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Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1A(2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees

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1 INTRODUCTION

The question of whether arbitrary deprivation of nationality constitutes persecution for the purposes of a determination of refugee status has received increased attention in recent jurisprudence,[1] however, no systematic argument has been made to date on the ordinary meaning of words, context, object and purpose of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees Refugee,[2] as it applies to stateless refugees.[3] This is an important question because in addition to the imperatives of refugee protection, the absence of determination procedures and a protection regime specifically for stateless persons, in many jurisdictions, makes refugee and/or complementary protection the only options.[4] Legal status as a refugee (or indeed as a stateless person) is not a substitute for nationality in the sense of a legal status of citizenship, however it goes some way in guaranteeing a range of basic rights. Divergent State practice on whether to grant refugee status to a person, who claims to have been persecuted on the basis of having been denied the right to nationality, also requires analysis.

The 1954 Convention relating to the Status of Stateless Persons[5] and the 1961 Convention on the Reduction of Statelessness[6] together form the foundation of the international legal framework to address statelessness.[7] Statelessness refers to 'a person who is not considered

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[1] Throughout this paper, the word 'jurisprudence' refers to 'courts' decisions' or case law, as in a civil law context.

[2] United Nations Treaty Series (U.N.T.S.), vol.189, p.150.

[3] This is in contrast with refugees with a nationality. See, e.g., Guy S. Goodwin-Gill, 'The search for the one, true meaning…' in G.S. Goodwin-Gill and H. Lambert *The Limits of Transnational Law – Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*, CUP 2010, 204-241; Jane McAdam, 'Interpretation of the 1951 Convention', in A. Zimmermann *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol – A Commentary*, OUP 2011, 75-115; James Hathaway, *The Rights of Refugees under International Law*, CUP 2005, 48-74; James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press 2014); Michelle Foster, *International refugee Law and Socio-Economic Rights* (Cambridge University Press 2nd ed 2007); Hugo Storey, 'Persecution: Towards a Working Definition', in V. Chetail and C. Bauloz (eds.), *Research Handbook on Migration and International Law*, Cheltenham: Edward Elgar Publishing, 2014, pp.459-518; UNHCR, 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', Geneva, April 2001 - available at: http://www.refworld.org/docid/3b20a3914.html [accessed 5 August 2013]

[4] There are currently 82 State parties to the 1954 Convention relating to the Status of Stateless Persons and 59 State parties to the 1961 Convention on the Reduction of Statelessness (http://www.refworld.org/statelessness.html - last accessed on 30 July 2014). Very few countries have established procedures to determine statelessness. Amongst those that have we find France, Hungary, Italy, Latvia, Mexico and Spain. See Office of the UNHCR, *The State of the World's Refugees 2012 – In search of solidarity*, OUP 2012, at p.107. On 9 April 2013, the UK implemented the 1954 Status of Stateless Persons Convention with the introduction of a new stateless determination procedure to identify and protect stateless persons in the UK. New story available at: http://www.unhcr.org/print/5163ec646.html . However, elements of good practice exist in non-State parties, see Office of the UNHCR, *The State of the World's Refugees 2012 – In search of solidarity*, OUP 2012, pp.110-2, and European Network on Statelessness, Statelessness determination and the Protection Status of Stateless persons, 2013 <http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/Statelessness%20determination%20and%20the%20protection%20status%20of%20stateless%20persons%20ENG.pdf> accessed 28 July 2014.

[5] U.N.T.S, vol.360, p.117.

[6] U.N.T.S., vol.989, p.175.

[7] Introductory Note by the Office of the UNHCR on the 1961 Convention on the Reduction of Statelessness, – available at http://www.unhcr.org/3bbb286d8.html. For a full analysis of both instruments, see UNHCR *Handbook*

as a national by any State under the operation of its law'.[8] This definition is part of customary international law;[9] it is concerned with whether a person has a nationality, and not with the manner in which a person became stateless. Accordingly, under the 1954 Stateless Status Convention, 'where a deprivation of nationality may be contrary to rules of international law, this illegality is not relevant in determining whether the person is a national … rather, it is the position under domestic law that is relevant'.[10] Thus, Article 1(1) of the 1954 Convention is connected to the right to nationality itself; it is not concerned with whether this nationality is effective in the sense of whether the individual can exercise the rights attached to nationality.[11] In contrast, a key question for persons fleeing persecution and claiming refugee status is that of state protection, which includes considerations of effective nationality and therefore of the ability to exercise human rights.[12] Refugees under the 1951 Refugees Convention, or other relevant regional instruments and under UNHCR's international protection mandate, may also be, and often are, stateless. When this happens, international law provides that they 'should be protected according to the higher standard which in most circumstances will be international refugee law, not least due to the protection from *refoulement* in Article 33 of the 1951 Convention'.[13]

