

WestminsterResearch

<http://www.westminster.ac.uk/westminsterresearch>

**Statelessness as a Human Rights Issue: A Concept Whose Time
Has Come?**

Foster, M. and Lambert, H.

This is a pre-copy edited, author-produced PDF of an article accepted for publication in the International Journal of Refugee Law Special Issue 2016, following peer review.

The definitive publisher-authenticated version of Lambert, H. (2016) Statelessness as a Human Rights Issue: A Concept Whose Time Has Come? *International Journal of Refugee Law Special Issue 2016* is available online at:

<https://doi.org/10.1093/ijrl/eew044>

The WestminsterResearch online digital archive at the University of Westminster aims to make the research output of the University available to a wider audience. Copyright and Moral Rights remain with the authors and/or copyright owners.

Whilst further distribution of specific materials from within this archive is forbidden, you may freely distribute the URL of WestminsterResearch: (<http://westminsterresearch.wmin.ac.uk/>).

In case of abuse or copyright appearing without permission e-mail repository@westminster.ac.uk

STATELESSNESS AS A HUMAN RIGHTS ISSUE: A CONCEPT WHOSE TIME HAS COME?

IJRL Special Issue 2016

Michelle Foster and H el ene Lambert**

1. INTRODUCTION

The protection of stateless persons has long been understood as a challenge for the international community, yet for many of the past sixty years a prioritized focus on refugees has dominated, indeed arguably eclipsed, the plight and protection needs of stateless persons. As Guy S Goodwin-Gill has observed, there is an irony in that ‘refugees and stateless persons once walked hand in hand’:¹ after the First World War ‘their numbers and condition were almost coterminous’,² and post–Second World War the intention had been to draft a single convention for the protection of both stateless persons and refugees. However, the consignment of a protection regime for stateless persons first to an annex and ultimately to excision from the Refugee Convention undoubtedly contributed to a lack of concentrated effort to address the plight and protection needs of this category of ‘unprotected persons’,³ notwithstanding the subsequent formulation of the Convention on the Status of Stateless Persons in 1954⁴ and the Convention on the Reduction of Statelessness in 1961.⁵

Goodwin-Gill has long argued for a refocus of international attention and effort on the plight, predicament, and protection needs of stateless persons. In a seminal contribution over two decades ago he observed that statelessness was perceived by many as a mere ‘technical problem’,⁶ involving the potential remedy of ‘harmonization of laws and co-ordination [of] rules’, hence likely lacking ‘the

* Professor and Director of the International Refugee Law Programme, Institute for International law and the Humanities, Melbourne Law School.

* Professor, Law School, University of Westminster, London. This article is based on a co-authored monograph entitled *International Refugee Law and the Protection of Stateless Persons* to be published by OUP in 2017. We are grateful to participants at the symposium, *Celebrating the Scholarship of Professor Guy S Goodwin-Gill: An International Gathering*, All Souls College, Oxford, 15 April 2016, for helpful comments on a draft of this paper. We are also grateful to Minh-Quan Nguyen, Melbourne Law School, for excellent editorial assistance. Any errors or omissions remain our own.

¹ GS Goodwin-Gill, ‘The Rights of Refugees and Stateless Persons’ in KP Saksena (ed), *Human Rights Perspective and Challenges (in 1900s and Beyond)* (Lancers Books 1994) 378–401, 389.

² *ibid.*

³ This was the terminology preferred by P Weis, as cited by Goodwin-Gill: *ibid* 383.

⁴ Convention relating to the Status of Stateless Persons (adopted 28 Sep 1954, entered into force 6 June 1960) 189 UNTS 117 (1954 Convention).

⁵ Convention on the Reduction of Statelessness (adopted 30 Aug 1961, entered into force 13 Dec 1975) 989 UNTS 175 (1961 Convention).

⁶ Goodwin-Gill, ‘The Rights of Refugees and Stateless Persons’ (n 1) 390.

fashionable touch'.⁷ In his view, however, 'the tragedy is that few commentators or practitioners ever looked beyond, to the underlying human rights issues', the central thesis of his contribution being that '*statelessness is indeed a broad human rights issue, even as it retains a distinct technical dimension*'.⁸ He argued that the international community had evolved to a level of sophistication such that the time was ripe for a reconceptualization of the problem of statelessness and a renewed focus on its identification and eradication. He observed:

Hitherto, international co-operation in improving the status of stateless persons, or in reducing or eliminating statelessness, has enjoyed limited success, often disappearing down relatively unproductive paths. The time has come for a revision of such arrangements, deconstruction of earlier analytical approaches, and their substitution with practical arrangements [which] reflect the principles generally shared by the community of nations.⁹

In this contribution, we examine the challenge set by Goodwin-Gill for the international community, namely, the need for greater recognition and protection of stateless persons, in light of developments over the more than two decades that have passed since his incisive analysis. The key challenges set by Goodwin-Gill can be divided into three themes: factual, institutional and jurisprudential/doctrinal. We consider the first two briefly, before examining in more depth doctrinal developments, and in particular the degree to which advancements have been made in strengthening the right to acquisition of nationality, as well as the right to protection against arbitrary deprivation of nationality. We note positive developments and highlight ongoing challenges.

The 1954 Convention relating to the Status of Stateless Persons (1954 Convention) and the 1961 Convention on the Reduction of Statelessness (1961 Convention) together form the foundation of the international legal framework to address statelessness.¹⁰ A stateless person is defined as 'a person who is not considered as a national by any State under the operation of its law',¹¹ this definition being considered part of customary international law.¹² According to the UN High Commissioner for Refugees (UNHCR), determining whether a person is considered a national by a state under the operation of its law requires a careful analysis of how a state applies its nationality laws in practice, in each individual case.¹³ In other words, 'it is the position under domestic law that is relevant'.¹⁴

⁷ *ibid.*

⁸ *ibid* (emphasis in original).

⁹ *ibid* 393–94.

¹⁰ For a historical account of these treaties, see GS Goodwin-Gill, 'Convention relating to the Status of Stateless Persons' (UN Audiovisual Library of International Law 2010) <http://legal.un.org/avl/pdf/ha/cssp/cssp_e.pdf> accessed 16 June 2016; GS Goodwin-Gill, 'Convention on the Reduction of Statelessness' (UN Audiovisual Library of International Law 2011) <http://legal.un.org/avl/pdf/ha/crs/crs_e.pdf> accessed 16 June 2016.

¹¹ 1954 Convention art 1.

¹² See the International Law Commission's Draft Articles on Diplomatic Protection with Commentaries as contained in International Law Commission, 'Report of the International Law Commission: Fifty-Eighth Session', UN doc A/61/10, 1 Oct 2006, 48–49.

¹³ UNHCR, 'Handbook on Protection of Stateless Persons' (30 June 2014) paras 23–24 <<http://www.unhcr.org/53b698ab9.html>> accessed 16 June 2016.

¹⁴ UNHCR, 'Commemorating the Refugee and Statelessness Conventions: A Compilation of Summary Conclusions from UNHCR's Expert Meetings' (May 2012) 16 <<http://www.unhcr.org/4fe31cff9.pdf>> accessed 16 June 2016. The UK Supreme Court supports this interpretation *in concreto*, ie a

The 1954 Convention is designed to ‘regulate and improve the status of stateless persons by an international agreement’¹⁵ by setting out a range of rights to which stateless persons are entitled. The Convention mirrors the Refugee Convention in structure and format, although there are notable omissions in the 1954 Convention such as a lack of protection against *refoulement* and a lack of protection against penalization for illegal entry.¹⁶ Hence where a de jure stateless person is a refugee, protection should also be accorded under the 1951 Convention as it provides both a better standard of protection and is far more widely ratified and implemented in practice.

