



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

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ABSTRACT

The protection of stateless persons has long been understood as a challenge for the international community. However, for many of the past 60 years, a prioritized focus on refugees has dominated, or even eclipsed, the plight and protection needs of stateless persons. Guy 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, at that time, statelessness was perceived by many as a mere ‘technical problem’, yet, ‘statelessness is indeed a broad human rights issue, even as it retains a distinct technical dimension.’ In light of developments since this incisive analysis, this article examines the challenge set by Goodwin-Gill for the international community, namely, to provide greater recognition of and protection for stateless persons. It celebrates the positive developments and identifies areas of ongoing challenge. The focus is on the key initiatives Goodwin-Gill identified as requiring attention, the progress made in relation to each, and, predominantly, on the relevance of developments in human rights law.

1. INTRODUCTION

The protection of stateless persons has long been understood as a challenge for the international community. However, for many of the past 60 years, a prioritized focus on refugees has dominated, or even eclipsed, the plight and protection needs of stateless persons. Guy S Goodwin-Gill noted the irony that ‘refugees and stateless persons once walked hand in hand’;¹ after the First World War ‘their numbers and condition were

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¹ GS Goodwin-Gill, ‘The Rights of Refugees and Stateless Persons’ in KP Saksena (ed), *Human Rights Perspective and Challenges (in 1990 and Beyond)* (Lancers Books 1994) 378, 389.

almost coterminous² 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 the failure to satisfactorily 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 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

This article examines 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. The first two are considered briefly below, before doctrinal developments are examined in more depth – in particular, the degree to which the right to acquisition of nationality, and the right to protection

² *ibid.*

³ This was the terminology preferred by P Weis, as cited by Goodwin-Gill (n 1) 383.

⁴ Convention relating to the Status of Stateless Persons (adopted 28 Sept 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 (n 1) 390.

⁷ *ibid.*

⁸ Goodwin-Gill (n 1) (emphasis in original).

⁹ *ibid* 393–94.

against arbitrary deprivation of nationality, have been strengthened. Positive developments are noted and ongoing challenges are highlighted.

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

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 the lack of protection against *refoulement* and 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 purpose of the 1961 Convention is to ‘reduce statelessness by international agreement’.¹⁷ Unlike its predecessor (the 1930 Hague Convention), the 1961 Convention imposes a positive obligation on States to grant nationality in certain

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 (n 4) art 1.

¹² See International Law Commission (ILC), Draft Articles on Diplomatic Protection with Commentaries, as contained in ‘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 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 Dec 2008; Supreme Court of Cassation, Judgment No 7614/2011, 4 Apr 2011.

¹⁵ 1954 Convention (n 4) preamble.

¹⁶ See Goodwin-Gill (n 1) 382.

¹⁷ 1961 Convention, preamble.

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. Thus, although the 1961 Convention does not recognize the general right of an 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.¹⁸ As Batchelor has observed, 'if all States actively applied the provisions of the 1961 Convention, there would be a decrease in the number of cases arising in relation to the 1954 Convention.'¹⁹

The historically low rate of accession and concomitant lack of implementation and enforcement of both of these treaties, including a lack of domestic status determination procedures in relation to the 1954 Convention, means that, as predicted by Goodwin-Gill, other human rights treaties have also 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 the right to work, to health care, and to education in one's own country, and that it can lead to vulnerability to other human rights violations, such as being trafficked.²⁰ Indeed, some stateless persons find that their predicament in their country of origin or habitual residence is so untenable that migration is the only option.²¹ 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',²² significant challenges remain.

¹⁸ S Hall, 'The European Convention on Nationality and the Right to Have Rights' (1999) 24 *European Law Review* 586, 592.

¹⁹ C Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7 *IJRL* 232, 235 (fn omitted).

²⁰ UN Human Rights Council (UNHRC), 'Resolution 20/4: The Right to a Nationality: Women and Children', UN doc A/HRC/RES/20/4, 16 July 2012.

²¹ 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, 249.