This research paper aims to do three things:
a. Review existing jurisprudence and academic literature regarding claims to refugee status based on arbitrary deprivation of nationality (and to a lesser extent claims based on the denial of the right to nationality) in the context of Article 1A(2) of the 1951 Convention and 1967 Protocol relating to the Status of Refugees in order to reach a clear understanding of the scope and key elements of these claims.
b. Analyze existing State practice on this question so as to identify divergence and good practice.
c. Suggest an appropriate and consistent approach to this question.

It should be pointed out that this paper is essentially interested in the overlap between statelessness and refugee status. Accordingly, it leaves outside the scope of enquiry persons arbitrarily denied nationality by one State who have another nationality or other nationalities to fall back onto and are not therefore stateless. Thus, this paper is primarily

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on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons, Geneva, 2014, and Interparliamentary Union and UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians No 22*, 2014.

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

[9] International Law Commission, *Articles on Diplomatic Protection with commentaries*, 2006, at pp.48-49 – available at:
http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf

[10] UNHCR Expert Meeting Prato 2010, page 4, para.18. See also, UNHCR *Handbook on Protection of Stateless Persons*, para.56.

[11] UNHCR *Handbook on Protection of Stateless Persons*, paras.53-54.

[12] Carol A. Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7 *International Journal of Refugee Law* 232-259, at 233-234.

[13] UNHCR Expert Meeting Prato 2010, page 2, para.5, and UNHCR *Handbook on Protection of Stateless Persons*, paras. 125-128. See also Article 5, 1954 Convention ('Rights granted apart from this Convention'): 'Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to stateless persons apart from this Convention'.

about refugee law and human rights law and is less interested in issues of nationality laws and conflict of laws.

Following a brief introduction (section 1), the paper proceeds by exploring the meaning and substance of the right to nationality and the concept of arbitrary deprivation of nationality in international law, including UN Human Rights Council Resolutions, UNHCR guidelines and UN Secretary General positions (section 2). Sections 3 and 4 examine arbitrary deprivation of nationality in the jurisprudence of the courts as an indicator of existing State practice. More specifically, section 3 focuses on the regional systems for the protection of human rights, with a particular emphasis on reparation and remedies for victims of violations of arbitrary deprivation of nationality. Section 4 examines whether arbitrary deprivation of nationality, either on its own or when taken with other forms of harm, amounts to persecution for the purpose of Article 1A(2) in the case law of domestic courts across the world, and if so whether it is well-founded and on what grounds; it also analyses whether denial of nationality per se can amount to persecution. Section 5 provides a summary of key findings on the interpretation of Article 1A(2) in relation to stateless persons. Section 6 concludes on the interrelationship between human rights and refugee law, and suggests an appropriate and consistent approach to refugee status and statelessness based on elements of good practice.

At the outset, it is worth pointing out that no real difference exists in public international law between 'nationality' and 'citizenship', with the former traditionally only having salience in the international context.[14] As the International Court of Justice noted, in 1955, in the *Nottebohm* Case:

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.[15]

This study therefore uses the words 'nationality' and 'citizenship' interchangeably, to mean the legal bond between an individual and a State (as opposed to the ethnic origin of an

[14] Guy S. Goodwin-Gill, Lecture on 'International Migration Law', UN Audiovisual Library of International Law [available at http://untreaty.un.org/cod/avl/ls/Goodwin-Gill_IML.html]. See also, Matthew J. Gibney, 'Should Citizenship be Conditional? The Ethics of Denationalization', 75 *Journal of Politics* 2013, pp.646-658, at 647.
[15] *Nottebohm Case (Liechtenstein v. Guatemala)*, Second Phase, Judgment of 6 April 1955, p.23.