The 1961 Convention is designed to reduce and ultimately eliminate statelessness by imposing both positive and negative duties on states in relation to the prevention of statelessness.

The historically low rate of accession and concomitant lack of implementation and enforcement of these treaties, including a lack of domestic status determination procedures in relation to the 1954 Convention, means that other human rights treaties have, as predicted by Goodwin-Gill, become important in the protection of stateless persons. While traditionally understood as a technical legal problem, it is in fact now widely appreciated that statelessness commonly occurs as a result of arbitrary deprivation of nationality, including on the basis of racial and gender discrimination. Arbitrary deprivation of nationality may take the form of failure to accord nationality, or of withdrawal of nationality on arbitrary or discriminatory grounds.

In addition, the consequences of statelessness are now increasingly conceived of in human rights terms, given that statelessness frequently results in discrimination in terms of accessing basic rights such as to work, to health care, and to education in one’s own country, and can lead to vulnerability to other human rights violations such as being trafficked.¹⁷ Indeed, some stateless persons find that their predicament in their country of origin or habitual residence is so untenable that migration is the only alternative.¹⁸ In this regard, increased international focus on the need to establish status determination procedures to identify and ensure protection of stateless persons in a migratory context is an important although still nascent legal development. Further, a growing body of jurisprudence recognizing arbitrary deprivation of nationality and its consequences as persecution pursuant to the Refugee Convention is another important development.

However, notwithstanding such developments, which support Goodwin-Gill’s sense that in relation to this issue ‘there is room for optimism today’,¹⁹ significant challenges remain.

government’s statement that a person is not a national does not override his or her position under domestic law: *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591. So does the Italian Supreme Court: Supreme Court of Cassation, Judgment no 28873/2008, 9 December 2008; Supreme Court of Cassation, Judgment no 7614/2011, 4 April 2011.

¹⁵ 1954 Convention preamble.

¹⁶ See Goodwin-Gill, ‘The Rights of Refugees and Stateless Persons’ (n 1) 382.

¹⁷ UN Human Rights Council, ‘Resolution 20/4: The Right to a Nationality: Women and Children’, UN doc A/HRC/RES/20/4, 16 July 2012.

¹⁸ S Nonnenmacher and R Cholewinski, ‘The Nexus between Statelessness and Migration’ in A Edwards and L van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014) 247–63, 249.

¹⁹ Goodwin-Gill, ‘The Rights of Refugees and Stateless Persons’ (n 1) 395.

2. THE CONSTITUENCY MUST BE KNOWN

A simple yet profoundly important observation made by Goodwin-Gill in 1994 was that '[n]o one knows how many stateless people there are in the world',²⁰ and that this 'paucity of information is due to the absence of serious attention to their plight by any international organization'.²¹ Accordingly, his first key recommendation was that 'the constituency must be known'.²²

More than two decades later this challenge remains an acute one, such that one of the UNHCR's ten key actions to eradicate statelessness is to 'improve quantitative and qualitative data on stateless populations'.²³ The extent of the challenge is highlighted in UNHCR's 'starting point' for concluding this action item, namely that quantitative population data on stateless populations is currently publicly available for only seventy-five states, while qualitative analysis on stateless populations is publicly available for only forty-five states.²⁴ As the UNHCR observes, stateless persons frequently are not only undocumented, but are also ignored by authorities and not counted in national administrative registries and databases or in population censuses.²⁵ There is also the inherent challenge in collecting information about stateless persons given that they may be unwilling to be identified 'because they lack a secure legal status'.²⁶

This is not to say that progress has not been made. There is increasing attention, including from within the academic research community, to issues of statelessness and hence much more is known about specific stateless populations.²⁷ The work of institutions such as the Institute on Statelessness and Inclusion has been key in highlighting gaps in UNHCR's statistics and in identifying the challenges associated with quantifying statelessness.²⁸ In addition, the work of non-government and regional networks, such as the European Migration Network and of the European Network on Statelessness, has been crucial to highlighting the issue and its scope, and facilitating co-ordinated efforts at prevention and remedy.²⁹ Finally, the increase in the establishment of national determination procedures will likely lead to 'new data in countries hosting stateless migrants',³⁰ although it should be acknowledged that this represents a minority of the world's stateless population

²⁰ *ibid* 378.

²¹ *ibid*.

²² *ibid* 394. See also his recommendation regarding regional initiatives to obtain and disseminate information.

²³ UNHCR, 'Global Action Plan to End Statelessness 2014–24' (4 Nov 2014) 24 <<http://www.unhcr.org/statelesscampaign2014/Global-Action-Plan-eng.pdf>> accessed 16 June 2016.

²⁴ *ibid*.

²⁵ *ibid*.

²⁶ *ibid* 25.

²⁷ For an overview, see M Manly and L van Waas, 'The State of Statelessness Research: A Human Rights Imperative' (2014) 19 *Tilburg Law Review* 3.

²⁸ Institute on Statelessness and Inclusion, *The World's Stateless* (Wolf Legal Publishers 2014).

²⁹ For example, in 2013, the European Network on Statelessness released its 'Good Practice Guide on Statelessness Determination and the Protection Status of Stateless Persons' (2013), which compares European countries regarding their laws and regulations on statelessness. In December 2015, the Council of the European Union adopted conclusions on statelessness, inviting the European Commission to use the European Migration Network as platform for exchanging of good practices among the member states, and for reducing statelessness and risk of discrimination and for strengthening protection: Council of the European Union, 'Conclusions of the Council and the Representatives of the Governments of the Member States on Statelessness', 14978/15, 4 Dec 2015.

³⁰ UNHCR, 'Global Action Plan' (n 23) 25.

Clearly, however, the inadequacy of empirical data remains a pertinent and crucial challenge to the protection of stateless persons globally.

3. INSTITUTIONAL ARRANGEMENTS: THE NEED FOR AN APPROPRIATE AGENCY

One of the key recommendations put forward by Goodwin-Gill was that ‘effective protection of the rights of stateless persons must be entrusted to an appropriate international agency, in a mandate that goes beyond the essentially reactive and non-functional tasks so far conferred upon UNHCR’.³¹ Since this statement was made in 1994, the work of the UNHCR concerning stateless persons and statelessness has been very substantive.

UNHCR’s responsibilities to address statelessness were initially limited to stateless persons who were refugees.³² In particular, the 1954 Statelessness Convention, although largely modelled on the 1951 Refugee Convention, does not repose supervisory authority in the UNHCR equivalent to article 35 of the Refugee Convention. In the mid-1970s, the UNHCR’s mandate was expanded to cover persons falling under the terms of the 1961 Convention.³³ As Seet has explained, the UNHCR attempted to ‘engage states on statelessness during the Cold War, exceeding its formal powers in doing so’, yet states ‘remained indifferent’.³⁴ However, in December 1995, the UNHCR was finally entrusted with responsibilities for stateless persons *generally*, as part of its statutory function.³⁵ The UNGA in particular expressed concern ‘that statelessness, including the inability to establish one’s nationality, may result in displacement’ and stressed ‘that the prevention and reduction of statelessness and the protection of stateless persons are important also in the prevention of potential refugee situations’.³⁶ It further requested the UNHCR ‘actively to promote accession to’ the 1954 Convention and 1961 Convention and ‘to provide relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States’.³⁷ A great deal more detail on how the UNHCR was to implement its mandate was provided in the Executive Committee’s 2006 conclusion on ‘Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons’,³⁸ which was endorsed by the UNGA.³⁹ In 2011, the UN Secretary-

³¹ Goodwin-Gill, ‘The Rights of Refugees and Stateless Persons’ (n 1) 394–95.