²² Goodwin-Gill (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',²³ and that this 'paucity of information is due to the absence of serious attention to their plight by any international organization.'²⁴ Accordingly, his first key recommendation was that 'the constituency must be known.'²⁵

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.'²⁶ 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 75 States, while qualitative analysis on stateless populations is publicly available for only 45 States.²⁷ As the UNHCR observes, stateless persons are not only frequently undocumented, but are also ignored by authorities and not counted in national administrative registries and databases or in population censuses.²⁸ 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.'²⁹

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.³⁰ The work of organisations 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.³¹ In addition, the work of non-government and regional networks, such as the European Migration Network and the European Network on Statelessness, has been crucial in highlighting the issue and its scope, and facilitating coordinated efforts at prevention and remedy.³² Finally, the increase in the establishment of national

²³ *ibid* 378.

²⁴ *ibid*.

²⁵ *ibid* 394. See also his recommendation regarding regional initiatives to obtain and disseminate information.

²⁶ 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.

²⁷ *ibid*.

²⁸ UNHCR Global Action Plan (n 26).

²⁹ *ibid* 25.

³⁰ 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.

³¹ Institute on Statelessness and Inclusion, *The World's Stateless* (Wolf Legal Publishers 2014).

³² 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 Dec 2015, the Council of the European Union adopted conclusions on statelessness, inviting the European Commission to use the European Migration Network as a platform for the exchange of good practices among Member States, for reducing statelessness and the 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.

determination procedures will likely lead to ‘new data in countries hosting stateless migrants’,³³ although it should be acknowledged that this represents a minority of the world’s stateless population.

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.’³⁴ 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.³⁵ 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.³⁶ 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.’³⁷ However, in December 1995, the UNHCR was finally entrusted with responsibilities for stateless persons *generally*, as part of its statutory function.³⁸ The UN General Assembly (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.’³⁹ 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.’⁴⁰ A great deal more detail on how the UNHCR was to

³³ UNHCR Global Action Plan (n 26) 25.

³⁴ Goodwin-Gill (n 1) 394–95.

³⁵ 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’).

³⁶ By UNGA res 3274(XXIX), 9 Dec 1974, and UNGA res 31/37, 30 Nov 1976, pursuant to arts 11 and 20 of the 1961 Convention.

³⁷ M Seet, ‘The Origins of UNHCR’s Global Mandate on Statelessness’ (2016) 28 *IJRL* 7, 7.

³⁸ 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.

³⁹ *ibid*, UNGA res 50/152.

⁴⁰ *ibid* para 15.

implement its mandate was provided in the Executive Committee's 2006 conclusion on 'Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons',⁴¹ which was endorsed by UNGA.⁴² In 2011, the UN Secretary-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'.⁴³

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 2011,⁴⁴ 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.⁴⁵

In addition, 61 States made statelessness-specific pledges, including 33 States pledging to accede to, or to take steps to accede to, one or both of the Statelessness Conventions.⁴⁶ Forty-one States made pledges relating to a range of other issues to prevent or reduce statelessness, including to reform the law, to implement better civil registration and documentation systems, to establish statelessness determination procedures, and to undertake studies and mapping initiatives.⁴⁷

⁴¹ 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 Edwards and Van Waas (eds) (n 21) 90.

⁴² UNGA res 61/137, 25 Jan 2006.

⁴³ UN Secretary-General, 'Guidance Note of the Secretary-General: The United Nations and Statelessness' (June 2011) 3.

⁴⁴ 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.

⁴⁵ *ibid* para 3.

⁴⁶ 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.

⁴⁷ *ibid*.

The UNHCR has also spearheaded important developments in legal principle. Specifically, since 2010, the UNHCR has organized a series of high-level expert meetings that have led to the rapid development of a series of guidelines on 'key doctrinal issues'⁴⁸ in interpreting the two pivotal treaties.⁴⁹

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.⁵⁰ By contrast, in 2016,⁵¹ the 1954 Convention has 88 Parties, with one-quarter of the total number of States Parties acceding since 2011.⁵² In addition, the 1961 Convention currently has 67 Parties, with almost half of those accessions occurring since 2011.⁵³

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',⁵⁴ and adopts ten specific actions to that end.⁵⁵

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'.⁵⁶

A problematic issue is the fact that the UNHCR's campaign to end statelessness by 2024 focuses solely on non-refugee stateless persons. This risks the situation of stateless refugees (see article 1A(2) of the Refugee Convention) continuing to be overlooked. It may also 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'⁵⁷ by strengthening the principles governing acquisition of nationality and translating the

⁴⁸ M Manly, 'UNHCR's Mandate and Activities to Address Statelessness in Europe' (2012) 14 *European Journal of Migration and Law* 261, 265.