individual),[16] by which a State guarantees and protects certain rights to individuals, generally including, the right to leave and re-enter one's own country, the right to permanent residence, freedom of movement within the State, the right to vote, to be elected or nominated to public office, the right of access to public services, and the right to diplomatic protection.[17] Whether this legal bond remains regulated entirely by the 'genuine link' theory or through an open and flexible approach more in tune with today nationality's diverse functions falls outside the scope of this paper.[18] However, this paper essentially agrees that 'Nationality does not stand apart from citizenship',[19] and that nationality is and continues to be an evolving concept:

> Nationality has no positive, immutable meaning. On the contrary its meaning and import have changed with the changing character of states … It may acquire a new meaning in the future as the result of further changes in the character of human society, and developments in international organization. Nationality always connotes, however, membership of some kind in the society of a state or nation.[20]

2 THE FUNDAMENTAL RIGHT TO A NATIONALITY

Traditionally, considerations of nationality (and statelessness) fell within the reserved domain of States.[21] The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws provides:

> It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality.[22]

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[16] This is the meaning of 'nationality' in article 2(a) of the 1997 European Convention on Nationality (Council of Europe, ETS no 166), in international law more generally, and in the practice of some States; other States use 'citizenship' when referring to this legal bond. See Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *International Journal of Refugee Law* 156-182.

[17] UNHCR *Handbook on Protection of Stateless Persons*, paras.52-56.

[18] For an excellent discussion on this, see Robert D. Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality', 50 *Harvard International Law Journal* 2009, 1-60.

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

[20] Manley O. Hudson and Richard W. Flournoy Jr., 'Nationality – responsibility of states – territorial waters, drafts of conventions prepared in anticipation of the First Conference on the Codification of International Law, The Hague 1930', 23 *American Journal of International Law* (1929) supplement, p.21.

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

[22] Article 1, League of Nations Treaty Series vol.179, p.89.

Thus, the role of classic international law was limited to regulating conflict of laws, in other words to 'order management'.[23] In 1955, the International Court of Justice, in the *Nottebohm* case, held: '… it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality'.[24] It follows that as a matter of traditional doctrine, citizenship membership criteria, in the sense of identity, have been a matter of national self-definition or State discretion, with hardly any interference from international law.[25]

More recently, matters of nationality and nationality law as reserved domain have come to be challenged by human rights law.[26] A new rights conception of citizenship has begun to emerge based on the principle of equality in State practice on citizenship, and limitations on the denial and deprivation of citizenship. Regional institutions (particularly in Europe and the Americas) and States practice have been 'receptive to' this new rights conception of citizenship.[27]

2.1 The right to a nationality

The 'rights perspective' was made explicit in Article 15 UDHR. Described as 'a total innovation in the history of international law',[28] Article 15 provides:

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

This fundamental provision has been held to fulfill two functions: to provide people with 'a sense of identity', and to give them entitlements to an array of basic rights.[29] Article 15(1) protects the right to a nationality, namely, the right of everyone to acquire, change and retain a nationality. More specifically, the right to retain a nationality corresponds to the prohibition of arbitrary deprivation of nationality in Article 15(2).[30]

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[23] Peter J. Spiro, 'A New International Law of Citizenship', 105 *American Journal of International Law* 2011, pp.694-746, at 698. See also, Kay Hailbronner, 'Nationality in public international law and European law', in R. Bauböck, E. Ersbøll, K. Groenendijk & H. Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and trends in 15 European countries,* volume 1, Amsterdam University Press (2006), s.1.1.4.

[24] (1955) ICJ Reports, p.20.

[25] Peter J. Spiro, 'A New International Law of Citizenship', 105 *American Journal of International Law* 2011, pp.694-746, at p.694.

[26] 'Human rights are rights held simply by virtue of being a human person. They are part and parcel of the integrity and dignity of the human being'. Rosalyn Higgins, *Problems & Process – International Law and How We Use it*, Oxford: Clarendon Press, 1994, p.96.

[27] Peter J. Spiro, 'A New International Law of Citizenship', 105 *American Journal of International Law* 2011, at p.695.

[28] Ibid, at p.710, footnote 105, referring to the words of Nehemiah Robinson.