³² Statute of the Office of the High Commissioner for Refugees, UNGA res 428(V), 14 Dec 1950, para 6(A)(ii); Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 Apr 1954) 189 UNTS 137, art 1A(2) (Refugee Convention).

³³ By UNGA res 3274(XXIX), 9 Dec 1974 and UNGA res 31/37, 30 Nov 1976, pursuant to articles 11 and 20 of the 1961 Convention.

³⁴ M Seet, ‘The Origins of UNHCR’s Global Mandate on Statelessness’ (2016) 28 *International Journal of Refugee Law* 7, 7.

³⁵ UNGA res 50/152, 9 Feb 1996, which endorsed the UNHCR Executive Committee’s (ExCom) Conclusion no 78 (XLVI) on ‘Prevention and Reduction of Statelessness and the Protection of Stateless Persons’ (1995) as contained in UNHCR ExCom, ‘Report of the Forty-Sixth Session of the Executive Committee of the High Commissioner’s Programme’, UN doc A/AC.96/860, 23 Oct 1995.

³⁶ UNGA res 50/152.

³⁷ *ibid* para 15.

³⁸ UNHCR ExCom, Conclusion no 106 (LVII) on ‘Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons’ as contained in UNHCR ExCom, ‘Report of the Fifty-Seventh Session of the Executive Committee of the High Commissioner’s Programme’, UN doc A/AC.96/1035, 10 Oct 2006. See also M Manly, ‘UNHCR’s Mandate and Activities to Address Statelessness’ in A Edwards and L van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014) 88–115, 90.

General declared that '[t]he UN should tackle both the causes and consequences of statelessness as a key priority within the Organization's broader efforts to strengthen the rule of law'.⁴⁰

In recent years the work of the UNHCR has been integral to a renewed impetus given to statelessness as an issue worthy of study and focus. In particular, the 50th anniversary of the 1961 Convention in 2011, and the 60th anniversary of the 1954 Convention in 2014, provided opportunities for focusing international attention on this historically overlooked issue. The UNHCR organized and hosted a ministerial-level conference in 2011,⁴¹ where states recognized (inter alia):

...that the 1961 Convention on the Reduction of Statelessness and the 1954 Convention relating to the Status of Stateless Persons are the principal international statelessness instruments, which provide important standards for the prevention and resolution of statelessness and safeguards for the protection of stateless people. We will consider becoming a party to them, where appropriate, and/or strengthening our policies that prevent and reduce statelessness.⁴²

In addition, sixty-one states made statelessness-specific pledges, including thirty-three states pledging to accede to, or to take steps to accede to, one of both of the Statelessness Conventions.⁴³ Forty-one states made pledges relating to a range of other issues, including effecting law reform to prevent or reduce statelessness, to implement better civil registration and documentation systems to prevent and reduce statelessness, to establish statelessness determination procedures, and to undertake studies and mapping initiatives.⁴⁴

The UNHCR has also spearheaded important developments in legal principle: specifically, from 2010 the UNHCR organized a series of high-level expert meetings that have led to the rapid development of a series of guidelines on 'key doctrinal issues'⁴⁵ in interpreting the two pivotal treaties.⁴⁶

As a result of these initiatives, ratifications have increased at an exponential rate. For example, Goodwin-Gill observed that, as at 1 January 1989, the 1954 Convention had just thirty-six ratifications, while the 1961 Convention had even fewer at fifteen.⁴⁷ By contrast, in 2016,⁴⁸ the 1954 Convention has eighty-eight

³⁹ UNGA res 61/137, 25 Jan 2006.

⁴⁰ UN Secretary-General, 'Guidance Note of the Secretary-General: The United Nations and Statelessness' (June 2011) 3.

⁴¹ See UNHCR, 'Intergovernmental Event at the Ministerial Level of Member States of the United Nations on the Occasion of the 60th Anniversary of the 1951 Convention relating to the Status of Refugees and the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness: Ministerial Communiqué' (8 Dec 2011) <<http://www.unhcr.org/4ee210d89.pdf>> accessed 16 June 2016.

⁴² *ibid* para 3.

⁴³ UNHCR, 'Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons (Geneva, Palais des Nations, 7–8 December 2011)' (Oct 2012) 34–35 <<http://www.unhcr.org/4ff55a319.pdf>> accessed 16 June 2016.

⁴⁴ *ibid*.

⁴⁵ M Manly, 'UNHCR's Mandate and Activities to Address Statelessness in Europe' (2012) 14 *European Journal of Migration and Law* 261, 265.

⁴⁶ See UNHCR, 'Handbook on Protection of Stateless Persons' (n 13).

⁴⁷ Goodwin-Gill, 'The Rights of Refugees and Stateless Persons' (n 1) 384.

⁴⁸ As at 16 June 2016.

parties, with one quarter of the total number of states parties acceding since 2011.⁴⁹ In addition, the 1961 Convention currently has sixty-seven parties, with almost half of those accessions occurring since 2011.⁵⁰

In arguably its most ambitious initiative to date, in 2014 the UNHCR launched its Global Action Plan to End Statelessness by 2024. The programme aims to eradicate statelessness ‘by resolving existing situations and preventing the emergence of new cases of statelessness’,⁵¹ and adopts ten specific actions to end statelessness.⁵²

Despite these considerable achievements, important challenges remain. The extent of the problem, and its neglect for so long, means that notwithstanding recent developments, the identification, prevention and reduction of statelessness and the protection of stateless persons ‘remain a work in progress’.⁵³

A problematic issue is the fact that the UNHCR’s campaign to end statelessness by 2024 focuses solely on non-refugee stateless persons. This runs the risk that the situation of stateless refugees (see article 1A(2) of the Refugee Convention) may continue to be overlooked. It also may result in a disconnection with issues of the prevention and reduction of statelessness in the refugee context.

4. STATELESSNESS AND HUMAN RIGHTS PRINCIPLES

The core issue identified by Goodwin-Gill in 1994 as needing close attention was doctrinal. He observed that both greater clarity of existing principle and progressive development of the law were required in relation to several central issues, including the lawfulness of deprivation of citizenship, and that reference to developments in the protection of human rights, including non-discrimination norms, were important in this regard. Integrally connected to this issue is the need to ‘stop[] statelessness at source’⁵⁴ by strengthening the principles governing acquisition of nationality and translating the ‘criteria of effective nationality into practical arrangements’.⁵⁵ Goodwin-Gill lamented that there was, at the time, insufficient analysis recognizing that both the causes and the effects of statelessness may implicate human rights issues, and that this manifested in various ways, including in a failure to recognize that some statelessness situations may give rise to qualification for refugee status.⁵⁶

While no new international instruments directly on the subject have been devised,⁵⁷ states’ discretion in the granting and withdrawal of nationality has undoubtedly come to be restrained by numerous prohibitions in international and regional human rights treaties regarding discrimination, and some regional developments have also proved particularly important. This has become an issue of growing practical significance, as has the question of refusal of return to the state of

⁴⁹ Our analysis suggests 23.