⁴⁹ See UNHCR Handbook (n 13).

⁵⁰ Goodwin-Gill (n 1) 384.

⁵¹ As at 16 June 2016.

⁵² The authors' analysis suggests 23.

⁵³ The authors' analysis suggests 30.

⁵⁴ UNHCR Global Action Plan (n 26) 4.

⁵⁵ 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.

⁵⁶ Manly (n 48) 277. While he was referring to Europe, it is fair to say this applies more generally.

⁵⁷ Goodwin-Gill (n 1) 394.

'criteria of effective nationality into practical arrangements'.⁵⁸ Goodwin-Gill lamented that there was, at the time, insufficient analysis recognizing that both the causes and effects of statelessness may implicate human rights issues, and that this is manifested in various ways, including the failure to recognize that some statelessness situations may give rise to qualification for refugee status.⁵⁹

While no new international instruments directly on the subject have been devised,⁶⁰ States' discretion in the granting and withdrawal of nationality has been 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 which one is a national, in 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 the 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'.⁶¹

Some progress has been made in this regard, particularly in treaty law. Of particular significance is the obligation, in the 1961 Convention, to grant nationality to children born in the territory, who would otherwise be stateless,⁶² which is now explicitly provided in the legislation of over 100 States, as well as in regional treaties.⁶³ 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.⁶⁴ 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.⁶⁵

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) recognizes that '[e]very child has the right to acquire a nationality'.⁶⁶ Furthermore, article 7(1) of the

⁵⁸ *ibid.*

⁵⁹ See his discussion of German decisions (n 1) 386–87.

⁶⁰ Foreshadowed as one possibility by Goodwin-Gill (n 1) 394.

⁶¹ *ibid.*

⁶² 1961 Convention art 1(1).

⁶³ Manly (n 41) 105.

⁶⁴ 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').

⁶⁵ European Convention on Nationality (adopted 6 Nov 1997, entered into force 1 Mar 2000) ETS 166, art 6(2) ('ECN').

⁶⁶ International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 Mar 1976) 999 UNTS 171, art 24(3) ('ICCPR').

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'.⁶⁷ Finally, article 7(2) provides that 'States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless'.

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.⁶⁸

It further provides that 'States Parties shall grant women equal rights with men with respect to the nationality of their children'.⁶⁹ Given the prevalence of gender discrimination as a cause of statelessness, these provisions amount to a vital safeguard to reduce statelessness and to ensure that women have the right to acquire nationality on an equal basis with men.⁷⁰ 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'.⁷¹ 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'.⁷²

Taking into account such developments, the UN Human Rights Council has stated that the right to a nationality is a fundamental human right.⁷³ Most recently,

⁶⁷ Convention on the Rights of the Child (adopted 20 Nov 1989, entered into force 2 Sept 1990) 1577 UNTS 3, art 7(1) ('CRC').

⁶⁸ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 Dec 1979, entered into force 3 Sept 1981) 1249 UNTS 13, art 9(1) ('CEDAW').

⁶⁹ *ibid* art 9(2).

⁷⁰ See also UNHRC res 20/4 (n 20); UNHRC, 'Report on Discrimination against Women on Nationality-Related Matters, including the Impact on Children', UN doc A/HRC/23/23, 15 Mar 2013.

⁷¹ 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').

⁷² 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).