[29] Sheila Keetharuth, welcoming remarks to a meeting held in Banjul, The Gambia, 14 May 2010 on 'The African Charter and the Right to a Nationality' – available at http://www.afrimap.org/english/images/research_pdf/CRAI-Report-of-BJL-meeting-final.pdf [accessed 8 August 2013]

[30] UN Human Rights Council, 'Human rights and arbitrary deprivation of nationality: report of the Secretary-General', 14 December 2009, A/HRC/13/34, para.21 available at:

Taking into account Article 15 UDHR, the Human Rights Council has acknowledged the right to a nationality to be a fundamental human right.[31] The right includes the right to acquire, change or retain a nationality, and it is recognized in some form or another in a raft of international legal instruments. For instance, the ICCPR recognizes the right of 'every child' to acquire a nationality.[32] In addition, every instrument of international human rights law enshrines the obligation of states to respect the human rights of all individuals without distinction of any kind. States at times have restricted the enjoyment of human rights, but only subject to strict conditions set by the principles of non-discrimination, equal protection of the law, and due process.[33] States therefore have a duty to ensure that everyone enjoys the right to a nationality without discrimination, and that no one is denied or deprived of their nationality on the basis of discriminatory grounds. For instance, Article 9 CEDAW refers specifically to non-discrimination in relation to acquisition, change or retention of nationality, and to statelessness as well as conferral of nationality to children,[34] but as of today, at least twenty States have attached reservations to Article 9.[35]

In sum, the acknowledgement of a right to nationality in the human rights law framework is strong on paper but the nature and scope of these provisions is limited. Moreover, enforcement mechanisms at national level are often weak and yet these mechanisms are essential 'to making rights a reality'.[36] This is because:

> Rights are not abstract. They are, if one adopts a social contract approach, part of the relationship between a citizen and a state in which the citizen has ceded certain powers to the state in return for the state's commitment to use those powers for the common good.[37]

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http://www.refworld.org/docid/4b83a9cb2.html [accessed 30 April 2013]

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

[32] Article 24, ICCPR.

[33] These principles are protected in all international human rights law instrument, including Articles 1(3) and 55 UN Charter, Articles 1, 2, 7 and 10 UDHR, and Articles 2, 3, 14, 16, 24, 26 ICCPR. See also UN HCR Resolution 20/5 (2012) and HRC Report of the Secretary General 25/28 (2013).

[34] CEDAW, Article 9

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

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

See Alice Edwards, 'Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women', UNHCR Legal and Protection Policy Research Series, August 2009.

[35] See http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm

[36] Aryeh Neier, *The International Human Rights Movement – A History*, Princeton University Press 2012, at p.68.

[37] Ibid.

This reality is reflected in the rule of exhaustion of local remedies, which has long been accepted in customary international law.[38] It is thus critical to have in place effective judicial enforcement mechanisms at the domestic level and the willingness to use them.

2.2 Prohibition of arbitrary deprivation of nationality and statelessness

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

> The scope of "his own country" … is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons … In no case may a person be arbitrarily deprived of the right to enter his or her own country.[39]

The Human Rights Committee recently applied this Comment, which was made with regard to individuals deprived of any effective nationality, to individuals with a nationality on the ground that nationality was not as effective as other ties. In a departure from the majority views in *Stewart v Canada*,[40] the Human Rights Committee, in *Nystrom v Australia*, took the view that the deportation of a Swedish national by Australia to Sweden was arbitrary based on two elements. The first element was that his 'own country' within the meaning of article 12(4) ICCPR was Australia 'in the light of the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country and the lack of any other ties than nationality with Sweden'.[41] The second element

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[38] *Interhandel* Case, ICJ Rep. 1959, 27.

[39] UN Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), paras 20-21.

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

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

was 'that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable'.[42] It may be noted that the Committee's disregard for any link to nationality in favour of long term residence and social ties was criticized by a minority of Committee members because it risks extending 'a kind of *de facto* second nationality to vast numbers of resident non-nationals'.[43]

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

> the arbitrary deprivation of nationality, especially on discriminatory grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, is a violation of human rights and fundamental freedoms.[44]

It recalled 'that the prevention and reduction of statelessness are primarily the responsibility of States, in appropriate cooperation with the international community';[45] States' obligations to meet their protection responsibilities towards refugees, stateless people and internally displaced persons had already been acknowledged by the UN General Assembly a few years earlier.[46] The Human Rights Council made two further observations: 'persons arbitrarily deprived of nationality are protected by international human rights and refugee law, as well as by instruments on statelessness' and 'the arbitrary deprivation of nationality disproportionately affects persons belonging to minorities'.[47]

In 2009, the UN Secretary General report to the Human Rights Council held the prohibition of arbitrary deprivation of nationality to have become a principle of customary international law;[48] and so too of the obligation to avoid statelessness.[49] This would support the argument

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

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

[44] UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: resolution / adopted by the Human Rights Council,* 16 July 2012, A/HRC/RES/20/5, para.2 - available at: http://www.unhcr.org/refworld/docid/5016631b2.html [accessed 18 January 2013]. See also Human Rights Council resolution 10/13.