⁵⁰ Our analysis suggests 30.

⁵¹ UNHCR, ‘Global Action Plan’ (n 23) 4.

⁵² The ten specific actions include resolving existing major situations of statelessness, ensuring that no child is born stateless, removing gender discrimination, preventing discriminatory deprivation of nationality and ensuring birth registration for the prevention of statelessness.

⁵³ M Manly, ‘UNHCR’s Mandate and Activities’ (n 45) 277. While he was referring to Europe, it is fair to say this applies more generally.

⁵⁴ Goodwin-Gill, ‘The Rights of Refugees and Stateless Persons’ (n 1) 394.

⁵⁵ *ibid.*

⁵⁶ See his discussion of German decisions: *ibid* 386–87.

⁵⁷ Foreshadowed as one possibility by Goodwin-Gill: *ibid* 394.

which one is a national in the light of recent efforts by states to restrict the activities of ‘home-grown terrorists’. Notions of statelessness and arbitrariness are pertinent in this debate.

4.1. Acquisition of nationality including principle of ‘effective nationality’

Goodwin-Gill argued that steps ‘should be taken to establish common understandings with respect to the principles that might reasonably govern the acquisition of nationality in modern society, with a view to stopping statelessness at source’.⁵⁸

Here some progress has been made, particularly in treaty law. Unlike its predecessor (the 1930 Hague Convention), the 1961 Convention imposes a positive obligation on states to grant nationality in certain circumstances (on the basis of *jus soli*). It also addresses a number of specific situations such as the nationality of foundlings, and of those born on board ships or aircraft etc. Thus, although the 1961 Convention does not recognize a general right of individual to a nationality, it attempts to reduce particular instances of statelessness, and imposes obligations on states to grant nationality to stateless persons in certain cases.⁵⁹ Of particular significance is the obligation to grant nationality to children born in the territory who would otherwise be stateless,⁶⁰ which is now explicitly provided in the legislation of over 100 states, as well as regional treaties.⁶¹ For example, the American Convention on Human Rights imposes a general duty on a state to grant its nationality on the basis of birth on the state’s territory in the absence of a right to any other nationality.⁶² The 1997 European Convention on Nationality (ECN) also provides a right to nationality based on *jus soli* for children who do not acquire at birth another nationality, albeit this may be conditioned on the person in question residing there lawfully and habitually.⁶³

While international human rights law does not explicitly impose a positive obligation on states to grant nationality, both general and specific human rights instruments contain relevant restrictions on state discretion on this issue. Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) recognises that ‘[e]very child has the right to acquire a nationality’.⁶⁴ Furthermore, article 7(1) of the Convention on the Rights of the Child requires that a child ‘shall be registered immediately after birth’, which is an important procedural safeguard in preventing statelessness, and that a child ‘shall have the right from birth to a name, the right to acquire a nationality’.⁶⁵ Finally, article 7(2) provides that ‘States Parties shall ensure the implementation of these rights in accordance with their national law and their

⁵⁸ *ibid.*

⁵⁹ S Hall, ‘The European Convention on Nationality and the Right to Have Rights’ (1999) 24 *European Law Review* 586, 592.

⁶⁰ 1961 Convention art 1(1).

⁶¹ Manly, ‘UNHCR’s Mandate and Activities’ (n 38) 105.

⁶² American Convention on Human Rights: ‘Pact of San José, Costa Rica’ (adopted 22 Nov 1969, entered into force 18 July 1978) 1144 UNTS 144, art 20 (ACHR).

⁶³ European Convention on Nationality (adopted 6 Nov 1997, entered into force 1 Mar 2000) ETS 166, art 6(2) (ECN).

⁶⁴ International Covenant on Civil and Political Rights (adopted 19 Dec 1966, entered into force 23 Mar 1976) 999 UNTS 171, art 24(3) (ICCPR).

⁶⁵ Convention on the Rights of the Child (adopted 20 Nov 1989, entered into force 2 Sep 1990) 1577 UNTS 3, art 7(1) (CRC).

obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless’.

The Convention on the Elimination of All Forms of Discrimination against Women provides in article 9 that states

shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.⁶⁶

It further provides that ‘States Parties shall grant women equal rights with men with respect to the nationality of their children’.⁶⁷ Given the prevalence of gender discrimination as a cause of statelessness, these provisions amount to a vital safeguard to reduce statelessness and ensure that women have the right to acquire nationality on an equal basis with men.⁶⁸ The International Convention on the Elimination of All Forms of Racial Discrimination specifically provides that laws relating to nationality, citizenship or naturalization must ‘not discriminate against any particular nationality’.⁶⁹ And the Convention on the Rights of Persons with Disabilities provides in article 18 that states parties shall ensure that persons with disabilities have ‘the right to acquire and change a nationality’.⁷⁰

Taking into account such developments, the UN Human Rights Council has stated that the right to a nationality is a fundamental human right.⁷¹ Most recently, the Council of the European Union has affirmed that ‘the right to a nationality is a fundamental legal right’.⁷²

It must be acknowledged, however, that there are ongoing challenges in identifying a corresponding obligation on any particular state to recognize this right in other than specific contexts. Hence, while developments have advanced considerably since Goodwin-Gill wrote in the early 1990s, in many situations it remains the case that a person is not able to enforce their abstract right to a nationality against a

⁶⁶ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 Dec 1979, entered into force 3 Sep 1981) 1249 UNTS 13, art 9(1) (CEDAW).

⁶⁷ *ibid* art 9(2).

⁶⁸ See also UN Human Rights Council, ‘Resolution 20/4’ (n 17); UN Human Rights Council, ‘Report on Discrimination against Women on Nationality-Related Matters, including the Impact on Children’, UN doc A/HRC/23/23, 15 Mar 2013.

⁶⁹ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 Mar 1966, entered into force 4 Jan 1969) 660 UNTS 195, art 1(3) (ICERD).

⁷⁰ Convention on the Rights of Persons with Disabilities (adopted 13 Dec 2006, entered into force 3 May 2008) 2515 UNTS 3, art 18(1)(a).

⁷¹ See, eg, UN Human Rights Council, ‘Resolution 7/10: Human Rights and Arbitrary Deprivation of Nationality’, UN doc A/HRC/RES/7/10, 27 Mar 2008; UN Human Rights Council, ‘Resolution 10/13: Human Rights and Arbitrary Deprivation of Nationality’, UN doc A/HRC/RES/10/13, 26 Mar 2009; UN Human Rights Council, ‘Resolution 13/2: Human Rights and Arbitrary Deprivation of Nationality’, UN doc A/HRC/RES/13/2, 24 Mar 2010; UN Human Rights Council, ‘Resolution 20/5: Human Rights and Arbitrary Deprivation of Nationality’, UN doc A/HRC/RES/20/5, 16 July 2012. See also UN Human Rights Council, ‘Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General’, UN doc A/HRC/25/28, 19 Dec 2013.

⁷² Council of the European Union (n 29).

particular state,⁷³ which in part explains why the UNHCR estimates that at least ten million people worldwide continue to be stateless.