⁷³ See, eg, UNHRC Resolutions: 'Resolution 7/10: Human Rights and Arbitrary Deprivation of Nationality', UN doc A/HRC/RES/7/10, 27 Mar 2008; 'Resolution 10/13: Human Rights and Arbitrary Deprivation of Nationality', UN doc A/HRC/RES/10/13, 26 Mar 2009; 'Resolution 13/2: Human Rights and Arbitrary Deprivation of Nationality', UN doc A/HRC/RES/13/2, 24 Mar 2010; 'Resolution 20/5: Human Rights and Arbitrary Deprivation of Nationality', UN doc A/HRC/RES/20/5, 16 July 2012. See also UNHRC, 'Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General', UN doc A/HRC/25/28, 19 Dec 2013.

the Council of the European Union has affirmed that ‘the right to a nationality is a fundamental legal right’.⁷⁴

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 there have been developments of considerable importance since Goodwin-Gill’s assessment 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 particular State,⁷⁵ which partly 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’,⁷⁶ a State may be ‘considered bound by other incidental obligations, such as that of non-expulsion, readmission, and a certain standard of treatment’.⁷⁷

While this criterion of effective nationality has not yet been translated ‘into practical arrangements, whereby the naturalization of those sufficiently attached to the territorial State might be facilitated’,⁷⁸ 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’.⁷⁹ 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.⁸⁰

⁷⁴ Council of the European Union Conclusions (n 32).

⁷⁵ 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.

⁷⁶ *Nottebohm (Liechtenstein v Guatemala)*, judgment of 6 Apr 1955, ICJ Rep 1955, 4, 23.

⁷⁷ Goodwin-Gill (n 1) 391.

⁷⁸ *ibid* 394.

⁷⁹ CRC art 2(1).

⁸⁰ 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 Sept 2005, para 12.

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.’⁸¹ Indeed, all core international human rights treaties prohibit discrimination on ground of nationality. There are some exceptions to the rule that everyone (that is, nationals and non-nationals) should enjoy the same rights but, as exceptions, these provisions must be interpreted restrictively.⁸²

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.⁸³

In *Nystrom v Australia*,⁸⁴ the Human Rights Committee took the view that the deportation to Sweden of a Swedish national who had committed serious criminal offences in Australia violated article 12(4), based on ‘the strong ties connecting him to Australia.’⁸⁵ 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.’⁸⁶ 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.’⁸⁷ Of course, Mr Nystrom was not stateless, but the predicament of statelessness in the situation where a person has a similarly close connection would only strengthen the claim that the relevant country is ‘one’s own’ for the purpose of article 12(4).

Analogous reasoning can be found in the European Court of Human Rights’ approach to assessing the legality of deportation of long-term residents in light of the

⁸¹ 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.

⁸² 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’).

⁸³ 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.

⁸⁴ UN Human Rights Committee, ‘Views: Communication no 1557/2007’, UN doc CCPR/C/102/D/1557/2007, 1 Sept 2011 (*Nystrom v Australia*).

⁸⁵ *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 Sept 2011, paras 8.4–8.6 (*Warsame v Canada*).

⁸⁶ *Nystrom v Australia* (n 84) para 7.4 (emphasis added).

⁸⁷ *ibid* para 7.5.

European Convention on Human Rights (ECHR).⁸⁸ Although there is no equivalent to article 12(4) in the ECHR, a similar approach can be found in the analysis of whether such deportation constitutes unjustified interference with the right to family and private life.⁸⁹ 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 in more depth the meaning of the connected but separate concept of ‘private life.’⁹⁰ In *Slivenko v Latvia*,⁹¹ 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 who 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.’⁹² In the subsequent decision of the Grand Chamber in *Maslov v Austria*,⁹³ 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.’⁹⁴ 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.⁹⁵ 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

⁸⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 Nov 1950, entered into force 3 Sept 1953) ETS 5 (European Convention on Human Rights, ‘ECHR’).

⁸⁹ *Genovese v Malta* App No 53124/09 (ECtHR, 11 Oct 2011); *Kurić v Slovenia* ECHR Reports of Judgments and Decisions 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 Sept 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).

⁹⁰ 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.

⁹¹ *Slivenko v Latvia* ECHR Reports of Judgments and Decisions 2003–X 229.

⁹² *ibid* para 96.

