Stateless refers to 'a person who is not considered as a national by any State under the operation of its law'.[7] This definition is part of customary international law;[8] it is concerned with whether a person has a nationality, and not with the manner in which a person became stateless. Accordingly, under the 1954 Stateless Persons Convention, 'where a deprivation of nationality may be contrary to rules of international law, this illegality is not relevant in determining whether the person is a national ... rather, it is the position under domestic law that is relevant'.[9] Thus, Article 1(1) of the 1954 Stateless Persons Convention is connected to the right to nationality itself; it is not concerned with whether this nationality is effective in the sense of whether the individual can exercise the rights attached to nationality.[10] In contrast, a key question for persons fleeing persecution and claiming refugee status is that of State protection, which includes considerations of effective nationality and therefore of the ability to exercise human rights.[11]

Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union (Cambridge University Press 2010) 204–41; J McAdam, 'Interpretation of the 1951 Convention' in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press 2011) 75–115; J Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 48–74; J Hathaway and M Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014); M Foster, *International Refugee Law and Socio-Economic Rights* (Cambridge University Press 2007); H Storey, 'Persecution: Towards a Working Definition' in V Chetail and C Bauloz (eds), *Research Handbook on Migration and International Law* (Edward Elgar Publishing 2014) 459–518.

[3] There are currently 82 State parties to the 1954 Convention relating to the Status of Stateless Persons and 59 State parties to the 1961 Convention on the Reduction of Statelessness <http://www.refworld.org/statelessness.html>. Currently, only eleven countries have a stateless status determination procedure (France, Italy, Spain, Hungary, Latvia, Mexico, Switzerland, Georgia, Moldova, the Philippines, and the UK). The Netherlands and Brazil are to have one soon. Even in countries that have a procedure, refugee law can be crucial if for instance stateless status provides less rights than refugee status in domestic law (eg in Hungary).

[4] 360 UNTS 117.

[5] 989 UNTS 175.

[6] Introductory Note by the UNHCR on the 1961 Convention on the Reduction of Statelessness <http://www.unhcr.org/3bbb286d8.html>.

[7] Art 1(1), 1954 UN Convention relating to the Status of Stateless Persons.

[8] International Law Commission, *Articles on Diplomatic Protection with commentaries* (2006) 48–9 <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf>.

[9] UNHCR Expert Meeting, 'The Concept of Stateless Persons under International Law: Summary Conclusions' ('Prato Conclusions') in *Commemorating the Refugees and Statelessness Conventions: A Compilation of Summary Conclusions from UNHCR's Expert Meetings* (2012) 16, para 18 <http://www.refworld.org/pdfid/4f461d372.pdf>.

[10] ibid 14, para 3.

[11] CA Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7 IJRL 232, 233–4.

There can be some overlap between stateless persons and refugees. Indeed, some refugees under the 1951 Refugee Convention may also be stateless, and some stateless persons may be refugees.[12] When this happens international law provides that they 'should be protected according to the higher standard which in most circumstances will be international refugee law, not least due to the protection from refoulement in Article 33 of the 1951 Refugee Convention'.[13] However, most refugees today are not stateless, and not all stateless persons are refugees, thus the two classifications are and remain distinct. This is because the causes of statelessness are very wide; they have been identified by UNHCR as being of three kinds.[14] The first of these kinds refers to causes linked to the dissolution and separation of States and transfer of territory between States (eg the dissolution of the Soviet Union and Yugoslavia, and the post-colonial formation of States in Asia and Africa). The second of these kinds refers to technical causes through the operation of citizenship laws or administrative practices. The third and final cause of statelessness is discrimination and arbitrary deprivation of nationality; in this case, discrimination is often both a cause of statelessness (eg the arbitrary deprivation of nationality) and an effect of statelessness on the person (eg the denial of human rights through discriminatory acts).

This article examines the overlap between statelessness and refugee status. Thus, it focuses on the third and final cause of statelessness, namely, discrimination and arbitrary deprivation of nationality resulting in the persons affected becoming stateless or 'denationalized' (a term coined by Fischer Williams in 1927)[15] with respect to the State that deprived them of their nationality. Vigorously criticized by Scelle as a 'monument of arbitrariness',[16] denationalization has been described by Chief Justice Warren of the US Supreme Court as:

> the total destruction of an individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the

[12] Other regional instruments (such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45) and UNHCR's international protection mandate through UNGA Resolutions are also relevant—a full list is available at <http://www.unhcr.org/pages/49c3646c16a.html>.

[13] Art 5, 1954 Stateless Persons Convention. See also UNHCR 'Prato Conclusions' (n 9) 14, para 5.

[14] Inter-Parliamentary Union and UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians No 22* (2014) 30–42. See also UNHCR and Asylum Aid, *Mapping Statelessness in the United Kingdom* (2011) 23–4.

[15] J Fischer Williams, 'Denationalisation' (1927) 8 BYIL 45, in GS Goodwin-Gill, 'Stateless Persons and Protection under the 1951 Convention or Refugees, Beware of Academic Error!' (December 1992), texte présenté au Colloque portant sur 'Les récents développements en droit de l'immigration', Barreau de Québec, 22 janvier 1993, fn 13.

[16] G Scelle, 'A propos de la loi allemande du 14 juillet 1933 sur la déchéance de la nationalité' (1934) 29 *Revue critique de droit international* 63–76, in L Preuss, 'International Law and Deprivation of Nationality' (1934–35) 23 GeoLJ 250, 253.

> political existence that was centuries in the development . . . In short the expatriate has lost the right to have rights.[17]

The key point for this article is that lack of State protection is linked to the deprivation of nationality, and that the 'possession of an effective nationality and the ability to exercise the rights inherent to nationality' help to prevent forced displacement,[18] and in some cases refugeehood. Accordingly, this article leaves outside its scope of enquiry persons arbitrarily denied nationality by one State who have another nationality or other nationalities to fall back onto and are not therefore stateless. Thus, it is primarily interested in protection under refugee law and human rights law, and less about issues of nationality laws and conflict of laws.

To date, statelessness has been examined by academics through the framework of international statelessness law, international human rights law, nationality law, and human security.[19] This article aims to fill a critical gap in existing scholarship by exploring statelessness through international refugee law, an enquiry that has received increasing attention by courts across the world but that has remained largely ignored by scholars.[20] Indeed, no systematic argument has been made to date, on the application of Article 1A(2) of the 1951 Refugee Convention to stateless refugees in contrast to refugees with a nationality.[21]

This article examines existing judicial decisions worldwide, relevant UN documents, and academic writing on whether arbitrary deprivation of nationality, either on its own or when taken with other forms of harm, amounts to persecution within the meaning of Article 1A(2) of the 1951 Refugee Convention, and if so on what grounds.[22]

Following this introduction, the article proceeds to explore the meaning and substance of the right to nationality and the concept of arbitrary

[17] US Supreme Court, *Trop v Dulles* 356 US 86 (1957) 101. The phrase 'a right to have rights' is borrowed from Hannah Arendt, *The Origins of Totalitarianism* (André Deutsch 1986) 295–6.

[18] UNGA Resolution A/RES/50/152 (21 December 1995), referred to Inter-Parliamentary Union and UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians No 22* (2014) 44.

[19] For a comprehensive review of the literature, see B Blitz and M Lynch (eds), *Statelessness and the Benefits of Citizenship: A Comparative Study* (Geneva Academy of International Humanitarian Law and Human Rights and the International Observatory on Statelessness, June 2009). See also WE Conklin, *Statelessness: The Enigma of the International Community* (Hart Publishing 2014); A Edwards and C Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press 2010).

[20] With the exception of a few country specific articles, eg G S Goodwin-Gill, 'Nationality and Statelessness, Residence and Refugee Status: Issues Affecting Palestinians' (March 1990), available at <http://refugeeresearch.net/engine/node/5026>; K Darling, 'Protection of Stateless Persons in International Asylum and Refugee Law' (2009) 21 IJRL 742–67; M Fullerton, 'The Intersection of Statelessness and Refugee Protection in US Asylum Policy' (2014) 2 Journal on Migration and Human Security 144–64; SE Forbes, '"Imagine There's No Country": Statelessness as Persecution in Light of *Haile II*' (2013) 61 BuffLRev 699–730.

[21] See (n 2).

[22] Relevant documents and cases were primarily located on Refworld <http://www.refworld.org> unless specified otherwise.

deprivation of nationality in international human rights law, by reference to UN Human Rights Council Resolutions, UN Human Rights Committee General Comments and views, UN Secretary General reports, UNHCR guidelines, academic writing, and landmark decisions from international human rights courts (section II). This section also explains when a State can lawfully deprive its national of nationality and when it cannot, and the consequences for that person. Section III contextualizes the intersection between statelessness and refugee status in international refugee law. Section IV examines arbitrary deprivation of nationality and refugee status in domestic jurisprudence as an indicator of existing State practice. More specifically, section IV focuses on whether arbitrary deprivation of nationality, either on its own or when taken with other forms of harm, amounts to persecution for the purpose of Article 1A (2) in the case law of domestic courts across the world; it also analyses whether statelessness per se can amount to persecution. Section V concludes on suggesting when (arbitrary) deprivation of nationality should lead to a finding of persecution, based on good practice, and points to a global consensus on a new rights perspective of nationality.

II. THE FUNDAMENTAL RIGHT TO NATIONALITY AND ARBITRARY DEPRIVATION OF NATIONALITY IN INTERNATIONAL LAW

At the outset, it is worth pointing out that no real difference exists in public international law between 'nationality' and 'citizenship', with the former traditionally only having salience in the international context, and the latter more commonly used in a domestic context.[23] As the International Court of Justice noted, in 1955, in the *Nottebohm* case:

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.[24]

This article therefore uses the words 'nationality' and 'citizenship' as synonymous, to mean the legal bond between an individual and a State (as

[23] GS Goodwin-Gill, Lecture on 'International Migration Law', UN Audiovisual Library of International Law <http://legal.un.org/avl/ls/Goodwin-Gill_IML.html>. See also MJ Gibney, 'Should Citizenship be Conditional? The Ethics of Denationalization' (2013) 75 JPol 646, 647.

[24] *Nottebohm Case (Liechtenstein v Guatemala)*, Second Phase, Judgment of 6 April 1955, 23.

opposed to the ethnic origin of an individual),[25] by which a State guarantees and protects certain rights to individuals, generally including, the right to leave and re-enter one's own country, the right to permanent residence, freedom of movement within the State, the right to vote, to be elected or nominated to public office, the right of access to public services, and the right to diplomatic protection.[26] Whether this legal bond remains regulated entirely by the 'genuine link' theory or through an open and flexible approach more in tune with today nationality's diverse functions falls outside the scope of this article.[27] However, this article essentially agrees that '[n]ationality does not stand apart from citizenship',[28] and that nationality is and continues to be an evolving concept:

> Nationality has no positive, immutable meaning. On the contrary its meaning and import have changed with the changing character of States … It may acquire a new meaning in the future as the result of further changes in the character of human society, and developments in international organization. Nationality always connotes, however, membership of some kind in the society of a State or nation.[29]

A. The Fundamental Right to a Nationality

Traditionally, considerations of nationality (and statelessness) fell within the reserved domain of States.[30] The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws provides:

> It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international

[25] This is the meaning of 'nationality' in art 2(a) of the 1997 European Convention on Nationality (Council of Europe, ETS No 166), in international law more generally, and in the practice of some States; other States use 'citizenship' when referring to this legal bond. See CA Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 IJRL 156–82; and Batchelor (n 11) 234.

[26] UNHCR, Submission in *Kuric v Slovenia*, GC, No 26828/06, Judgment of 26 June 2012, para 2.2.3. See also B Manby, *Les lois sur la nationalité en Afrique: Une étude comparée* (Open Society Institute 2009) ix.

[27] For an excellent discussion on this point, see RD Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 HarvIntlLJ 1–60; and Batchelor (n 25).