An intriguing and creative argument made by Goodwin-Gill to respond to this lacuna was that the principles governing acquisition of nationality needed to be strengthened and that the notion of effective nationality may be integral to such a development. He suggested innovatively that the criteria set out by the International Court of Justice in the *Nottebohm Case* to assess an individual's genuine connection with a state in the context of diplomatic protection may have relevance beyond this limited context. In particular he observed that where these criteria are met, including 'a social fact of attachment, a genuine connection of existence, interests and sentiments',⁷⁴ a state may be 'considered bound by other incidental obligations, such as that of non-expulsion, readmission, and a certain standard of treatment'.⁷⁵

While we have not reached the position that this criterion of effective nationality has been translated 'into practical arrangements, whereby the naturalization of those sufficiently attached to the territorial State might be facilitated',⁷⁶ jurisprudential developments in international and regional human rights law have progressed considerably closer to achieving this goal.

First, it is clearly the case that regardless of citizenship status, all those within a state's territory or jurisdiction are entitled to a 'certain standard of treatment'. The widely ratified human rights treaties prohibit discrimination on grounds relevant to stateless persons including 'national, ethnic or social origin ... birth or other status'.⁷⁷ As the Committee on the Rights of the Child has emphasized,

the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children – including asylum-seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness.⁷⁸

Human rights instruments by nature guarantee rights regardless of citizenship and access to or deprivation of nationality. As long held by the Human Rights Committee, 'the general rule is that each one of the rights in the [ICCPR] must be guaranteed without discrimination between citizens and aliens'.⁷⁹ Indeed, all core international human rights treaties prohibit discrimination on ground of nationality. There are some exceptions to the rule that everyone (ie nationals and non-nationals) should be

⁷³ For example, according to the Human Rights Committee, the ICCPR 'does not necessarily make it an obligation for States to give their nationality to every child born in their territory': UN Human Rights Committee, 'General Comment No 17: Article 24 (Rights of the Child)', UN doc HRI/GEN/1/Rev.9 (Vol I), 27 May 2008, 195, para 8.

⁷⁴ *Nottebohm (Liechtenstein v Guatemala)*, judgment of 6 Apr 1955, ICJ Rep 1955, 4, 23.

⁷⁵ Goodwin-Gill, 'The Rights of Refugees and Stateless Persons' (n 1) 391.

⁷⁶ *ibid* 394.

⁷⁷ CRC art 2(1).

⁷⁸ Committee on the Rights of the Child, 'General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children outside Their Country of Origin', UN doc CRC/GC/2005/6, 1 Sep 2005, para 12.

⁷⁹ UN Human Rights Committee, 'General Comment No 15: The Position of Aliens under the Covenant', UN doc HRI/GEN/1/Rev.9 (Vol I), 27 May 2008, 189, para 2.

enjoying the same rights, but as exceptions, these provisions must be interpreted restrictively.⁸⁰

Second and more fundamentally, the ultimate hallmark of citizenship, the right to remain, has been extended beyond formal citizenship in a manner that may have particular relevance to stateless persons. The right to return to one's 'own country' as set out in article 12(4) of the ICCPR has long been understood to apply to a category of persons wider than those considered nationals by any state. In its 1999 General Comment, the Human Rights Committee explained that 'the right to enter his own country' goes beyond the right of entry to one's country of nationality. It also applies to anyone who has 'special ties or claims in relation to a given country', such as stateless persons who have been unlawfully deprived of that country or stateless persons who are long-term residents of that country.⁸¹

In *Nystrom v Australia*,⁸² the Human Rights Committee took the view that the deportation to Sweden of a Swedish national who had committed serious criminal offences in Australia was arbitrary, based on 'the strong ties connecting him to Australia'.⁸³ In particular the Committee acknowledged that there are factors 'other than nationality which may establish close and enduring connections between a person and a country, connections *which may be stronger than those of nationality*'.⁸⁴ The Committee took into account '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'.⁸⁵ Mr Nystrom was not of course stateless, but the predicament of statelessness in the situation where a person has a similarly close connection as Mr Nystrom could only strengthen the claim that the relevant country is 'one's own'.

Analogous reasoning can be found in the European Court of Human Rights' approach to assessing the legality of deportation of long-term residents against the protection, in article 8 of the European Convention on Human Rights (ECHR),⁸⁶ against unjustified interference with the right to family and private life.⁸⁷ While the European Court has long been concerned with the 'family life' aspect of article 8 as it pertains to long-term residents, in more recent cases the Court has sought to explore

⁸⁰ See, eg, ICCPR arts 13 and 25; ICERD art 1(2); International Covenant on Economic, Social and Cultural Rights (adopted 16 Dec 1966, entered into force 3 Jan 1976) 993 UNTS 3, art 2(3) (ICESCR).

⁸¹ UN Human Rights Committee, 'General Comment No 27: Freedom of Movement (Article 12)', UN doc CCPR/C/21/Rev.1/Add.9, 1 Nov 1999, para 20.

⁸² UN Human Rights Committee, 'Views: Communication No 1557/2007', UN doc CCPR/C/102/D/1557/2007, 1 Sep 2011 (*Nystrom v Australia*).

⁸³ *ibid* paras 7.5–7.6. See also UN Human Rights Committee, 'Views: Communication No 1959/2010', UN doc CCPR/C/102/D/1959/2010, 1 Sep 2011, paras 8.4–8.6 (*Warsame v Canada*).

⁸⁴ *Nystrom v Australia* (n 82) para 7.4 (emphasis added).

⁸⁵ *ibid* para 7.5.

⁸⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 Nov 1950, entered into force 3 Sep 1953) ETS 5 (European Convention on Human Rights, ECHR).

⁸⁷ *Genovese v Malta* App no 53124/09 (ECtHR, 11 Oct 2011); *Kurić v Slovenia* ECHR 2012–IV 1. See also ECHR art 14; Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 16 Sep 1963, entered into force 2 May 1968) ETS 46 (freedom of movement, prohibition of expulsion of nationals and prohibition of collective expulsion of aliens); Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 Nov 2000, entered into force 1 Apr 2005) ETS 177 (prohibition of discrimination).

in more depth the meaning of the connected but separate concept of ‘private life’.⁸⁸ In *Slivenko v Latvia*,⁸⁹ the Grand Chamber of the Court considered the purported expulsion of a Soviet army officer and his family who had lived in Latvia most of their lives but were not citizens. The Court observed that although its main emphasis in the past had been on the family life aspect of article 8 in decisions concerning deportation or expulsion, the private life aspect offered distinct and possibly wider protection. In that case it was said that the deportation of the family violated their right to private life since they were ‘removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being’.⁹⁰ In the subsequent decision of the Grand Chamber in *Maslov v Austria*,⁹¹ the Court noted that the right to private life ‘also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual’s social identity’; it thus encompasses ‘the totality of social ties between settled migrants and the community in which they are living’.⁹² This does not, of course, mean that non-citizen long-term residents, including stateless persons, can never be deported: the seriousness of offending may well outweigh the interference with family and/or private life entailed in deportation.⁹³ However, it does indicate that the traditionally wide discretion accorded states in such matters has been conditioned and restricted in significant ways by virtue of both international and regional human rights instruments.