⁹³ *Maslov v Austria* ECHR Reports of Judgments and Decisions 2008–III 301.

⁹⁴ *ibid* para 63. For an analysis of these cases, see Foster (n 90) 515–27.

⁹⁵ 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 *ICLQ* 87, 93–94.

obligation to secure an applicant's admission and entry into a third country prior to deportation;⁹⁶ they must pursue the matter 'vigorously'.⁹⁷ This is particularly the case where the applicant is stateless and therefore in a 'particularly vulnerable situation' because of a lack of consular protection.⁹⁸ 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.⁹⁹

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 individual and the State, which suggests 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.¹⁰⁰ 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 of nationality if it is arbitrary. The key provision is article 15 of the Universal Declaration of Human Rights,¹⁰¹ 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.¹⁰² Protection against arbitrary deprivation can also be found in some form or another in a raft of binding international and regional legal instruments,¹⁰³ and is protected by the principle of non-discrimination in all core human rights treaties.

⁹⁶ *Amie v Bulgaria* App No 58149/08 (ECtHR, 12 Feb 2013) para 77.

⁹⁷ *Kim v Russia* App No 44260/13 (ECtHR, 17 July 2014) para 50.

⁹⁸ *ibid* para 54.

⁹⁹ 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 art 8 being made: eg, *Okonkwo v Austria* App No 35117/97 (ECtHR, 22 May 2011).

¹⁰⁰ ECN art 6(4)(e)–(f).

¹⁰¹ Universal Declaration of Human Rights, UNGA res 217A (III), 10 Dec 1948 ('UDHR').

¹⁰² 1961 Convention art 9.

¹⁰³ See, eg, ICCPR art 24(3), CRC arts 7 and 8; ICERD art 5.

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;¹⁰⁴ and so too the obligation to avoid statelessness.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷

The scope of the prohibition of arbitrary deprivation of nationality 'rests on the interpretation of the concepts of *arbitrariness* and of *deprivation of nationality*'.¹⁰⁸ Deprivation of nationality refers generally to situations of withdrawal of citizenship (including 'loss'), as well as to denial of access to nationality.¹⁰⁹ Arbitrariness goes beyond unlawfulness to cover standards of justice or due process considerations, and non-discrimination.¹¹⁰ 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.¹¹¹ In cases where deprivation of nationality takes place on the basis of race, colour, sex, descent, national or ethnic origin, and so forth, it becomes both arbitrary and a breach of the principle of non-discrimination in the enjoyment of the right to nationality.¹¹² Thus, the principles of equality and

¹⁰⁴ See UNHRC, 'Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General', UN doc A/HRC/13/34, 14 Dec 2009, paras 19–22.

¹⁰⁵ This issue is explicitly regulated in the 1961 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.

¹⁰⁶ UNHRC res 20/5 (n 73) para 2. See also UNHRC res 10/13 (n 73).

¹⁰⁷ UNHRC, '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.

¹⁰⁸ 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, 63 (emphasis in original).

¹⁰⁹ *ibid* 63–64.

¹¹⁰ UNHRC Report of the Secretary-General (n 73).

¹¹¹ Art 17, ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States with Commentaries, as contained in, *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 UNHRC Report of the Secretary-General (n 73); UNHCR Handbook (n 13) paras 71–77.

¹¹² Art 15, ILC Draft Articles on Nationality of Natural Persons, *ibid*, 37.

non-discrimination are fundamental elements of international human rights law;¹¹³ 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 Bronstein's nationality was not consensual and the procedure used to annul did not comply with provisions of domestic law, therefore rendering it arbitrary.¹¹⁴ 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.¹¹⁵ 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 violation of his rights to family life, to freedom of movement, to leave and to return to his own country and property, and to equal access to the public service of his country under the African Charter on Human and Peoples' Rights.¹¹⁶ 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 18 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.¹¹⁷ 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.¹¹⁸

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

¹¹³ 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.

¹¹⁴ *Ivcher Bronstein v Peru* (Merits, Reparations and Costs), IACtHR Series C No 74 (6 Feb 2001) paras 93–97.