[28] A Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 65.

[29] MO Hudson and RW Flournoy Jr, 'Nationality – responsibility of states – territorial waters, drafts of conventions prepared in anticipation of the First Conference on the Codification of International Law, The Hague 1930' (1929) 23 AJIL supplement, 21.

[30] The same may be said of considerations of 'property' or indeed 'asylum', which until their mention in the Universal Declaration of Human Rights of 1948 were part of State's sovereignty. C Beyani, 'The Right to Seek and Obtain Asylum under the African Human Rights System', Talk at the 4th International Refugee Law Seminar Series, Refugee Law Initiative, London, 16 October 2013.

> conventions, international custom and the principles of law generally recognized with regard to nationality.[31]

Thus, the role of international law was limited to regulating conflict of laws, in other words to 'order management'.[32] In 1955, the International Court of Justice, in the *Nottebohm* case, held: 'it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality'.[33] It follows that as a matter of traditional doctrine, citizenship membership criteria, in the sense of identity, have been a matter of national self-definition or State discretion, with hardly any interference from international law.[34]

More recently, matters of nationality and nationality law as reserved domain have come to be counteracted by human rights law. A new rights conception of nationality has begun to emerge based on concepts of human dignity and humanity,[35] and serious limitations on the denial and deprivation of nationality at least when viewed as an 'external act' touching on international obligations.[36] Regional institutions (particularly in Europe, Africa and the Americas) and States practice have been 'receptive to' this new rights conception of citizenship (see sections IIC and IV).[37]

The 'rights perspective' was made explicit in Article 15 UDHR. Described as 'a total innovation in the history of international law',[38] Article 15 provides:

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.

This fundamental provision has been held to fulfil two functions: to provide people with 'a sense of identity', and to give them entitlements to an array of basic rights.[39] Article 15(1) protects the right to a nationality, namely, the right

[31] Art 1, 179 League of Nations Treaty Series 89.

[32] PJ Spiro, 'A New International Law of Citizenship' (2011) 105 AJIL 694, 698. See also K Hailbronner, 'Nationality in public international law and European law' in R Bauböck, E Ersbøll, K Groenendijk and H Waldrauch (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries* vol 1 (Amsterdam University Press 2006) 1.1.4.

[33] (1955) ICJ Reports 20.

[34] Spiro (n 32) 694.

[35] O Schachter, 'Human Dignity As a Normative Concept' (1983) AJIL 848–54; C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655–724; C Harvey, 'Is Humanity Enough? Refugees, Asylum Seekers and the Rights Regime' in S Juss and C Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar Publishing 2013) 68–90; Kesby (n 28) ch 4.

[36] See GS Goodwin-Gill, 'Deprivation of Citizenship resulting in Statelessness and its Implications in International Law: Opinion', 12 March 2014, at 8–16 <http://www.ilpa.org.uk/resources.php/25900/ilpa-briefings-for-immigration-bill-house-of-lords-committee-stage-3-march-2014>.

[37] Spiro (n 32) 695.

[38] ibid 710, fn 105, referring to the words of Nehemiah Robinson.

[39] S Keetharuth, welcoming remarks to a meeting held in Banjul, The Gambia, 14 May 2010 on 'The African Charter and the Right to a Nationality' <http://www.afrimap.org/english/images/research_pdf/CRAI-Report-of-BJL-meeting-final.pdf>.

of everyone to acquire, change and retain a nationality. More specifically, the right to retain a nationality corresponds to the prohibition of arbitrary deprivation of nationality in Article 15(2).[40]

Taking into account Article 15 UDHR, the Human Rights Council has acknowledged the right to a nationality to be a human right.[41] It is recognized in some form or another in almost every international human rights law instruments. This right is particularly relevant in the context of children's rights, for instance, the ICCPR recognizes the right of 'every child' to acquire a nationality.[42] In addition, virtually every instrument of international human rights law enshrines the obligation of States to respect the human rights of all individuals without distinction of any kind.[43] States at times have restricted the enjoyment of human rights, but only subject to strict conditions set by the principles of non-discrimination, equal protection of the law, and due process.[44] States therefore have a duty to ensure that everyone enjoys the right to a nationality without discrimination, and that no one is denied or deprived of their nationality on the basis of discriminatory grounds (discussed below in section IIB). For instance, Article 9 CEDAW refers specifically to non-discrimination in relation to acquisition, change or retention of nationality, and to statelessness as well as conferral of nationality to children.[45]

B. Prohibition of Arbitrary Deprivation of Nationality and Statelessness

In parallel to the development of the right to acquire a nationality, both the UN Human Rights Committee and the Human Rights Council have played a key

[40] UN Human Rights Council (HRC), 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', 14 December 2009, A/HRC/13/3414, para 21.

[41] UN HRC Resolutions 7/10 of 27 March 2008, 10/13 of 26 March 2009, 13/2 of 24 March 2010, and 20/5 of 16 July 2012, as well as all previous resolutions adopted by the Commission on Human Rights on the issue of human rights and the arbitrary deprivation of nationality. See also UN HRC 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', 19 December 2013, A/HRC/25/28.

[42] Art 24, ICCPR. See also art 7 of the Convention on the Rights of the Child (CRC).

[43] Note that the prohibition of racial discrimination has become jus cogens and so has the prohibition of racial discrimination in relation to nationality in the Convention on the Elimination of All Forms of Racial Discrimination (CERD). Art 9 of the 1961 Statelessness Convention also prohibits deprivation of nationality on the basis of discrimination on racial, ethnic or political grounds. UNHCR, Expert Meeting: Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ('Tunis Conclusions'), March 2014, paras 18 and 70–71 <http://www.refworld.org/docid/533a754b4.html>.

[44] These principles are protected in all international human rights law instrument, including arts 1(3) and 55 UN Charter, arts 1, 2, 7 and 10 UDHR, and arts 2, 3, 14, 16, 24, 26 ICCPR. See also UN HCR Resolution 20/5 (2012) and UN HRC, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', 19 December 2013, A/HRC/25/28.

[45] However, as of today, at least 20 States have attached reservations to this provision <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>. See also A Edwards, 'Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women', UNHCR Legal and Protection Policy Research Series, August 2009.

role in consolidating protection against arbitrary deprivation of nationality, and the right to return and be admitted to his or her own country. In its General Comment on Article 12 ICCPR (freedom of movement), the Human Rights Committee explained that 'the right to enter his own country' (in para 4) is there to protect a State's citizen against forced exile or from being denied return:

> The scope of 'his own country' . . . is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of Article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons . . . In no case may a person be arbitrarily deprived of the right to enter his or her own country.[46]

The Human Rights Committee recently applied this Comment, which was made with regard to individuals deprived of any effective nationality, to individuals with a nationality on the ground that nationality was not as effective as other ties. In a departure from the majority views in *Stewart v Canada*,[47] the Human Rights Committee, in *Nystrom v Australia*, took the view that the deportation of a Swedish national by Australia to Sweden was arbitrary based on two elements. The first element was that his 'own country' within the meaning of Article 12(4) ICCPR was Australia 'in the light of the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country and the lack of any other ties than nationality with Sweden'.[48] The second element was 'that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable'.[49] It may be noted that the Committee's disregard for any link to nationality in favour of long-term residence and social

[46] UN Human Rights Committee, General Comment 27, Freedom of Movement (Art 12), UN Doc CCPR/C/21/Rev.1/Add.9 (1999) paras 20–1.

[47] *Stewart v Canada*, Comm No 538/1993, Views of 1 November 1996, para 12.4: When 'the country of immigration facilitates acquiring its nationality and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become "his own country" within the meaning of article 12, paragraph 4, of the Covenant'. For an application of *Stewart*, see *Toala et al. v New Zealand*, Comm No 675/1995, Views of 2 November 2000.

[48] *Nystrom, Nystrom and Turner v Australia*, Comm No 1557/2007, Views of 18 July 2011, para 7.5.

[49] *Nystrom, Nystrom and Turner v Australia*, Comm No 1557/2007, Views of 18 July 2011, paras 7.5 and 7.6. See also *Warsame v Canada*, Comm No 1959/2010, Views of 21 July 2011, paras 8.4–8.6.

ties was criticized by a minority of Committee members because it risks extending 'a kind of *de facto* second nationality to vast numbers of resident non-nationals'.[50]

In its Resolution 20/5 (2012), the Human Rights Council reaffirmed that

> the arbitrary deprivation of nationality, especially on discriminatory grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, is a violation of human rights and fundamental freedoms.[51]

The Human Rights Council made two further observations: first, that persons arbitrarily deprived of nationality are protected by international human rights, refugee and stateless law, and second that 'arbitrary deprivation of nationality disproportionately affects persons belonging to minorities'.[52]

In 2009, the UN Secretary General report to the Human Rights Council held the prohibition of arbitrary deprivation of nationality to have become a principle of customary international law;[53] and so too of the obligation to avoid statelessness.[54] This would support the argument that these human rights violations 'share a common characteristic of severity' that is key to a finding of persecution under the 1951 Refugee Convention,[55] at least insofar as the violation of the right not to be rendered stateless or the right not to be arbitrarily deprived of one's nationality acts as 'the precursor'[56] to persecution.

[50] Individual Opinion of Committee members Gerald, Neuman and Iwasawa (dissenting), and Rodley (Sir), Keller and O'Flaherty (dissenting) in *Nystrom, Nystrom and Turner v Australia*, Comm No 1557/2007, Views of 18 July 2011, also referred to in *Warsame v Canada*, Comm No 1959/2010, Views of 21 July 2011.

[51] UN HRC, 'Human rights and arbitrary deprivation of nationality: resolution / adopted by the Human Rights Council', 16 July 2012, A/HRC/RES/20/5, para 2. See also UN HRC Resolution 10/13.

[52] ibid.

[53] See UN HRC, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', 14 December 2009, A/HRC/13/34, referring to the following instruments: Universal Declaration of Human Rights, International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Nationality of Married Women, Convention on the Rights of Persons with Disabilities, and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. See also UN HRC, 'Arbitrary deprivation of nationality: Report of the Secretary-General', 26 January 2009, A/HRC/10/34, reporting on State practice in 28 countries that provided information to the UN Secretary General call for information.

[54] The issue of nationality is explicitly regulated in the Convention on the Reduction of Statelessness, the Convention relating to the Status of Stateless Persons and the Convention relating to the Status of Refugees.

[55] DC Baluarte, 'Denationalization as persecution: Using a human rights approach to refugee law to address the stateless legal limbo in the United States', paper presented at the *First Global Forum on Statelessness: New Directions in Statelessness Research and Policy*, 15–17 September 2014, at 26 (on file with the author).

[56] Foster (n 2) 143.

1. Concepts of deprivation and arbitrariness

Arbitrary deprivation of nationality covers all forms of withdrawal (including 'loss')[57] of nationality, except where voluntarily requested by the individual. The scope of the prohibition of arbitrary deprivation of nationality 'rests on the interpretation of the concepts of *arbitrariness* and of *deprivation of nationality*', which are notions of human rights law.[58] Deprivation of nationality refers generally 'to situations of denationalization (or withdrawal of citizenship)' as well as 'denial of access of nationality (or refusal to confer citizenship)'.[59] Arbitrariness goes beyond unlawfulness to cover standards of justice or due process considerations, and non-discrimination.[60]

Not all deprivation of nationality is arbitrary. In order *not* to be arbitrary, deprivation of nationality must be in conformity with domestic law and comply with specific procedural and substantive standards of international human rights law, in particular the principles of proportionality, non-discrimination or equality, and due process.[61] Thus, the measure in question must serve a legitimate aim that is consistent with the objectives of international human rights law. It must also be the least intrusive measure amongst those that might achieve the desired result, and it must be proportionate to the interest to be protected. Furthermore, the decision leading to deprivation of nationality must be issued in writing and be open to effective administrative or judicial review.[62] Accordingly, 'the notion of arbitrariness applies to all State action, legislative, administrative and judicial' and is concerned with acts that are against the law but also, more broadly, with 'elements of inappropriateness, injustice and lack of predictability'.[63] In cases where deprivation of nationality takes place on the basis of race, colour, sex, descent, national or ethnic origin etc, it becomes both

[57] UN HRC, 'Human rights and arbitrary deprivation of nationality: report of the Secretary-General', 19 December 2013, A/HRC/25/28, para 3. Note that while human rights instruments, the UN HRC and the UNGA use (or appear to use) deprivation to refer to all forms of withdrawal of nationality, automatic and non-automatic, since the outcome is the same, the 1954 Stateless Persons Convention and the 1961 Statelessness Convention use deprivation to refer to withdrawal of nationality resulting from the decision of a State authority—while 'loss' refers only when occurring by operation of the law, thereby focusing more on the processes (see arts 7–8). UNHCR 'Tunis Conclusions' (n 43) paras 9–14.