Finally, the European Court of Human Rights has held that irrespective of the reasons for wanting to deport a non-national, states parties to the ECHR have a positive obligation to secure an applicant’s admission and entry into a third country prior to deportation;⁹⁴ they must pursue the matter ‘vigorously’.⁹⁵ This is particularly the case where the applicant is stateless and therefore in a ‘particularly vulnerable situation’ because of a lack of consular protection.⁹⁶ In such cases, the deporting state must do all it can to ensure the issuance and delivery of a travel document to the applicant by the former country of residence or country of birth, failing which the expulsion will breach article 8 of the ECHR.⁹⁷

What is significant about these developments is that human rights courts and bodies are increasingly challenging the notion that the deportation of non-citizens, including stateless persons, is within the *domaine réservé* of states, at least where a state is arguably responsible for an individual due to the substantive ties between the

⁸⁸ This discussion draws on M Foster, ‘An Alien by the Barest of Threads: The Legality of the Deportation of Long-Term Residents from Australia’ (2009) 33 Melbourne University Law Review 483, 515–27.

⁸⁹ *Slivenko v Latvia* ECHR 2003–X 229.

⁹⁰ *ibid* para 96.

⁹¹ *Maslov v Austria* ECHR 2008–III 301.

⁹² *ibid* para 63. For an analysis of these cases, see Foster (n 88) 515–27.

⁹³ D Thym, ‘Respect for Private Life and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’ (2008) 57 International and Comparative Law Quarterly 87, 93–94.

⁹⁴ *Amie v Bulgaria* App no 58149/08 (ECtHR, 12 Feb 2013) para 77.

⁹⁵ *Kim v Russia* App no 44260/13 (ECtHR, 17 July 2014) para 50.

⁹⁶ *ibid* para 54.

⁹⁷ In previous cases, the Court’s view had been that where the state’s authorities accept that the applicant is stateless, he or she cannot be deported and the application is simply inadmissible with no assessment of article 8 being made: eg *Okonkwo v Austria* App no 35117/97 (ECtHR, 22 May 2011).

individual and the state which suggest that the individual has effective, if not technical, nationality. Indeed, the ECN goes so far as to recognize a right to nationality based on *jus domicile* (long-term residence) in certain situations.⁹⁸ Such an approach clearly resonates with Goodwin-Gill's fundamental argument that a substantive rather than formal approach to identifying the right to a nationality represents the most progressive and appropriate way forward.

4.2. Arbitrary deprivation of citizenship, including as persecution

International human rights law generally prohibits deprivation nationality if it is arbitrary. The key provision is article 15 of the Universal Declaration of Human Rights,⁹⁹ which 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.

The 1961 Convention explicitly prohibits the deprivation of nationality on the grounds of race, ethnicity, and religious or political orientation, and requires that deprivation for other causes be made contingent on having acquired nationality in another state.¹⁰⁰ Protection against arbitrary deprivation can also be found in some form or another in a raft of binding international and regional legal instruments,¹⁰¹ and is protected by the principle of non-discrimination in all core human rights treaties.

Based on these various instruments, the UN Secretary-General's report to the Human Rights Council stated that the prohibition of arbitrary deprivation of nationality had become a principle of customary international law;¹⁰² and so too the obligation to avoid statelessness.¹⁰³ In its Resolution 20/5 (2012), the Human Rights Council reaffirmed that arbitrary deprivation of nationality, especially on discriminatory grounds, is a violation of human rights law.¹⁰⁴ In December 2015, the Human Rights Council highlighted statelessness as a concept that is inconsistent with and undermines the principle of the best interest of the child.¹⁰⁵

⁹⁸ ECN art 6(4)(e)–(f).

⁹⁹ Universal Declaration of Human Rights, UNGA res 217A (III), 10 Dec 1948 (UDHR).

¹⁰⁰ 1961 Convention art 9.

¹⁰¹ See, eg, ICCPR art 24(3), CRC arts 7 and 8; ICERD art 5.

¹⁰² See UN Human Rights Council, 'Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General', UN doc A/HRC/13/34, 14 Dec 2009, paras 19–22.

¹⁰³ This issue is explicitly regulated in the 1961 Convention, in conjunction with the 1954 Convention and the Refugee Convention. See also Council of Europe, 'Explanatory Report to the European Convention on Nationality', para 33; UNHCR, 'Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *Kurić and Others v Slovenia* (No 26828/06)' (8 June 2011) para 5.3.

¹⁰⁴ UN Human Rights Council, 'Resolution 20/5' (n 71) para 2. See also UN Human Rights Council, 'Resolution 10/13' (n 71).

¹⁰⁵ UN Human Rights Council, 'Impact of the Arbitrary Deprivation of Nationality on the Enjoyment of the Rights of Children Concerned, and Existing Laws and Practices on Accessibility for Children to Acquire Nationality, Inter Alia, of the Country in Which They Are Born, if They Otherwise Would Be Stateless: Report of the Secretary-General', UN doc A/HRC/31/29, 16 Dec 2015.

The scope of the prohibition of arbitrary deprivation of nationality ‘rests on the interpretation of the concepts of *arbitrariness* and of *deprivation of nationality*’.¹⁰⁶ Deprivation of nationality refers generally to situations of withdrawal of citizenship (including ‘loss’) as well as denial of access to nationality.¹⁰⁷ Arbitrariness goes beyond unlawfulness to cover standards of justice or due process considerations, and non-discrimination.¹⁰⁸ 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 principle of proportionality, that is, it must serve a legitimate purpose, be the least intrusive means, and be proportionate to the interest to be protected. Furthermore, it must be issued in writing and be open to effective administrative or judicial review.¹⁰⁹ In cases where deprivation of nationality takes place on the basis of race, colour, sex, descent, national or ethnic origin etc, it becomes both arbitrary and a breach of the principle of non-discrimination in the enjoyment of the right to nationality.¹¹⁰ Thus, the principles of equality and non-discrimination are fundamental elements of international human rights law;¹¹¹ the linkage between statelessness and discrimination is very strong.

The application of these principles to individual instances has been explored in a series of important cases examined by regional human rights courts. In *Ivcher Bronstein v Peru*, the Inter-American Court of Human Rights held that a deprivation of nationality constituted a violation of article 20 of the American Convention on Human Rights (right to nationality), because the annulment of Mr Ivcher Bronstein’s nationality was not consensual and the procedure used to annul his nationality did not comply with provisions of domestic law, therefore rendering it arbitrary.¹¹² In *Yean and Bosico v Dominican Republic*, the Inter-American Court of Human Rights ruled that the prohibition on racial discrimination, the principle of equality before the law, and the obligation to prevent, avoid and reduce statelessness apply to nationality.¹¹³ In *Modise v Botswana*, the African Commission on Human and Peoples’ Rights found the repeated expulsion from one state without the right to enter another state, caused by the Government of Botswana’s failure to recognize the applicant’s nationality (by descent), to constitute inhuman or degrading treatment, 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 under the African Charter on

¹⁰⁶ M Manly and L van Waas, ‘The Value of the Human Security Framework in Addressing Statelessness’ in A Edwards and C Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (CUP 2010) 49–81, 63 (emphasis in original).

¹⁰⁷ *ibid* 63–64.

¹⁰⁸ UN Human Rights Council, ‘Report of the Secretary-General’ (n 71).