¹¹⁵ *Yean and Bosico v Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C no 130 (8 Sept 2005) paras 140–41.

¹¹⁶ *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).

¹¹⁷ 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.

¹¹⁸ *Genovese v Malta* (n 89). See also *Kurić v Slovenia* (n 89).

give rise to a legitimate refugee claim.¹¹⁹ 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.¹²⁰

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 applicant;¹²¹ these exceptions must be interpreted restrictively and comply with the principle of proportionality.¹²²

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'.¹²³ 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.

¹¹⁹ See H Lambert, 'Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status' (2015) 64 ICLQ 1.

¹²⁰ M Foster and H Lambert, *International Refugee Law and the Protection of Stateless Persons* (OUP 2017, forthcoming).

¹²¹ 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).

¹²² 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 nationality was obtained by deception, on condition that the decision to withdraw complies with the principle of proportionality).

¹²³ 1961 Convention art 8(3)(a)(ii); ECN art 7(d). See also UNHRC Report of the Secretary-General (n 73) 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.

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.¹²⁴

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,¹²⁵ Canada,¹²⁶ Israel,¹²⁷ the United Kingdom,¹²⁸ and Belgium.¹²⁹ The trend is 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 2016,¹³⁰ and the Canadian government has announced

¹²⁴ 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 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.

¹²⁵ 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’ (Sept 2015) 18–21.

¹²⁶ Strengthening Canadian Citizenship Act, SC 2014, c 22 (Canada).

¹²⁷ See S Lavi, ‘Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel’ (2010) 13 *New Criminal Law Review* 404.

¹²⁸ Immigration Act 2014 (UK) s 66.

¹²⁹ 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.

¹³⁰ 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, ‘Refusons l’extension de la déchéance de la nationalité!’ *Le Monde* (Paris, 8 Dec 2015) 23.

that it intends to repeal legislation that broadened its citizenship-stripping powers.¹³¹ 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 article. However, some specific concerns are briefly identified, 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 naturalization) even where this would render them stateless,¹³² 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 Canada, in order to avoid rendering a person stateless, contrary to ‘any international human rights instrument regarding statelessness to which Canada is signatory’,¹³³ the Minister must have ‘reasonable grounds to believe the person is a citizen’ of another country before pursuing revocation,¹³⁴ 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 the relevant conduct¹³⁵ – 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 have largely been inadequately addressed.¹³⁶ Goodwin-Gill has recently

¹³¹ 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 Mar 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). The repealing legislation had not yet passed into law by the time this article went to press: see <<http://www.cicnews.com/2016/07/bill-change-canadian-citizenship-act-passes-house-commons-senate-approval-pending-078363.html>> accessed 30 Aug 2016.

¹³² 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 of State is satisfied that it would make a person stateless; the provision was inserted by the Immigration Act 2014 (UK) s 66(1).

¹³³ Strengthening Canadian Citizenship Act (Canada) s 10.4 (1).

¹³⁴ 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 (2).

¹³⁵ See, eg, Australian Citizenship Act 2007 (Cth) s 33AA; the provision was inserted by the Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth).

¹³⁶ For the treatment of considerations of statelessness as technical, secondary issues, see *Pham* (n 14).

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),¹³⁷ the consequences of such an 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'.¹³⁸ 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'.¹³⁹ This general principle is included in General Comment No 27 of the Human Rights Committee.¹⁴⁰ 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.¹⁴¹ 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.¹⁴²

5. CONCLUSION

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

¹³⁷ Goodwin-Gill 'Al-Jedda' (n 124) 6.

¹³⁸ *ibid* 11, referring to art 9 ILC Draft Articles on the Expulsion of Aliens, as contained in 'Report of the International Law Commission: Sixty-Fourth Session', UN doc A/67/10, 7 Sept 2012, ch IV.

¹³⁹ Goodwin-Gill 'Al-Jedda' (n 124) 13.

¹⁴⁰ UNHRC General Comment No 27 (n 83) 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'.

¹⁴¹ Goodwin-Gill 'Al-Jedda' (n 124) 13–15.

¹⁴² 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 *G1 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.

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.