[58] M Manly and L Van Waas, 'The Value of the Human Security Framework in Addressing Statelessness' in Edwards and Ferstman (n 19) 49, 63.

[59] ibid 63–4.

[60] UN HRC, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', 19 December 2013, A/HRC/25/28.

[61] See (n 44). See also UNHCR 'Tunis Conclusions' (n 43) paras 15–27.

[62] Art 17 of the International Law Commission's Draft Articles on Nationality of Natural Persons in relation to the Succession of States, with commentaries, *Yearbook of the International Law Commission*, 1999, vol II (Part 2) 38. UNHCR 'Tunis Conclusions' (n 43) paras 28–29. See also art 8(4) of the Convention on the Reduction of Statelessness, and arts 11 and 12 of the European Convention on Nationality (1997). For a useful summary of these conditions, see UN HRC, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', 19 December 2013, A/HRC/25/28, paras 4–5, and UNHCR, *Handbook on Protection of Stateless Persons* (Geneva 2014) paras 71–77.

[63] ILC Draft arts, ibid, para 25.

arbitrary and a breach of the principle of non-discrimination in the enjoyment of the right to nationality.[64]

2. Impact on the enjoyment of human rights

Arbitrary deprivation of nationality impacts on the enjoyment of human rights (political, civil, economic, social or cultural) in two important ways. The first of these ways is that arbitrary deprivation of nationality puts the affected persons in a disadvantage situation by impeding the full enjoyment of their human rights. The second way is because these persons find themselves placed in a situation of increased vulnerability to human rights violations.[65]

The human rights that are particularly affected in cases of arbitrary (including discriminatory) deprivation of nationality are many. They include, for instance, *political rights* resulting in the inability to participate politically, the right to *freedom of movement* resulting in the inability to travel, to return and be readmitted in a country of habitual residence, but also in the inability to access health and educational services, the right to *liberty* resulting in arbitrary arrest or detention, the right to an *effective remedy* resulting in the inability to challenge administrative or judicial decisions or acts of racial discrimination, and the right to *family life* due to limitations to the right to enter or reside in a territory.[66] Crucially, it also includes the *right to work* and the *right to education*. In this respect, it is generally accepted that a complete denial of the right to work amounts to persecution;[67] so does the denial of a child's right to education.[68] However, lesser exclusion from these rights may not necessarily reach that threshold,[69] unless taken cumulatively with a number of other less serious violations (such as denial of the right to welfare benefits or to health). The same is true of the denial of other socio-economic rights (as a result of State action), which taken together could reach the threshold of persecution, for instance

> withdrawal of ration card and confiscation of property in combination with threat of violence; withdrawal of state benefits, in combination with inability to obtain employment or accommodation due to ethnic origin; denial of state benefits such as housing, food and clothing benefits and subsidies in a state-controlled

[64] ibid, para 26.

[65] UN HRC, 'Human rights and arbitrary deprivation of nationality: Report of Secretary-General', 19 December 2011, A/HRC/19/43. UN HRC, 'Human rights and arbitrary deprivation of nationality: resolution / adopted by the Human Rights Council', 16 July 2012, A/HRC/RES/20/5, para 6.

[66] For a full discussion of these rights in the context of international human rights law instruments and treaty bodies, see UN HRC, 'Human rights and arbitrary deprivation of nationality: Report of Secretary-General', 19 December 2011, A/HRC/19/43. See also UN HRC, 'Human rights and arbitrary deprivation of nationality: resolution / adopted by the Human Rights Council', 16 July 2012, A/HRC/RES/20/5, para 7.

[67] Foster (n 2) 94.

[68] ibid 103.

[69] ibid 96–103.

economy; severe discrimination in 'most civil, social and economic rights' such that the applicant would suffer 'a life of destitution'.[70]

The key issue is the extent to which 'persecution is understood to be concerned fundamentally with serious violations of human dignity' in the jurisprudence of domestic courts.[71] Section IV shows some engagement by courts with this issue when examining claims based on ethnic and racial discrimination of Faili Kurds, Roma, Rohingya of Myanmar, refugees from Bhutan, the Bidoons in the Gulf States, and Dominicans of Haitian descent in the Dominican Republic.

3. Lawful deprivation of nationality

The above discussion clearly indicates that denationalization done arbitrarily, including on discriminatory grounds, is prohibited under international law and constitutes a severe violation of human rights, particularly if it results in statelessness. However, there exist (albeit very limited) circumstances in which a State can lawfully deprive its nationals of nationality, ie, if the act pursues a legitimate aim and complies with the principle of proportionality,[72] and the person concerned does not become stateless following loss of his or her nationality.[73] Only in the most exceptional circumstances can a State lawfully deprive a national of its nationality where doing so would result in statelessness. Article 7(1)(b), read together with Article 7(3) of the 1997 European Convention on Nationality,[74] may be given as an example of a provision permitting loss of nationality even where it leads to statelessness, this being if nationality has been obtained by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant, under the theory of abuse of rights; these exceptions are to be interpreted restrictively.[75] In such cases, 'States are free either to revoke the nationality (loss) or to consider that the person never acquired their nationality (void ab initio)',[76] and practice varies in each Contracting State. For instance, the UK considers British citizenship acquired fraudulently by impersonation (ie, false representations about one's identity) as 'nul' or void ab initio, and no right of appeal is provided in such cases, although judicial review might be allowed. However, where the fraud concerns other matters, nationality is said to be 'lost' and a (non-suspensive) right of appeal exists.[77] The 1961 Statelessness Convention also allows deprivation of nationality obtained by misrepresentation or fraud

[70] ibid 105–6.
[71] ibid 103.
[72] ILC Draft Article on Nationality, para 25.
[73] Art 8(1), 1961 Statelessness Convention; arts 4(b), 7(1) and 7(3), 1997 European Convention on Nationality.
[74] Council of Europe, ETS No 166.
[75] eg Case C-135/08 *Rottmann v Bayern* [2010] ECR I-1449.
[76] Explanatory Report, art 7(1)(b), 1997 European Convention on Nationality.
[77] For a critic of this distinction, A Berry, 'Who are you? Fraud, impersonation and loss of nationality without procedural protection' <http://www.statelessness.eu/blog/who-are-you-fraud-impersonation-and-loss-nationality-without-procedural-protection>.

even where it would lead to the person being stateless.[78] Both the 1961 Statelessness Convention and the 1997 European Convention on Nationality further provide for the possibility of a State lawfully depriving its national of nationality on grounds of 'conduct seriously prejudicial to the vital interests of the State Party'.[79] Explanatory Report to the 1997 European Convention on Nationality explains that

> Such conduct notably includes treason and other activities directed against the vital interests of the State concerned (for example work for a foreign secret service) but would not include criminal offences of a general nature, however serious they might be.

Furthermore, Article 8(3) of the 1961 Statelessness Convention specifies that

> conduct seriously prejudicial to the vital interests of the State can constitute a ground for deprivation of nationality only if it is an existing ground for deprivation in the internal law of the State concerned, which, at the time of signature, ratification or accession, the State specifies it will retain.[80]

International law further requires that in any cases of loss of nationality, persons arbitrarily deprived of their nationality should have the possibility to appeal and be guaranteed adequate procedural standards.[81] They should also have access to an effective remedy, including but not limited to restoration of nationality and reparation; this should be made available in domestic law, and flexibility should apply when considering evidence of proof required for personal identification.[82] It is therefore questionable whether the absence of a suspensive right of appeal, such as in the UK, particularly without the need for

[78] Art 8(2)(b), 1961 Statelessness Convention.

[79] Art 8(3)(a)ii, 1961 Statelessness Convention; art 7(d), 1997 European Convention on Nationality. See also UN HRC, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', 19 December 2013, A/HRC/25/28, paras 12–13 and 18–19. UNHCR 'Tunis Conclusions' (n 43) paras 52–69. Note that both the 1961 Statelessness Convention and the 1997 European Convention on Nationality also provide for lawful deprivation of nationality where a person acquired nationality by naturalization and resided abroad for more than seven years without registering with the State authorities whilst abroad.

[80] On the UK's declaration under art 8(3), see GS Goodwin-Gill, 'Mr Al-Jedda, Deprivation of Citizenship, and International Law', revised draft of a paper presented at a Seminar at Middlesex University 14 February 2014, at 4 <http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf>. The points made in that paper were further developed in Goodwin-Gill (n 35); Goodwin-Gill, 'Deprivation of Citizenship resulting in Statelessness and its Implications in International Law – Further Comments', 6 April 2014 <http://www.ilpa.org.uk/resources.php/26116/ilpa-briefing-for-the-immigration-bill-house-of-lords-report-7-april-2014-deprivation-of-citizenship>; Goodwin-Gill, 'Deprivation of Citizenship resulting in Statelessness and its Implications in International Law: More Authority (if it were needed…)', 5 May 2014 <http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenship-MoreAuthority.pdf>.

[81] eg art 8(4), 1961 Statelessness Convention; Chapter IV, 1997 European Convention on Nationality. See also UN HRC, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', 19 December 2013, A/HRC/25/28, paras 31–34.

[82] UN HRC Resolutions 7/10 and 10/13. See also UNHCR, *Handbook on Protection of Stateless Persons* (Geneva 2014) Part Two.

judicial confirmation of the decision before loss of nationality, satisfies international procedural standards.[83] In the UK still, further questions arise following the recently adopted Immigration Act 2014. Section 66(1) of the Act allows the Secretary of State to make an order to deprive a national of nationality if (a) citizenship was acquired from naturalization, (b) deprivation is 'conducive to the public good' (ie, the person 'has conducted him or herself in a manner which is seriously prejudicial to the vital interests' of the country), and (c) 'the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory'.[84] Section 66(1) therefore makes it possible for the Secretary of State to strip someone of their British citizenship, even where this would render them stateless. Goodwin-Gill argues that this, in and of itself, is not a violation by the UK of its international obligations because the UK made a declaration under Article 8(3)(a) of the 1961 Statelessness Convention at the time of ratification, and it has not ratified the 1997 European Convention on Nationality.[85] However, the consequences of such act may well have implications in international law. Thus, a State may not deprive an individual of nationality 'for the sole purpose of expelling him or her'.[86] Neither may a State (eg the UK) refuse to readmit an individual whom it stripped of his or her nationality whilst abroad; to do so 'would be in breach of its [ie, the UK's] obligations towards the receiving State'.[87] Deprivation of citizenship may also impact the right to respect for private and family life under Article 8 ECHR, and the (UK's) obligation to prosecute international crimes such as terrorist acts. It would also impact the right to diplomatic protection abroad.[88]

In sum, as Batchelor rightly puts it: 'If a State has legislation or practice which creates statelessness, it is that State which should resolve the problem'.[89] The Human Rights Council also recently recalled 'that the prevention and reduction of statelessness are primarily the responsibility of States, in appropriate cooperation with the international community'.[90] It has therefore been argued that a State's responsibility occurs on two levels.[91] First, a State's responsibility occurs for the act of arbitrary deprivation of nationality that

[83] Berry (n 77).