¹⁰⁹ Article 17 of the International Law Commission’s Draft Articles on Nationality of Natural Persons in relation to the Succession of States with Commentaries as contained in International Law Commission, *Yearbook of the International Law Commission 1999: Volume II, Part Two* (UN 2003) 38. See also 1961 Convention art 8(4); ECN arts 11 and 12. For a useful summary of these conditions, see UN Human Rights Council, ‘Report of the Secretary-General’ (n 71); UNHCR, ‘Handbook on Protection of Stateless Persons’ (n 13) paras 71–77.

¹¹⁰ Article 15 of the Draft Articles on Nationality of Natural Persons in relation to the Succession of States as contained in International Law Commission, *Yearbook* (n 109) 37.

¹¹¹ See, eg, UDHR preamble and arts 1 and 7; ICCPR preamble and arts 3 and 26; ICESCR preamble and art 3; Protocol No 12 to the ECHR preamble and art 1; CEDAW art 9; ACHR art 24.

¹¹² *Ivcher Bronstein v Peru* (Merits, Reparations and Costs), IACtHR Series C No 74 (6 Feb 2001) paras 93–97.

¹¹³ *Yean and Bosico v Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No 130 (8 Sep 2005) paras 140–41.

Human and Peoples' Rights.¹¹⁴ In *Nubian Children v Kenya*, the African Committee of Experts on the Rights and Welfare of the Child held the practice of making children wait until they turn eighteen years of age to apply to acquire a nationality to be racially and ethnically discriminatory, as well as disproportionate and unnecessary to the protection of the state interest.¹¹⁵ Finally, although the ECHR does not guarantee a right to citizenship as such, in *Genovese v Malta*, the European Court of Human Rights recognized nationality as an inherent part of a person's social identity, protected as such as an element of private life (article 8). It further held Maltese citizenship law to be discriminatory and a serious violation of human rights (article 14 in conjunction with article 8) because it denied Maltese citizenship to an illegitimate child in cases where the illegitimate offspring was born to a non-Maltese mother and a Maltese father.¹¹⁶

In addition to these developments, there is a burgeoning jurisprudence in international refugee law, partly relying on these wider developments in human rights law, that is grappling with the extent to which the predicament of statelessness can give rise to a legitimate refugee claim.¹¹⁷ To this extent, case law globally is moving towards a more sophisticated approach to the connection between statelessness and refugee status, with the full potential of this connection being ripe for further analysis.

118

In sum, it is now understood that international law imposes strict limitations on states' power to deprive nationals of their nationality: these are enshrined in numerous international human rights treaties and are subject to certain procedural and substantive standards. Goodwin-Gill's call for a clearer understanding of the human rights implications of the deprivation of citizenship has thus proven prescient.

4.3. Deprivation of nationality: current challenges

International law provides for certain *exceptional* situations where a state may be acting lawfully in depriving a national of his or her nationality, even where such act would result in statelessness. However, these are closely circumscribed and generally limited to cases where nationality has been obtained by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant¹¹⁹; these exceptions must be interpreted restrictively and comply with the principle of proportionality.¹²⁰

¹¹⁴ *Modise v Botswana*, ACHPR Communication no 97/93 (6 Nov 2000). See African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 Oct 1986) 1520 UNTS 217. See also *Malawi African Association v Mauritania*, ACHPR Communication nos 54/91, 61/91, 96/93, 98/93, 164/97, 196/97 and 210/98 (11 May 2000).

¹¹⁵ African Committee of Experts on the Rights and Welfare of the Child, *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 (22 Mar 2011) paras 56–57.

¹¹⁶ *Genovese v Malta* (n 87). See also *Kurić v Slovenia* (n 87).

¹¹⁷ See H Lambert, 'Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status' (2015) 64 *International and Comparative Law Quarterly* 1.

¹¹⁸ M Foster and H Lambert, *International Refugee Law and the Protection of Stateless Persons* (OUP 2017, forthcoming).

¹¹⁹ The 1961 Convention also allows deprivation of nationality obtained by misrepresentation or fraud even where it would lead to the person being stateless: art 8(2)(b). See also ECN art 7(1)(b).

¹²⁰ See, eg, Case C-135/08 *Rottmann v Bayern* [2010] ECR I-1449 (holding that it is not contrary to EU law for a member state to withdraw the nationality of that state acquired by naturalization when the

Both the 1961 Statelessness Convention and the 1997 ECN further provide for the possibility of a state lawfully depriving its nationals of nationality on grounds of ‘conduct seriously prejudicial to the vital interests of the State Party’.¹²¹ The Explanatory Report to the 1997 ECN 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.

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.¹²²

A series of recent domestic legislative developments designed to strip citizenship from so-called ‘home-grown terrorists’ presents a contemporary threat to the otherwise positive trend away from arbitrary deprivation of citizenship. Legislation granting or strengthening governments’ ability to revoke the citizenship of suspected ‘foreign fighters’ has been introduced in a range of jurisdictions including Australia,¹²³ Canada,¹²⁴ Israel,¹²⁵ the United Kingdom¹²⁶ and Belgium.¹²⁷ The trend is

nationality was obtained by deception, on condition that the decision to withdraw complies with the principle of proportionality).

¹²¹ 1961 Convention art 8(3)(a)(ii); ECN art 7(d). See also UN Human Rights Council, ‘Report of the Secretary-General’ (n 71) paras 12–13, 18–19; UNHCR, ‘Expert Meeting: Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality – Summary Conclusions’ (Mar 2014) paras 52–69 <<http://www.unhcr.org/5465e2cb9.pdf>> accessed 16 June 2016. Note that both the 1961 Convention and the 1997 ECN 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.

¹²² On the UK’s declaration under article 8(3), see GS Goodwin-Gill, ‘Mr Al-Jedda, Deprivation of Citizenship, and International Law’ (revised draft of paper presented at Middlesex University, 14 Feb 2014) 4 <<http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf>> accessed 16 June 2016. The points made in that paper were further developed in GS Goodwin-Gill, ‘Deprivation of Citizenship resulting in Statelessness and Its Implications in International Law: Opinion’ (12 Mar 2014) <<https://assets.documentcloud.org/documents/1086878/guy-s-goodwin-gill-legal-opinion-on-deprivation.pdf>> accessed 16 June 2016; GS Goodwin-Gill, ‘Deprivation of Citizenship resulting in Statelessness and Its Implications in International Law: Further Comments’ (6 Apr 2014) <<https://assets.documentcloud.org/documents/1104868/gsgg-deprivationcitizenshipfurthercommentfinal.pdf>> accessed 16 June 2016; GS Goodwin-Gill, ‘Deprivation of Citizenship resulting in Statelessness and Its Implications in International Law: More Authority (If It Were Needed ...)’ <<https://assets.documentcloud.org/documents/1154592/gsgg-deprivationcitizenship-moreauthority.pdf>> accessed 16 June 2016.

¹²³ Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth). A parliamentary committee report prepared during the legislative process canvassed similar legislation in Canada, New Zealand, the United Kingdom, the United States and France: Parliamentary Joint Committee on Intelligence and Security, ‘Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015’ (Sep 2015) 18–21.

¹²⁴ Strengthening Canadian Citizenship Act, SC 2014, c 22 (Canada).

¹²⁵ See S Lavi, ‘Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel’ (2010) 13 *New Criminal Law Review* 404.