[84] <http://www.legislation.gov.uk/ukpga/2014/22/section/66/enacted>.

[85] Goodwin-Gill, 'Mr Al-Jedda' (n 80) 6.

[86] ibid 11—referring to art 9 of the International Law Commission Draft Articles on the expulsion of aliens.

[87] ibid 13.

[88] ibid 13–15.

[89] Batchelor (n 25) 169.

[90] UN HRC, 'Human rights and arbitrary deprivation of nationality: Resolution / adopted by the Human Rights Council', 16 July 2012, A/HRC/RES/20/5, para 3. Note that States' obligations to meet their protection responsibilities towards refugees, stateless people and internally displaced persons had already been acknowledged by the UN General Assembly a few years earlier. UNGA Resolutions on the Office of the UNHCR 61/137 of 25 January 2007, 66/133 of 12 March 2012 and 67/149 of 6 March 2013.

[91] Baluarte (n 55) 28, referring to *the Draft Articles of Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/10,GAOR, 56th Sess, Suppl No 10 (2001) art 14.

results in statelessness. Second, a State's responsibility occurs for the continuing nature of this violation as a result of the stateless person becoming increasingly vulnerable in the society in which he or she lives. Numerous illustrations of these principles can be found in the case law of international courts, as discussed next.

C. Arbitrary Deprivation of Nationality in the Jurisprudence of International Human Rights Court

The Inter-American Court of Human Rights (IACtHR), the African Commission on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child, and the European Court of Human Rights (ECtHR) have all issued important judgments, decisions or opinions on nationality-related issues.[92] This case law focuses primarily on issues of reparation and remedies for victims of violations of arbitrary deprivation of nationality, and not directly on claims for refugee status.

The IACtHR considers the right to nationality to be a right of the individual, and explicitly acknowledges that nationality has evolved from a State's attribute to 'a conception of nationality which, in addition to being the competence of the State, is a human right'.[93] Thus, the powers of States to regulate matters of nationality are determined by their obligations under human rights law. The IACtHR regards the right to nationality, protected in Article 20 of the American Convention on Human Rights (ACHR), to include an international and domestic element:

> The right to a nationality provides the individual with a minimum measure of legal *protection* in international relations, through the link his nationality establishes between him and the State in question; and second, the protection therein accorded the individual against the arbitrary deprivation of his nationality, without which he would be deprived for all practical purposes of all his political *rights* as well as those civil *rights* that are tied to the nationality of the individual (italics added).[94]

Thus, it provides a basis for protection at the international level and for access to specific rights at the national level, ranging from freedom of movement to education and health care. The approach of the IACtHR is to look at both the act of denial of nationality in relation to the right to nationality and the

[92] Note that of the three main regional instruments—the 1969 American Convention on Human Rights (ACHR), the 1981 African Charter on Human and Peoples' Rights (ACHPR), and the 1950 European Convention on Human Rights (ECHR)—the ACHR is alone in providing explicitly the right to a nationality (art 20(1)); it also takes the leading step of seeking to combat statelessness by securing the right of children to acquire a nationality (art 20(2)).

[93] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, OC-4/84, IACtHR, 19 January 1984, paras 32 and 33.

[94] *Castillo Petruzzi*, IACtHR, 30 May 1999, para 100. See also *Constitution of Costa Rica*, OC-4/84, IACtHR, 19 January 1984, para 34.

consequences of the denial of nationality in relation to other human rights set out in the ACHR.[95] In assessing the consequences of the denial of nationality, the IACtHR takes account of the broader context of discrimination and vulnerability of stateless children in a particular country, particularly if this has been going on for many years.[96] In the same case, it found the 'uncertainty and insecurity' caused to the children's mothers (and sister) 'by the situation of vulnerability that the State imposed on the Yean and Bosico children', such as the fear of expulsion of their children (brother), to constitute inhuman treatment under Article 5 of the American Convention.[97] In other cases involving children, it has relied on the Convention on the Rights of the Child in order to give further content to the right to nationality.[98] This is a welcome application of the principle of indivisibility of rights by the IACtHR according to which no human right can be fully realized without the full realization of all other human rights. In other words, 'states cannot pick and choose among rights'.[99] For the IACtHR, the realization of each human right imposes a tripartite obligation on States: to respect, protect and fulfil. A violation of any of these would entail States' international responsibility, and a duty of reparation ranging from recognition of nationality to the payment of compensation for the damage sustained, and even an act of apology.

The African Commission on Human and Peoples' Rights has held the right to human dignity and recognition of his or her legal status, protected in Article 5 of the African Charter on Human and Peoples' Rights, to include the right to a nationality and protection against arbitrary deprivation of nationality.[100] It emphasizes that each human right (including nationality, identity, and non-discrimination) creates obligations on the part of the State to respect, protect and fulfil. Hence, the consequential violations of the rights to nationality and/or non-discrimination are very much part of the case law analysis. In one case, for instance, the African Commission found the repetitive expulsion from one State without the right to enter another State, caused by the State of nationality's failure to recognize the applicant's nationality, to constitute inhuman or degrading treatment under Article 5 of the African Charter, and to violate his rights to family life, freedom of movement, to leave and to return to his own country, property, and equal access to the public service of his country

[95] *Bronstein v Peru*, IACtHR, 6 February 2001, para 93.

[96] *Yean and Bosico Children v The Dominican Republic*, IACrtHR, 8 September 2005, para 168.

[97] ibid, paras 205–206.

[98] *Gelman v Uruguay*, IACtHR, 24 February 2011, paras 121–122.

[99] JW Nickel, 'Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights' (2008) 30 HRQ 984–1001, arguing that rights with low-quality implementation provide little support to other rights; for indivisibility to work, the rights in question must be fully realized (at 984).

[100] African Commission on Human and Peoples' Rights, *234: Resolution on the Right to Nationality*, 23 April 2013. See also Union Inter-Africaine des Droits de l'Homme, *Fédération Internationale des Ligues des Droits de l'Homme v Angola*, African Commission on Human and Peoples' Rights, Comm No 159/96 (1997).

under the same Charter.[101] On the issue of remedies, the African Commission found States accountable to provide reparation for the harm caused by the arbitrary deprivation of nationality in the context of systematic violations of human rights, ethnic discrimination and forced expulsion.[102] It considers that whilst the recognition of the right to return in safety must be welcome, it is not enough to annul the violation committed by the State. Diligent measures should include amongst others, the issuance of new ID documents and the restitution of the belongings looted from them after they were expelled, compensation for the damage sustained, and the reinstatement of the rights to work.[103] Similarly, the African Committee of Experts on the Rights and Welfare of the Child assesses both the act of denial of nationality and the consequences of the act.[104] Thus, it found the denial of citizenship of Nubian children to violate the right to nationality, the right to a name, protection against non-discrimination and protection against statelessness.[105] It then considered the consequences of the non-recognition of the nationality of children of Nubian descent, by reference to the widespread and systematic denial right of nationality over several generations, and held that the principle of non-discrimination requires the children affected to be recognized their essential socio-economic rights (ie, health and education), on equal terms with children in comparable communities.[106]

Finally, the ECtHR treats arbitrary deprivation of nationality as a serious violation of human rights that requires States parties to the European Convention on Human Rights (ECHR) to take positive and non-discriminatory action; the right to a nationality is an essential and practical element of one's legal identity (Article 8).[107] Arbitrary denial of a citizenship might also raise an issue under other provisions of the ECHR, including Article 14

[101] *John K Modise v Botswana*, African Commission on Human and Peoples' Rights, Comm No 97/93 (2000).

[102] *Malawi African Association v Mauritania*, African Commission on Human and Peoples' Rights, Comm Nos 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98 (2000).

[103] ibid.

[104] The Committee was created in 1999; one of its functions is to interpret the African Charter on the Rights and Welfare of the Child. See G Bekker, 'The African Committee of Experts on the Rights and Welfare of the Child' in M Ssenyonjo (ed), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples Rights* (Martinus Nijhoff 2011) 249–63.

[105] African Committee of Experts on the Rights and Welfare of the Child, *The Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian Descent in Kenya) v Kenya*, Decision No 002/Com/002/2009.

[106] *Nubian Children v Kenya*, ibid, paras 40–46. See also judgment of the African Commission in *Free Legal Assistance Group v Zaire*, Comm Nos 25/89, 47/90, 56/91,100/93.

[107] In principle: *Karassev v Finland*, Application No 31314/96, decision of 12 January 1999, at 10 (inadmissible). In fact: *Sisojeva v Latvia*, Application No 60654/00, judgment of 16 June 2005; *Kaftailova v Latvia*, Application No 59643/00, judgment of 22 June 2006 (both cases affirm that State authorities have an obligation under art 8 ECHR to regularize the stay of aliens but not to give them a choice of legal status or residence permit). See also *Genovese v Malta*, Application No 53124/09, judgment of 11 October 2011.

(non-discrimination) in conjunction with Article 1, Protocol 1 (property rights). For instance, in *Andrejeva v Latvia*, the ECtHR held Latvia to be responsible for a long-term resident stateless person in terms of social security, thereby suggesting that a host State may no longer rely exclusively on the link of nationality to fulfil its socio-economic obligations. [108] In a (non-) admissibility case, the then European Commission of Human Rights recalled that 'differential treatment of a group of persons on the basis of race might be capable of constituting degrading treatment prohibited under (Art. 3) of the Convention'.[109] Based on this statement, arbitrary deprivation of nationality on the ground of race or ethnicity would constitute degrading treatment under Article 3 of the ECHR, although so far the ECtHR has preferred to examine this issue under Article 8. For instance, according to the ECtHR, a failure to apply for citizenship is not a reasonable ground for depriving a group of aliens of their residence permits;[110] such treatment was found to be discriminatory and in violation of the right to private life and/or family life.[111] The ECtHR also requires States to ensure (actively) that persons deprived of nationality are granted the necessary documents allowing them to re-enter their country of habitual residence before deporting them; they must be able to show 'that they pursued the matter vigorously or endeavoured to enter into negotiations with the . . . authorities [in question] with a view to expediting its [travel document] delivery'.[112] If this cannot be guaranteed, the expelling State must suspend deportation and, therefore, detention with a view to deportation,[113] and it must regularize their stay in its territory.[114] The ECtHR further requires States to award effective and adequate remedies; these cannot be limited to the issuance of retroactive residence permits but must also include full compensation for the

[108] *Andrejeva v Latvia*, Application No 55707/00, judgment of 18 February 2009, para 88. See also *Zeibek v Greece*, Application No 46368/06, judgment of 9 July 2009.

[109] *Zeibek v Greece*, Application No 34372/97, decision of 21 May 1997.

[110] *Kuric v Slovenia*, GC, Application No 26828/06, judgment of 26 June 2012, paras 357 and 393.

[111] *Kuric v Slovenia*, GC, Application No 26828/06, judgment of 26 June 2012, paras 359–361, 386 and 390.

[112] *Amie v Bulgaria*, Application No 58149/08, judgment of 12 February 2013, para 77, and *Kim v Russia*, Application No 44260/13, judgment of 17 July 2014, para 50.

[113] *Amie v Bulgaria*, Application No 58149/08, judgment of 12 February 2013, para 77, and *Kim v Russia*, Application No 44260/13, judgment of 17 July 2014, para 53. This line of cases builds on *Amuur v France*, Application No 19776/92, judgment of 25 June 1996, and *Saadi v UK*, GC, Application No 13229/03, judgment of 29 January 2008, and previously on *Giama v Belgium*, Application No 7612/76, European Commission of Human Rights, report of 17 July 1980 in which the Commission accepted that Belgium's attempt to remove Mr Giama from its territory without travel documents may raise an issue under art 3 ECHR (para 31). In an EU context, see art 15 of the Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, limiting the maximum period of detention for removal purposes to six months. Case C-357/09, *Saïd Shamilovich Kadzoev v Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti*, ECJ, 30 November 2009.

[114] Although, on this aspect, the ECtHR considers 'the Committee of Ministers to be better placed than the Court to assess the specific individual measures to be taken' and leaves it to the Committee to supervise these measures (*Kim v Russia*, Application No 44260/13, para 74).

harm caused by the arbitrary deprivation of nationality.[115] Finally, it now explicitly considers asylum seekers (even more so if they are stateless) as an underprivileged and vulnerable group of persons in need of special protection because of their past experience, the fact that they live in a new and different environment to the one they are used to, and because of the uncertainty about their future.[116]

In sum, neither arbitrary deprivation of nationality nor statelessness per se has yet been examined in terms of inhuman or degrading treatment by the regional human rights courts. However, the consequences of deprivation of nationality or of statelessness, particularly expulsion, have been recognized to constitute such treatment.

III. STATELESSNESS AND REFUGEE LAW

Historically, the problem (or 'evil')[117] of statelessness was said to be more comprehensive than the problem of refugees (following World War I and later on the entry into force of the denationalization decree of the Nazi regime 1941), with both categories found to face very similar predicament[118] and to receive protection and assistance from international refugee organizations.[119] In addition, non-refugee stateless persons (*de jure* stateless) were thought to be quite few in numbers.[120] This has led some academics and drafters of the 1951 Refugee Convention, such as Louis Henkin, to conclude that formal statelessness was a necessary criterion for refugee status; statelessness per se gave rise to refugee status.[121] However, this interpretation has been contested,[122] and a more cautious approach may be called for based on the fact that 'legal categories', such as refugees, stateless persons and displaced persons, had not yet been clearly defined at the time.[123] What is certain is that

[115] *Kuric v Slovenia*, GC, Application No 26828/06, judgment of 26 June 2012.

[116] *MSS v Belgium and Greece*, GC, Application No 30696/09, judgment of 21 January 2011, para 251, and *Kim v Russia*, Application No 44260/13, judgment of 17 July 2014, para 54.

[117] *Secretary of State for the Home Department (Appellant) v Al-Jedda (Respondent)* [2013] UKSC 62, judgment of 9 October 2013, para 12 (as per Lord Wilson).

[118] UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons: Memorandum by the Secretary-General*, 3 January 1950, E/AC.32/2, art 2 <http://www.refworld.org/docid/3ae68c280.html>. See also Batchelor (n 11) 239.

[119] C Sawyer, 'Stateless in Europe: legal aspects of *de jure* and *de facto* statelessness in the European Union' in C Sawyer and B K Blitz (eds), *Statelessness in the European Union: Displaced, Undocumented, Unwanted* (Cambridge University Press 2011) 69, 76.

[120] UN Ad Hoc Committee on Refugees and Stateless Persons, art 2 (n 118).

[121] A Zimmermmann and C Mahler, 'Article 1A, para 2' in A Zimmermmann (n 2) para 675. See also UNHCR, 'Eligibility: A Guide for the Staff of the Office of the United Nations High Commissioner for Refugees', March 1962, at 81, para 78, cited in H Massey, 'UNHCR and *De Facto* Statelessness', UNHCR Legal and Protection Policy Research Series, April 2010, at 10.

[122] Batchelor (n 25); and Massey ibid 7.

[123] This is quite evident from reading ECOSOC Resolution 248(IX) of 6 and 8 August 1949 which repeatedly refers to 'refugees and stateless persons' in the English text, but to 'réfugiés et des personnes déplacées' in the French text; in UN Ad Hoc Committee on Refugees and Stateless

the original idea of a Protocol relating to the Status of Stateless Persons, attached to the 1951 Refugee Convention, was meant to reflect the link between stateless persons and refugees, but practical considerations prevented the Conference of Plenipotentiaries to consider both, and priority was given to the more urgent problem of refugees.[124]

Thus, it was during the drafting of the 1951 Refugee Convention that States decided to leave the issue of statelessness (at the time considered to cover non-refugee stateless persons) to a later date (1954), and they agreed to concentrate exclusively on refugees (who for the most part were also stateless, *de facto*, but need not be).[125] Since then, 'statelessness, the condition of being without citizenship, was distinguished from the condition of being a refugee'.[126] There can of course be some overlap between stateless persons and refugees but the two classifications are and remain distinct. UNHCR's mandates on statelessness and refugees overlap because stateless refugees are protected under the provisions of the 1951 Refugee Convention.[127] Yet UNHCR's long-standing 'prioritisation of refugees at the expense of statelessness' has done little to clarify this overlap.[128] UNHCR has sought to redress this disparity over the last ten years; for instance, recommending that where a stateless person is simultaneously a refugee, each claim should be assessed and both statuses should be explicitly recognized,[129] although in practice refugee status is likely to 'trump' the status of stateless person, as it is more comprehensive.[130] Some academics are wary about labeling stateless refugees as stateless (as opposed to refugees) because 'citizenship [as a concept or 'container'] … is seldom completely empty (statelessness) or completely full'.[131] A further compelling argument has been made that to identify refugees as stateless can weaken refugees' right to return to their country of origin in safety and in dignity, and undermine claims against their States of origin for the redress of their rights as citizens, for

Persons, art 2 (n 118). See also GD Cohen, *In War's Wake: Europe's Displaced Persons in the Postwar Order* (Oxford University Press 2012) 84–90.

[124] Batchelor (n 11) 243.

[125] UN Ad Hoc Committee on Refugees and Stateless Persons, 7–8 (n 118). See also UNHCR reprint, N Robinson, *Convention Relating to the Status of Stateless Persons: Its History and Interpretation*, 1997, Part Two, art 1 <http://www.refworld.org/docid/4785f03d2.html>.

[126] Goodwin-Gill, 'Beware of Academic Error!' (n 15) 5.

[127] UNGA Resolution 3274 (XXIX), 10 December 1974. See also UNHCR ExCom Conclusion No 78 (XVVI) 1995 and UNGA Resolution 50/152, 9 February 1996. In addition, UNHCR Statute includes stateless persons in its definition of refugees, provided unwillingness to return occurred for a reason 'other than personal convenience' (which includes tax evasion for instance). UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), art 6A(ii).

[128] A de Chickera, 'A stateless person, a refugee and an irregular migrant walk into a bar…', European Network on Statelessness, 7 July 2014 <http://www.statelessness.eu/blog/stateless-person-refugee-and-irregular-migrant-walk-bar>.

[129] UNHCR, *Handbook on Protection of Stateless Persons* (Geneva 2014) paras 78–82 and 125–128. See also Inter-Parliamentary Union and UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians No 22* (2014).

[130] ibid.

[131] A Macklin, 'Who Is the Citizens' Other? Considering the Heft of Citizenship' (2007) 8 Theoretical Inquiries in Law 333, 337.

instance, hold accountable their State of origin for the crimes that caused their displacement or secure the restitution of lost property.[132]

Article 1A(2) of the 1951 Refugee Convention (with the omitted dateline in Article I of the 1967 Protocol) defines a refugee as any person

> owing to well-founded 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 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, is unable or, owing to such fear, is unwilling to return to it.

It is evident from this definition that a refugee can be a national (or not) of a country; nationality is irrelevant 'in its *legal* sense, to the quality of being a refugee'.[133] UNHCR's position confirms this interpretation.[134] The key points are that in the case of stateless refugees, the words 'the country of nationality' in Article 1A(2) of the 1951 Refugee Convention are replaced by 'the country of his former habitual residence' (discussed in the next paragraph) and the expression 'unwilling to avail himself of the protection of that country' is replaced by 'unwilling to return to it' (discussed in section IV).

The meaning of one's 'former habitual residence' is generally construed by reference 'to the length and character of the time a refugee spent in a country',[135] independently of whether residence was lawful.[136] In cases of more than one country of former habitual residence, the Canadian Federal Court of Appeal applies the test of well-founded fear of persecution on Convention grounds in any country of former habitual residence coupled with the inability or unwillingness to return to any of the countries where he or she formerly habitually resided, so as to discount any possible safe country.[137] In contrast, the German Federal Administrative Court considers the last country of habitual residence alone as being relevant, especially if the applicant spent a

[132] M Bradley, 'Rethinking Refugeehood: Statelessness, Repatriation, and Refugee Agency' (2014) 40 RevIntlStud 101, 109.

[133] Goodwin-Gill, 'Beware of Academic Error!' (n 15). On the meaning of the semicolon in art 1A(2), see *Revenko* discussed in section IVB.

[134] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (re-edited 1992) paras 101–105.

[135] It is defined in the UNHCR Handbook (ibid) para 103, as 'the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned'. See *Revenko v SSHD* [2001] QB 601, UK Court of Appeal, Pill LJ, at 617; *YL (Nationality)*, UKIAT 2003, para 17; United States Court of Appeal, 6th circuit, *El Assadi v Holder*, No 09-4193, 25 April 2011, 2. For a detailed analysis of what 'country of former habitual residence' means in the doctrine, see New Zealand, Refugee Status Appeal Authority, *Refugee Appeal No.1/92 Re SA*, decision of 30 April 1992, and Hathaway and Foster (n 2) 67–70.

[136] German Federal Administrative Court, 26 February 2009, 10C 50.07—English summary available on EDAL <http://www.asylumlawdatabase.eu>.

[137] *Thabet v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FC 21, Canada: Federal Court of Appeal, 11 May 1998. See also in Australia, Case No 0908992 [2010] RRTA 389, 14 May 2010, at para 127. This position is also that held by Hathaway and Foster (n 2) 71–5.

considerable number of years (eg 10 years) in that last country.[138] Thus, for the German Federal Administrative Court, it is in principle sufficient to demonstrate a well-founded fear of persecution in relation to the last country of former habitual residence, and to be granted refugee status on that basis. The benefit of the doubt principle should then be applied with regard to all other countries to avoid possible risks of indirect refoulement.

In sum, the key elements in any assessment of a claim to refugee status by a stateless person are no different from those applicable to claimants with a nationality, namely, a well-founded fear of persecution attributable to the person's country of former habitual residence for a reason listed in Article 1A(2), and whether they are able to or willing to return to it, in other words, whether protection is afforded there. Next section discusses how national courts across the world have applied these elements to stateless persons. Specifically, it examines whether arbitrary deprivation of nationality, either on its own or when taken with other forms of harm, amounts to persecution within the meaning of Article 1A(2) 1951 Refugee Convention, and if so on what grounds.

IV. ARBITRARY DEPRIVATION OF NATIONALITY AND REFUGEE STATUS IN THE DOMESTIC COURTS

According to the 1951 Refugee Convention, anyone can seek refugee protection under Article 1A(2), so long as they are able to show a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'. By far the most developed case law on statelessness and refugee status exists in the UK. Landmark cases can also be found in the United States, Canada, Australia and New Zealand. Further isolated cases were found in Ireland, Germany, Spain and Belgium. An in-depth analysis of courts' decisions in claims for refugee status based on arbitrary deprivation of nationality reveals that judicial bodies across the world have been wrestling mainly with two legal issues. The first issue concerns the right to return and whether the inability to secure entry in the country of former habitual residence constitutes persecution for the purpose of the 1951 Refugee Convention. The second legal issue concerns the denial or deprivation of nationality leading to the unwillingness to return to the country of former habitual residence, and the circumstances under which such denial or deprivation constitutes persecution. It is therefore interested in the arguments and courts' ruling on whether deprivation of nationality can amount to persecution, independently from considerations of ability to return and re-entry. As held by Stanley-Burton LJ, 'Deprivation of nationality may lead to inability to return to one's country of nationality, but

[138] German Federal Administrative Court, 26 February 2009, 10C 50.07—English summary available on EDAL <http://www.asylumlawdatabase.eu>.

they are not identical.'[139] Underlying all of these issues lies the consideration whether discrimination is the same as persecution, and if not, where does the difference lie in cases involving statelessness.