¹²⁶ Immigration Act 2014 (UK) s 66.

not linear: in France, a constitutional amendment allowing the stripping of nationality from convicted terrorists (whether born in France or naturalized), even if this would make them stateless, was rejected in March 2016,¹²⁸ and the Canadian government has announced that it intends to repeal legislation that broadened its citizenship-stripping powers.¹²⁹ Nonetheless, such legislation continues to be proposed and debated in a wide range of states, and represents a contemporary threat to the notion that statelessness and indeed citizenship is a human rights issue.

An extensive analysis of such developments is beyond the scope of this contribution. However, we briefly identify some specific concerns including inadequate safeguards for preventing statelessness, overly broad criteria for permitting deprivation of citizenship, and a trend towards a focus on technical aspects of nationality as opposed to a full appreciation of the human rights implications of this practice.

First, while some legislation, such as that in Canada and Australia, permits revocation only where the person concerned is a dual national, the UK legislation allows for the Secretary of State to strip someone of their British citizenship (resulting from naturalisation), even where this would render them stateless,¹³⁰ relying on the article 8(3) exception in the 1961 Convention. However, even where legislation will not on its face result in statelessness, the practical effects may be different. In both Canada and the United Kingdom, the Minister/Secretary of State ‘must have reasonable grounds to believe that the person is a citizen of another country before pursuing revocation’,¹³¹ but such a precaution is absent from the Australian legislation. That is, while the Australian legislation theoretically applies to dual nationals, there is neither indication in the legislation nor any guidance in the background materials as to how the Australian Government will investigate whether or not a person is a dual national. Combined with the fact that the Australian legislation introduces the notion of constructive renunciation – namely, a person is deemed to have renounced their Australian citizenship immediately upon engaging in

¹²⁷ P Wautelet, ‘Deprivation of Citizenship for ‘Jihadists’: Analysis of Belgian and French Practice and Policy in light of the Principle of Equal Treatment’ (11 Jan 2016) <<http://ssrn.com/abstract=2713742>> accessed 16 June 2016.

¹²⁸ J McAuley, ‘French Senate Effectively Kills Controversial Nationality Law’ *The Washington Post* (Washington DC, 18 Mar 2016) <<http://www.washingtonpost.com/news/worldviews/wp/2016/03/18/french-senate-effectively-kills-controversial-nationality-law/>> accessed 16 June 2016. See also P Weil and J Lepoutre, ‘Nationalité déchue et constitutionnalité’ *Libération* (Paris, 10 Dec 2015) 25.

¹²⁹ The grounds for revoking citizenship were expanded by the Strengthening Canadian Citizenship Act (Canada), which came into force on 28 May 2015. A repeal Bill was introduced in March 2016: Bill C-6, An Act to Amend the Citizenship Act and to Make Consequential Amendments to Another Act, 1st Sess, 38th Parl, 2016 (Canada).

¹³⁰ British Nationality Act 1981 (UK) s 40(4A), which contains an express exception to the general rule that an order may not be made if the Secretary is satisfied that it would make a person stateless; the provision was inserted by the Immigration Act 2014 (UK) s 66(1).

¹³¹ Government of Canada, ‘Revocation of Citizenship’ (29 May 2015) <<http://www.cic.gc.ca/english/resources/tools/cit/acquisition/revocation.asp>> accessed 16 June 2016; see Strengthening Canadian Citizenship Act (Canada) s 10.4; Immigration Act 2014 (UK) s 66(1)(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’.

the relevant conduct¹³² – there is a genuine risk that Australian nationals will be rendered stateless should this legislation be applied.

Second, the wider international law, especially human rights law, implications of such legislation has largely been inadequately addressed.¹³³ Goodwin-Gill has recently observed that while the UK legislation permitting statelessness is not a violation by the UK of its international obligations concerning statelessness (because the UK made a declaration under article 8(3)(a) of the 1961 Convention at the time of ratification, and it has not ratified the 1997 ECN),¹³⁴ 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’.¹³⁵ Neither may a state refuse to readmit an individual whom it stripped of his or her nationality whilst abroad; to do so ‘would be in breach of its obligations towards the receiving State’.¹³⁶ This general principle is included in General Comment No 27 of the Human Rights Committee.¹³⁷ Deprivation of citizenship may also impact the right to respect for private and family life under article 8 of the ECHR, and the obligation to prosecute international crimes such as terrorist acts. It would also impact the right to diplomatic protection abroad.¹³⁸ Further deprivation of citizenship and the concomitant denial of entry may well amount to arbitrary refusal of the right of a person to enter their own country pursuant to article 12(4) of the ICCPR.

Third, some procedural requirements have been insufficiently protected by states. In particular, to be lawful, deprivation of nationality must not be arbitrary, that is, it must be in accordance with the law and comply with certain standards of justice such as proportionality and non-discrimination. Hence, it is questionable whether the absence of a suspensive right of appeal, such as in the UK, particularly without the need for judicial confirmation of the decision before loss of nationality, satisfies international procedural standards.¹³⁹

5. CONCLUSION

¹³² See, eg, Australian Citizenship Act 2007 (Cth) s 33AA; the provision was inserted by the Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth).

¹³³ For the treatment of considerations of statelessness as technical, secondary issues, see *Pham* (n 14).

¹³⁴ Goodwin-Gill, ‘Al-Jedda’ (n 122) 6.

¹³⁵ *ibid* 11, referring to article 9 of the International Law Commission’s Draft Articles on the Expulsion of Aliens as contained in International Law Commission, ‘Report of the International Law Commission: Sixty-Fourth Session’, UN doc A/67/10, 7 Sep 2012, ch IV.

¹³⁶ Goodwin-Gill, ‘Al-Jedda’ (n 122) 13.

¹³⁷ UN Human Rights Committee, ‘General Comment No 27’ (n 81) para 21, which provides that a state ‘must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country’.

¹³⁸ Goodwin-Gill, ‘Al-Jedda’ (n 122) 13-15.

¹³⁹ British Nationality Act 1981 (UK) s 40(5) requires that notice be given before making an order to deprive a person of citizenship, and s 40A(1) grants a right of appeal to a person who has been given such notice. However, s 40A(6), which prohibited the making of a deprivation order as long as an appeal was pending or could be brought, was repealed in 2005: Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (UK) sch 2, para 4(c). Accordingly, an appeal does not prevent an order being made or taking effect in the meantime. The consequences of repealing s 40A(6) were considered in *GI v Secretary of State for the Home Department* [2012] EWCA Civ 867, [2013] 1 QB 1008. See also A Berry, ‘Who Are You? Fraud, Impersonation and Loss of Nationality without Procedural Protection’ (*European Network on Statelessness*, 25 June 2014) <<http://www.statelessness.eu/blog/who-are-you-fraud-impersonation-and-loss-nationality-without-procedural-protection>> accessed 16 June 2016.

Although much has been achieved in the past two decades, Goodwin-Gill's insightful analysis of the problem of statelessness as a human rights issue is still very relevant today. The number of accessions to the two main human rights treaties dealing with statelessness has increased significantly due to UNHCR's leadership, but this does not necessarily mean that *in reality* things are improving. There remain very few domestic statelessness determination procedures in place, and there are still a large number of nationality laws that blatantly violate the principle of non-discrimination. Nonetheless, when we consider the number of landmark judgments delivered by regional human rights courts, particularly concerning arbitrary deprivation of nationality, resolutions by and reports to the UN Human Rights Council, and renewed international and institutional attention, we can conclude that statelessness as a human rights issue is indeed a concept whose time has come.