A. Persecution and Discrimination

Despite the lack of a universal definition of persecution in international refugee law, except in the EU where a legal definition of persecution now exists in Article 9 of the Qualification Directive (discussed below), a consensus exists that 'human rights are the correct point of departure'.[140] It is now the common view that 'Refugees are owed international protection precisely because their human rights are under threat' and that 'Human rights principles … should inform the interpretation of the definition to who is owed that protection'.[141] However, jurisprudential and scholarly divergence remains regarding which human rights to consider, including issues of intensity of the acts, their duration and their cumulative effect. For instance, in 1991, Hathaway defined persecution as 'the sustained or systemic violation of basic human rights demonstrative of a failure of State protection',[142] and proposed a framework of analysis for measuring the seriousness and nature of harm based on the UDHR, ICCPR and ICESCR.[143] Goodwin-Gill and McAdam, on the other hand, view persecution as 'a concept only too readily filled by the latest examples of one person's inhumanity to another, and little purpose is served by attempting to list all its known measures'.[144] They therefore recommend that '[a]ssessments must be made from case to case, taking account, on the one hand, of the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured'.[145]

Combatting discrimination is a fundamental purpose of the 1951 Refugee Convention, as expressed in the Preamble; 'discrimination is an aspect of persecution'.[146] Thus, anti-discrimination norms supply an important baseline

[139] *MA (Ethiopia) v SSHD* [2009] EWCA Civ 289, para 73.

[140] Hathaway and Foster (n 2) 193–208. See also A Zimmermann and C Mahler, 'Article 1 A, para.2', in A Zimmermann (n 2) 282–465, at paras 216–233, and D Alland and C Teitgen-Colly, *Traité du droit d'asile* (Presses Universitaires de France 2002) 370–7.

[141] UNHCR, 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', April 2001, at 2, para 5 <http://www.refworld.org/docid/3b20a3914.html>. See also Storey (n 2); V Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in R Rubio-Marín, *Human Rights and Immigration* (Oxford University Press 2014).

[142] Hathaway, *The Law of Refugee Status* (n 2) 104–5.

[143] ibid 109–11; and advocating a slightly different approach, Hathaway and Foster (n 2) 200–4.

[144] Goodwin-Gill and McAdam (n 2) 93. See also J McAdam, 'Rethinking the Origins of 'Persecution' in Refugee Law' (2014) 25 IJRL 667–92.

[145] Goodwin-Gill and McAdam (n 2) 94.

[146] *Revenko*, [2001] QB 606-A-B (Steven Kovats for the Secretary of State). See also Justice McHugh in *A v MIEA*: 'Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a

in determining a claim for refugee status,[147] as illustrated by the grounds of race, nationality, and membership of a particular social group, which are clearly based on the principle of non-discrimination. It has been noted that the word discrimination has a different meaning depending on the legal context.[148] In international refugee law, discrimination is often used to support the individualized or targeted character of persecutory acts, in contrast with the indiscriminate character of generalized violence.[149] In this context also, discrimination is often used to indicate a form of harm that is less serious in terms of its intensity or gravity than persecution, on par with harassment.[150] For instance, this view has long been that of the UNHCR which has advocated a 'cumulative grounds' approach in cases involving discriminatory measures not in themselves amounting to persecution.[151] It has been argued that '[t]he idea that there are degrees of severity when it comes to discrimination is unique to refugee law'.[152]

From the perspective of international human rights law, the principle of non-discrimination (which is enshrined in all core human rights treaties) is generally used in conjunction with another human right, and covers a wide range of grounds, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. With the exception of Article 26 of the ICCPR and Article 24 of the American Convention on Human Rights, it is not a self-standing provision in that it guarantees the equal recognition, enjoyment and exercise of other human rights. The key question therefore becomes whether or not discrimination is affecting the meaningful enjoyment of an individual's rights, such as his or her rights to return, to life, not to be tortured, work, education, etc. If it is, no matter what right is affected (eg economic, social or cultural), the discriminatory basis makes such matters also a violation of civil and political rights.[153] In some cases, discrimination may also constitute a serious violation of human rights in itself (eg racial discrimination) based on the 'consequences of a substantially prejudicial nature for the person concerned'.[154] Such instances are evidence

person because of race, religion, nationality, political opinion or membership of a social group', [1997] HCA 4; (1997) 190 CLR 225; (1997) 142 ALR 331 (24 February 1997).

[147] Chetail (n 141) 26, referring to Jacques Vernant's early (1953) definition of persecution as 'severe measures and sanctions of an arbitrary nature, incompatible with the principles set forth in the Universal Declaration of Human Rights'.

[148] R Dowd, 'Dissecting Discrimination in Refugee Law' (2011) 23 IJRL 28–53.

[149] H Lambert, 'The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence' (2013) 15 IJRL 207–34.

[150] Dowd (n 148) 32.

[151] UNHCR Handbook (n 134) para 53.

[152] Dowd (n 148) 35.

[153] A Neier, *The International Human Rights Movement: A History* (Princeton University Press 2012) 80 referring to the judgment by the Constitutional Court of South Africa *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC), 5 July 2002. See also Foster (n 2) 143, fn 234.

[154] UNHCR Handbook (n 134) para 54. See also *East African Asians v UK*, Application No 4403/70, Commission decision of 14 December 1973.

that the meaning of discrimination in human rights law can sometimes be similar to that in refugee law 'in certain circumstances' or 'cumulatively'.[155]

Indeed, similarities exist between the UNHCR's 'cumulative grounds' or 'circumstantial' approach and the human rights approach whereby for a violation of rights to constitute persecution within the meaning of Article 1A (2) of the 1951 Refugee Convention, it must be sufficiently serious.[156] Since *Ireland v UK*, the ECtHR's leitmotiv in all Article 3 ECHR cases has been its 'obligation to consider all the relevant circumstances of the case'.[157] Thirty years later, in the leading case *NA v UK*, the ECtHR explained that this means that 'all relevant factors taken cumulatively' should be considered, and that include all personal circumstances as well as the general situation in the country of destination.[158] In this case, the ECtHR accepted the argument, which had been made by UNHCR regarding the 1951 Refugee Convention that individual acts of harassment taken together might constitute persecution, and it applied it to Article 3 ECHR. The cumulative approach was confirmed in *RC v Sweden*.[159]

In the EU, it is the duty of the Member States to lay down the conditions for the acquisition and loss of nationality, with due regard to EU law.[160] The CJEU describes citizenship of the Union as the fundamental status of nationals of the Member States.[161] The CJEU has so far considered two cases involving stateless persons. These will be dealt with swiftly since neither of them examined the issue of deprivation of nationality. Both cases involved asylum seekers of Palestinian origin, and Article 1D of the 1951 Refugee Convention as incorporated in Article 12(1)a of the EU Qualification Directive, first sentence.[162] In the first case, the CJEU held that the specific rules in the 1951 Refugee Convention (ie, Article 1D) concern only those persons who have actually availed themselves of the assistance provided by UNRWA; those who are, or were, merely eligible to receive protection and assistance from that agency are still covered by the general provisions of the 1951 Refugee Convention (or EU

[155] UNHCR Handbook (n 134) paras 53–55.

[156] For a compelling discussion on this point, see Storey (n 2).

[157] *Ireland v UK*, Application No 5310/71, judgment of 18 January 1978 (plenary).

[158] *NA v UK*, Application No 25904/07, judgment of 17 July 2008.

[159] *RC v Sweden*, Application No 41827/07, judgment 9 March 2010. However, the cumulative approach to risk assessment has not been applied consistently by the ECtHR, see *FH v Sweden*, Application No 32621/06, judgment of 20 January 2009.

[160] Case C-369/90 *Micheletti* [1992] ECR I-4239, para 10; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, para 37; Case C-135/08 *Rottmann v Bayern* [2010] ECR I-1449, para 39.

[161] Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, para 82.

[162] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted—now Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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 (recast).

Qualification Directive), and their applications for refugee status will be successful if there is persecution for a Convention reason.[163] In the second case, the CJEU held that should a person who, after availing him or herself of the protection or assistance of the UNRWA, cease to receive it for a reason beyond his or control and independent of his or her volition, he or she must automatically be recognized as a refugee and granted refugee status in accordance with the 1951 Refugee Convention (or EU Qualification Directive).[164]

The CJEU also recently gave guidance on the concept of 'persecution' in the contexts of a religious persecution,[165] and of a particular social group and gay concealment.[166] According to Article 9(1) of the EU Qualification Directive, 'acts of persecution' within the meaning of Article 1A(2) of the 1951 Refugee Convention must

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the [ECHR]; or
(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

In addition, Article 9(2) of the EU Qualification Directive lists as acts of persecution

(a) acts of physical or mental violence;
(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
(c) prosecution or punishment which is disproportionate or discriminatory;
(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

It follows that persons specifically targeted by laws or practices of denationalization would most likely be found to fear discriminatory treatment amounting to persecution with or without other violations of human rights. 'Arbitrary deprivation of nationality' is not currently listed as an act of persecution in Article 9(2) of the EU Qualification Directive, but a desirable solution would be to have such acts explicitly included in the definition as a matter of policy.[167]

[163] Case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, judgment of 17 June 2010.
[164] *El Kott, Radi and Ismail v Bevándorlási és Állampolgársági Hivatal*, Case C-364/11, judgment of 19 December 2012.
[165] Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z*, judgment of 5 September 2012.
[166] Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z*, judgment of 7 November 2013.
[167] I thank Hugo Storey for this point.

As will be shown next, domestic courts have found stateless persons to have a well-founded fear of persecution when they are able to show sufficiently severe treatment related to their stateless condition. The discriminatory denial by a State of rights arising out of nationality, such as the deprivation of identity documents and the refusal to re-document a national, has been found to be successful ground for refugee status in a number of domestic cases.

B. Persecution and the Right to Return and Be Admitted to the Country of Former Habitual Residence

This section examines the situation of a stateless person who is unable to return to his or her country of habitual residence (due to lack of nationality, or proper ID or travel documents) and as a result is refused entry into his or her country of habitual residence. Such inability to return may be due to practical obstacles (eg lack of proper ID or travel documents) and/or discriminatory treatment by the State of former habitual residence based on (lack of) nationality. It is worth noting that the right to return, although not guaranteed in the 1951 Refugee Convention, is protected under Article 12(4) of the ICCPR, which covers the right to enter one's own country.[168]

Courts' jurisprudence worldwide is consistent in denying protection if obstacles are purely practical; statelessness per se is not a ground for refugee status under the 1951 Refugee Convention because, technically, the 1954 Stateless Persons Convention should provide the appropriate legal framework for protection. Leading authority on the effect of the inability to return, based on a claim for refugee status, is *Revenko v Secretary of State for the Home Department*.[169] In this case, the UK Court of Appeal (UKCA) held that 'mere statelessness or inability to return to one's country of former habitual residence is not sufficient of itself to confer refugee status under the [Refugee] Convention'.[170] The Court explained that Article 1A(2) sets 'a single test for refugee status', namely, the need to show a well-founded fear of being persecuted; this test applies to everyone claiming refugee status, irrespective of whether they have a nationality or not.[171] The same conclusion

[168] Human Rights Committee, General Comment 27, Freedom of Movement (art 12), UN Doc CCPR/C/21/Rev.1/Add.9 (1999). See discussion in section IIB.

[169] *Revenko v SSHD* [2001] QB 601. See also *EB (Ethiopia) v SSHD* [2007] EWCA Civ 809; *MA (Ethiopia) v SSHD* [2009] EWCA Civ 289; *ST (Ethiopia) v SSHD* [2011] UKUT 252 (IAC).

[170] *Revenko*, 601-E.

[171] For Pill LJ, 'the phrase "well-founded fear of persecution" is the key phrase in the definition of art 1A(2)', Pill LJ, *Revenko*, 622-H.

was reached in Canada,[172] New Zealand,[173] Australia,[174] Ireland[175] and the USA.[176]

However, in a number of cases, the refusal of entry on grounds of (lack of) nationality has been found to amount to persecution based on the right to leave and re-enter one's country, linked closely to the arbitrary deprivation of nationality. For instance, in *EB (Eritrea)*, the UKCA held that discriminatory removal of ID documents itself can constitute persecution within the meaning of the 1951 Refugee Convention if 'done as it was with the motive of making it difficult for EB [the appellant] in future to prove her Ethiopian nationality' and if done by the authorities.[177] This is because the ability 'freely to leave and freely to re-enter one's country' is considered a basic right, as notably guaranteed in Article 12(4) of the ICCPR.[178] With this judgment, therefore, the UKCA is recognizing that persons without nationality are entitled to refugee status if they can show that they have been arbitrarily deprived of their nationality for discriminatory reasons, that is, on a protected Convention ground.[179] The inability 'freely to leave and freely to re-enter one's country' for discriminatory reasons was again found to amount to persecution in *ST (Ethiopia)*, where the UK Upper Tribunal (UKUT) explained that the mere removal of an ID card does not generally constitute persecution.[180] However, such an act constitutes persecution when placed in the context of evidence of the treatment by Ethiopian authorities towards persons in the appellant's position, where the removal of the ID card is part of an ongoing deprivation of nationality that has had a very serious effect on the appellant, and is therefore discriminatory.[181]

[172] *Thabet v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FC 21, Canada: Federal Court of Appeal, 11 May 1998.

[173] NZ RSAA *Appeal No 72635/01* 2002, paras 65–68. See also NZ RSAA *Appeal No 76187*, 18 June 2008.

[174] *Diatlov v Minister for Immigration & Multicultural Affairs* [1999] FCA 468, (1999) 167 ALR 313; and *Savvin v Minister for Immigration and Multicultural Affairs* (2000) 171 ALR 483—in this case Katz J came to the same conclusion reached by the UKCA in *Revenko*, but by applying a literal interpretation to art 1A(2) of the Convention. For an Application of *Savvin* by the Tribunal, see Case No 0908992 [2010] RRTA 389, 14 May 2010, para 123. For further examples, see also *DZABG v Minister for Immigration & Anor* [2012] FMCA 36, para 121, and Appeal No 0805551 [2009] RRTA 24, 15 January 2009.

[175] *AAAAD v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2009] IEHC 326.

[176] *Maksimova v Holder*, 361 F Appendix 690, 693 (6th Cir 2010) (stating that statelessness is not grounds for asylum, and that a 'stateless applicant must show the same well-founded fear of persecution as an applicant with a nationality'); see also *Ahmed v Ashcroft*, 341 F 3d 214 (3rd Cir 2003).

[177] *EB (Ethiopia) v SSHD* [2007] EWCA Civ 809, UKCA, 31 July 2007, para 63.

[178] *EB (Ethiopia)*, Longmore LJ, para 67.

[179] See also S Gillan, 'Refugee Convention: Whether Deprivation of Citizenship Amounts to Persecution' (2007) 21 Journal of Immigration, Asylum and Nationality Law 347–50.

[180] *ST (Ethnic Eritrean – nationality – return) Ethiopia GC* [2011] UKUT 252, applying *EB (Ethiopia)*.

[181] For details on the general context referred to in *ST (Ethiopia)*, see Eritrea Ethiopia Claims Commission, *Final Award, Eritrea's Damages Claims between The State of Eritrea and The Federal Democratic Republic of Ethiopia*, 17 August 2009, The Hague.

EB (Ethiopia) can be contrasted with *MA (Ethiopia)*,[182] where the UKCA did not find the deprivation of nationality to constitute persecution mainly due to much weaker evidence. In particular, the appellant had been able to leave Ethiopia on her own passport and had voluntarily left her passport with the agent who helped her leave. Moreover, when asked to present herself to the Ethiopian embassy, she wrongly told the staff that she was Eritrean. The UKCA explained that 'refugee status is not a matter of choice. A person cannot be entitled to refugee status solely because he or she refuses to make an application to her embassy, or refuses or fails to take reasonable steps to obtain recognition and evidence of her nationality'.[183] It may therefore be harder for a person to show that they are stateless if they have not taken any steps to claim nationality.[184] The Court confirmed that 'denial of return is not of itself persecution', but that deprivation of nationality would amount to persecution if the consequences were sufficiently serious.[185] 'The legal and practical consequences for any person of the deprivation of nationality in a foreign state are questions of fact.'[186] Similar rulings have been made by the UK Asylum and Immigration Tribunal (UKAIT), the UKCA, the UK Supreme Court (UKSC), and the Irish High Court, in cases involving stateless Palestinians from the West Bank.[187]

The Federal Court of Appeal of Canada has long recognized that denial of the right to return to a country can in itself be an act of persecution, provided persecutorial intent or conduct can be shown, namely, discriminatory treatment on a Convention ground.[188] According to the Federal Court of Appeal, the fundamental question to ask comes down to 'why the applicant is being denied entry to a country of former habitual residence'.[189] If the answer to this

[182] *MA (Ethiopia) v SSHD* [2009] EWCA Civ 289. [183] ibid, para 83.

[184] In *YL (Eritrea) v SSHD*, 30 June 2003, the then UK Asylum and Immigration Tribunal held that it is always relevant to consider the steps taken by claimants to apply for nationality of the country of formal habitual residence and whether these steps have been successful or not (paras 45–46, referring to the Bradshaw principle as it extends to asylum cases, that there may be valid reasons for a claimant not to approach his or her embassy or consulate, or the authorities of the country direct, regarding an application for citizenship). These may go some way towards establishing persecution under art 1A(2) of the 1951 Refugee Convention and, indeed, may provide good indication of persecution at its extreme, namely, denial of membership in society.

[185] *MA (Ethiopia)* paras 64 and 66.

[186] *MA (Ethiopia)* para 66. To read more on this case, see JR Campbell, 'The Enduring Problem of Statelessness in the Horn of Africa' (2011) 23 IJRL 656–79.

[187] In the UK: *BA (Kuwait) CG v SSHD* [2004] UK AIT 00256; *MA (Palestinian Territories) v SSHD* [2008] EWCA Civ 304; *MT (Palestinian Territories) v SSHD* [2008] EWCA Civ 1149; *SH (Palestinian Territories) v SSHD* [2008] EWCA Civ 1150; and now *MS (Palestinian Territories) v SSHD* [2010] UKSC 25. In Ireland: High Court, *SHM v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2009] IEHC 128, applying *Revenko.*

[188] *Maarouf and Abdel-Khalik v Minister of Employment and Immigration* (1994), 73 FTR 211 (FCTD) and *Altawil v Canada (Minister of Citizenship and Immigration)* (1996), 114 FTR 241 (FCTD) at 243.

[189] eg *Thabet v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FC 21, Canada: Federal Court of Appeal, 11 May 1998.

question is simply the lack of a valid residency permit, the person in question should not be granted refugee status.[190]

In Australia, the Federal Magistrates Court examined the issue of returnability in *DZABG v Minister for Immigration & Anor*.[191] The Court accepted that many Bidoons are subject to systematic discrimination within Kuwait arising from their lack of entitlement to Kuwaiti citizenship. However, it considered that, in this case, the applicant had been *documented*, he had received ten years of education in Kuwait and his children also attended school there, therefore, any restrictions that he would face (such as the absence of public places for Bidoons to practice religion) did not amount to persecution.

However, in a decision concerning Article 1D/Article 1A(2) assessment in a case involving a stateless Palestinian refugee, the Refugee Review Tribunal of Australia (RRTA) found the refusal of entry as a result of lack of citizenship to be discriminatory treatment that could, together with other discriminatory treatments, amount to persecution.[192] It explained that 'the Jordanian government's refusal to renew the applicant's passport is amongst a long list of discriminatory treatments it subjects Palestinian refugees to'.[193] It concluded that the restrictions and discriminatory measures adopted by Jordan, particularly with regard to employment, would cause the applicant 'significant economic hardship threatening his capacity to subsist' in that he would be denied 'access to basic services and the capacity to earn a livelihood', and would constitute persecution for reasons of the applicant's Palestinian ethnicity.[194]

However, the RRTA reached a different conclusion in the case of a Palestinian from Kuwait who was unable to return there, arguing that what is important for the purpose of showing a well-founded fear of persecution is whether a law in relation to non-residents operates in a discriminatory fashion.[195] For the Tribunal, 'there can be no persecution where there is a relevant reason for the different treatment and a relevant reason will always exist where the law in question has a legitimate objective and is appropriate and adopted to achieve this'.[196] The Tribunal concluded that the law in relation to Palestinians applies to all non-Kuwaiti citizens. Whilst Palestinians may be subject to potentially indefinite detention (unlike non-Palestinians) this is due to the fact that there is no country to deport them to; this is not due to a reason

[190] As decided by the Federal Court of Appeal of Canada in *Thabet v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FC 21, 11 May 1998.
[191] *DZABG v Minister for Immigration* [2012] FMCA 36.
[192] Appeal No 0805551 [2009] RRTA 24, 15 January 2009.
[193] ibid, para 56.
[194] ibid, para 60.
[195] Appeal No 0808284 [2009] RRTA 454, 21 May 2009, para 105.
[196] ibid, para 109.

of a Convention ground.[197] Hence, the applicant was found to lack a well-founded fear of persecution for Convention reasons.[198]

In Ireland, the High Court, considered both the purposive approach adopted by Pill LJ in *Revenko* and the literal approach adopted by Katz J in *Savvin* to be appropriate since both approaches led to the same conclusion: a stateless person who is unable to return to the country of his former habitual residence, is not, by reason of those facts alone, a refugee within the meaning of Article 1A(2); he or she needs to show a present well-founded fear of persecution (for instance, based on lack of nationality) on a Convention ground.[199] However, in this case, the High Court granted leave to bring judicial review on the ground that the reason the applicant was outside Kuwait was because he had been refused entry for a Convention reason, and this refusal itself may amount to 'persecution'.

In sum, State practice is consistent on this point: a stateless person who is unable to return to his or her country of former habitual residence due to practical obstacles is not, by reasons of those facts alone, a refugee within the meaning of Article 1A(2) of the 1951 Refugee Convention. This is consistent with modern doctrine according to which not all stateless persons are refugees; the implication being that the protection needs of stateless non-refugees should be determined under relevant legal provisions relating to statelessness. This jurisprudence further shows that courts consider issues of nationality to be part of the persecution assessment, and that consideration of how the person came to be stateless (eg for discriminatory reasons) is relevant. Thus, in a number of cases, where a person had been refused entry because they had been deprived of their nationality arbitrarily, the courts found this to constitute discrimination amounting to persecution.

C. (Arbitrary) Deprivation of Nationality and Persecution

The second legal issue concerns the very lack of a nationality that may itself lead to severe discrimination amounting to persecution, without consideration of return. This scenario covers situations where stateless persons are unwilling to return to their country of habitual residence because of a well-founded fear of persecution in that country, independently from their ability to return there. Some overlap exists between the case law discussed in previous subsection IVB and here; notwithstanding, this section focuses entirely on whether deprivation of nationality can amount to persecution. In all successful cases, race, nationality or membership of a particular social group were found to be

[197] ibid, para 112.
[198] He was nonetheless recommended for humanitarian considerations to the Minister.
[199] *AAAAD v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2009] IEHC 326.

relevant grounds since these are directly based on the principle of non-discrimination.

A detailed analysis of the relevant case law reveals that domestic courts and tribunals in the UK,[200] New Zealand,[201] Australia,[202] Germany,[203] Spain[204] and Belgium[205] generally consider the practical consequences of the act of deprivation (or denial) of nationality to be key in their assessment of whether the act in question amounts to persecution; these need to be serious enough or sufficiently severe to reach the threshold of persecution because discrimination is not the same as persecution.[206] For example, the NZ RSAA and the US Court of Appeals accept as persecution the denial of nationality together with the social and economic problems faced by a stateless person provided these problems are sufficiently intolerable or causing unbearable suffering.[207] However, cases based purely on economic deprivation (eg inability to work due to the fact of being a woman in Saudi Arabia with no legal status) have generally been rejected, unless it can be established that the denial of work would result in economic deprivation of sufficient severity.[208]

In some cases, domestic courts have specifically required the existence of institutionalized, widespread or systematic discrimination resulting in severe violations of human rights.[209] Accordingly, the UKAIT for instance recognizes that undocumented Bidoons in Kuwait have been persecuted as a particular social group or because of their race[210]—but not documented Bidoons[211] or undocumented stateless Palestinians (eg in Lebanon).[212] A similar group approach to systematic problems of discrimination has been praised in the

[200] *BA (Kuwait) CG v SSHD* [2004] UK AIT 00256, para 63. See also *HE (Bidoon) Kuwait CG* [2006] UKAIT 00051 for an application of *BA and Others* (2004).

[201] NZ RSAA Appeal No 76077, 19 May 2009, para 106.

[202] *DZABG v Minister for Immigration* [2012] FMCA 36; Appeal No 0908370 [2010] RRTA, 18 January 2010; Appeal No 0805551 [2009] RRTA 24, 15 January 2009.

[203] German Federal Administrative Court, decision of 26 February 2009, 10 C 50.07—English summary available on EDAL <http://www.asylumlawdatabase.eu>.

[204] Spain, High National Court, decision of 3 November 2010, case 555/2009.

[205] Belgium, Conseil du Contentieux des Etrangers, *X v Commissaire général aux réfugiés et aux apatrides*, Decision No 22144, 28 January 2009.

[206] *Islam (A.P.) v SSHD; R v Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998–99, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, as per Lord Millet.

[207] NZ RSAA, Refugee Appeal No 71687, decision of 28 September 1999; *Stserba v Holder*, No 09-4312, US Court of Appeals, 6th Circ, 20 May 2011.

[208] *El Assadi v Holder*, US Court of Appeals, 6th Circ, 25 April 2011, 4. This is also the view of the Australian courts, eg case no 0908992 [2010] RRTA 389, 14 May 2010, para 141, and in New Zealand, NZ RSAA, Refugee Appeal No 1/92, 30 April 1992.

[209] In the UK: *BA (Kuwait) CG v SSHD* [2004] UK AIT 00256, paras 65–66 and para 81; *YL (Eritrea) v SSHD*, UKAIT, 30 June 2003, para 41. In New Zealand: Appeal No 74467, decision of 1 September 2004, para 94. In Germany: High Administrative Court Sachsen-Anhalt, 25 May 2011, 3 L 374/09.

[210] *BA (Kuwait) CG v SSHD* [2004] UK AIT 00256.

[211] *NM (documented/undocumented Bidoon: risk) Kuwait CG* [2013] UKUT 00365(IAC), para 97.

[212] The exclusion of a stateless Palestinian from accessing Lebanese government hospitals does not constitute serious harm because 'the differential treatment of Palestinian refugees stems entirely

context of Article 14 ECHR for it could ease qualification for protection of persons as a collective (eg members of the Roma community) vs an individual (ie the applicant).[213]

An illustration of this approach in the context of Article 1A(2) of the 1951 Refugee Convention may implicitly be found in Germany where the Federal Administrative Court focuses on the intensity of interference and the resulting exclusion of the person from the material rights of citizenship.[214] The decisive factor for the German Federal Court simply lies in the exclusion from residency protection; the person is rendered stateless and unprotected.[215] This position appears to be similar to that in the US courts which view statelessness as a sufficiently deplorable condition itself to amount to persecution (based on past persecution), even regardless of the consequences of the act of denationalization or of considerations of refusal of entry, provided it occurs on account of a protected ground, such as, ethnicity or membership in a protected group.[216] Thus, in *Haile v Gonzalez (Haile I)*, the Seventh Circuit recognized, in principle, the arbitrary expulsion and denationalization by Ethiopia of thousands of ethnic Eritreans born in Ethiopia, to be 'a particularly acute form of persecution'.[217] In *Haile v Holder (Haile II)*, the Seventh Circuit explained that '[i]f Ethiopia denationalized the petitioner because of his Eritrean ethnicity, it did so because of hostility to Eritreans' and recognized this, for the first time, to constitute persecution in fact.[218] A year later, in *Stserba v Holder*, the Sixth Circuit applied *Haile II* and held denationalization motivated by ethnic considerations to constitute persecution.[219] The Court will need to consider the practical consequences of denationalization, which may vary between genocide, expulsion, or the possibility to remain in the country and become naturalized but with some hurdles.[220] Even regardless of the consequences, 'a person who is made stateless *due to his or her membership in*

from their statelessness' and is therefore justified, see *KK IH HE (Palestinians – Lebanon) v SSHD*, 29 October 2004, UKAIT, paras 101 and 104. See also *MM and FH (stateless Palestinians) v SSHD*, UKAIT, 4 March 2008, para 127, reaffirming *KK IH HE (Palestinians – Lebanon)*. The same conclusion was reached in Ireland, High Court, *S.H.M. v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2009] IEHC 128; in Australia, Appeal No 0808284 [2009] RRTA 454, 21 May 2009; and in New Zealand, NZ RSAA, Refugee Appeal No 1/92, 30 April 1992.

[213] C Vlieks, 'Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?' European Network on Statelessness Discussion Paper 09/14 (2014) 26.

[214] German Federal Administrative Court, decision of 26 February 2009, 10 C 50.07—English summary available on EDAL <http://www.asylumlawdatabase.eu>.

[215] ibid.

[216] The United States is a party to the 1967 Protocol, and this practice reflects that advocated in para 51 of UNHCR Handbook (n 127).

[217] *Haile v Gonzales (Haile I)*, 421 F3d 493 (7th Cir 2005) at 496. See also, for the same point of law, *Mengstu v Holder*, 560 F3d 1055 (9th Cir 2009) at 1056–1057.

[218] *Haile v Holder (Haile II)*, 384 F Appendix 501 (7th Cir 2010). See SE Forbes (n 20) 699–730.

[219] *Stserba v Holder*, No 09-4312, US Court of Appeals, 6th Cir, 20 May 2011.

[220] ibid 9.

a protected group may have demonstrated persecution, even without proving that he or she has suffered collateral damage from the act of denationalization'.[221]

This approach must be praised for it recognizes denationalization for what it is: a severe and serious violation of human rights that entails 'the total destruction of the individual's status in organized society'.[222] Hence, the misfortune is 'not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever', namely, 'the right to have rights'.[223] This is a strong affirmation of the right to a nationality as an entitlement, a human right, in the context of refugee law.

V. CONCLUSION

Twenty-three years later, Goodwin-Gill's statement that 'State practice confirms that stateless persons were not to be ignored as refugees' remains valid.[224] This article has examined claims to refugee status based on arbitrary deprivation of nationality in relation to the 1951 Refugee Convention (and 1967 Protocol). Thus, it has dealt mainly with the third (or last) cause of statelessness identified by UNHCR, namely, discrimination and arbitrary deprivation of nationality. In any such situation, discrimination is often both a cause of statelessness (i.e., the arbitrary deprivation of nationality or act of denationalization) and an effect of statelessness on the person (i.e., the denial of human rights through discriminatory acts against stateless persons).

Key to a proper interpretation of persecution is a clear understanding of how persecution relates to arbitrary and discriminatory treatment. Human rights law provides the standards necessary to determine when a treatment is considered arbitrary or discriminatory and the mechanisms to challenge such treatment if it is disproportionate, lacking due process or discriminatory. However, not all discriminatory treatment amounts to persecution; refugee law requires that the discriminatory treatment in question reach a certain level of severity to be considered as persecution.

Rare are the domestic courts willing to recognize statelessness per se as persecution. This is because the cause of statelessness (i.e., deprivation of nationality) may well violate human rights law but not all human rights violations are persecutory acts, and the 1954 Stateless Persons Convention

[221] ibid 10.

[222] US Supreme Court, *Trop v Dulles*, 356 US 86, 101–102.

[223] *Mendoza-Martinez*, 372 US at 161, quoting Hannah Arendt, *The Origins of Totalitarianism* (1951) 294. See also Lord Macdonald of River Glaven's statement 17 March 2014, col 53, before the UK House of Lords defeating the Government on deprivation of citizenship leading to statelessness <http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140317-0002.htm>.

[224] Goodwin-Gill, 'Beware of Academic Error!' (n 15) December 1992) 7.

should be applied. Another relevant factor may be that some domestic courts have to live with the fact that their own State may still allow for persons to be rendered stateless (as discussed in section IIB3). Thus, courts tend to focus on the effects or consequences of statelessness on the person (eg the denial of human rights through discriminatory acts, such as arbitrary denial of the right to enter one's own country), as these are easier to measure in terms of severity.

This article has discussed the fundamental character of the right to nationality in international human rights law (the cause), and the effects should this basic right be violated (the consequences). It has highlighted the approach of international human rights courts based on the indivisibility of rights. The right to nationality is widely recognized as a human right in its own right; it is also regarded as an essential element of human dignity and legal identity. As such it creates obligations on the part of the State to respect, protect and fulfil. Arbitrary deprivation of nationality resulting in statelessness heightens the risk of being refused entry into one's own country and cases where the right to return has been denied are many. Furthermore, stateless persons are often the most vulnerable to discriminatory treatment in the society in which they live because deprivation or denial of nationality itself may be discriminatory treatment and/or may lead to discriminatory treatment beyond the actual act depriving a person of his or her nationality (eg denial of residence, right to work, education, basic health care, etc). Such acts are clearly captured by the existing human rights framework. Yet, no international court has so far recognized arbitrary deprivation of nationality or statelessness itself as inhuman or degrading treatment, preferring instead to examine the consequences of such act (eg the risk of expulsion) in terms of ill-treatment.

This article argues that short of engineering one's deprivation of nationality for personal convenience, all deprivation of nationality should amount to persecution (and inhuman or degrading treatment) because nationality is and continues to be the gateway for the exercise of most human rights. Where deprivation of nationality is found to be arbitrary (eg discriminatory), this should lead to a finding of persecution for a Convention ground because race, nationality, and particular social group are deeply rooted in the prohibition against discrimination. The task is a simple one, even in the field of economic, social and cultural rights, because as argued by Roth, the 'nature of the violation, violator and remedy is clearest when it is possible to identify arbitrary or discriminatory governmental conduct that causes or substantially contributes to an ESC rights violation', as opposed to a problem of distributive justice.[225]

[225] K Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2004) 26 HRQ 63, 69.

Such an approach would be consistent with a global consensus on a new rights perspective of nationality (as evidenced by human rights treaties, jurisprudence, UN documents, and academic writing). Furthermore, it would be consistent with parallel growing consensus that asylum seekers and refugees (including stateless) are a special category of persons, as vulnerable people.[226] Their vulnerability imposes specific obligations on States,[227] such as, for instance, the duty to address refugees' basic needs or the duty not to obstruct humanitarian organizations from providing assistance to refugees in need, in addition to their obligation to respect, protect, and fulfil human rights.

[226] eg High Court of Kenya, *Kituo Cha Sheria v Attorney General*, 26 July 2013, paras 34 and 40; ECtHR, *MSS v Belgium and Greece*, GC, Application No 30696/09, judgment of 21 January 2011; ECtHR, *Kim v Russia*, Application No 44260/13, judgment of 17 July 2014, para 54. See also A Timmer and L Peroni, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 IJCL 1056–85.

[227] These may be provided by constitutional provisions (eg art 21(3) of the Constitution of Kenya) or human rights treaties (eg arts 3 or 5 ECHR or art 4 EU Charter of Fundamental Rights).