[45] UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: resolution / adopted by the Human Rights Council,* 16 July 2012, A/HRC/RES/20/5, para.3 - available at: http://www.unhcr.org/refworld/docid/5016631b2.html [accessed 18 January 2013].

[46] UNGA Resolutions on the Office of the UNHCR 61/137 of 25 January 2007, 66/133 of 12 March 2012, and 67/149 of 6 March 2013 – available at: http://www.refworld.org/pdfid/4c49a02c2.pdf [accessed 31 July 2013].

[47] Ibid.

[48] See UNSG report to the Human Rights Council, 'Human rights and arbitrary deprivation of nationality', A/HRC/13/34, 14 December 2009, referring to the following instruments: Universal Declaration of Human Rights, International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Nationality of Married Women, Convention on the Rights of Persons with Disabilities, and International Convention on the Protection of the Rights of All Migrant Workers

that these human rights violations 'share a common characteristic of severity' that is key to a finding of persecution under the 1951 Refugee Convention,[50] at least insofar as the violation of the right not to be rendered stateless or the right not to be arbitrary deprived of one's nationality acts as 'the precursor'[51] to persecution.

Arbitrary deprivation of nationality covers *all* forms of withdrawal (including 'loss'[52]) of nationality, except where voluntarily requested by the individual. Arbitrariness goes beyond unlawfulness to cover standards of justice or due process considerations, and non-discrimination.[53] Not all deprivation of nationality is arbitrary. In order *not* to be arbitrary, deprivation of nationality must be in conformity with domestic law and comply with specific procedural and substantive standards of international human rights law, in particular the principle of proportionality. Thus, the measure in question must serve a legitimate purpose that is consistent with the objectives of international human rights law. It must also be the least intrusive measure amongst those that might achieve the desired result, and it must be proportionate to the interest to be protected. Furthermore, the decision leading to deprivation of nationality must be issued in writing and be open to effective administrative or judicial review.[54] Accordingly, 'the notion of arbitrariness applies to all

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and Members of Their Families. For instance, the Convention of the Rights of Persons with Disabilities contains the following bar on arbitrary deprivation:

Article 18 - Liberty of movement and nationality

1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

a. Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;

b. Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement; […]

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

[49] The issue of nationality is explicitly regulated in the Convention on the Reduction of Statelessness, the Convention relating to the Status of Stateless Persons and the Convention relating to the Status of Refugees. See also, UNHCR, Submission in *Kuric*, para.5.3 referring to Council of Europe, *Explanatory Report of the European Convention on Nationality*, para.33.

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

[51] Foster, *International Refugee Law and Socio-Economic Rights*, at p.143.

[52] UN Human Rights Council, 'Human rights and arbitrary deprivation of nationality: report of the Secretary-General', 19 December 2013, A/HRC/25/28, para.3. Note that while human rights instruments, the UN Human Rights Council, the UNGA etc. use (or appear to use) deprivation to refer to all forms of withdrawal of nationality, automatic and non-automatic, the 1961 Convention on the Reduction of Statelessness uses deprivation to refer to withdrawal of nationality resulting from the decision of a state authority – while 'loss' refers only when occurring by operation of the law (see Articles 7-8).

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

[54] Article 17 of the International Law Commission's Draft Articles on Nationality of Natural Persons in relation to the Succession of States, with commentaries, *Yearbook of the International Law Commission*, 1999, vol. II (part 2), at p. 38. See also Article 8(4) of the Convention on the Reduction of Statelessness, and Articles 11 and 12 of the

State action, legislative, administrative and judicial' and is concerned with acts that are against the law but also, more broadly, with 'elements of inappropriateness, injustice and lack of predictability'.[55] 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.[56]

Arbitrary deprivation of nationality impacts on the enjoyment of human rights (political, civil, economic, social or cultural) in two important ways. The first of these ways is that arbitrary deprivation of nationality puts the affected persons in a situation of disadvantage by impeding the full enjoyment of their human rights. The second way is because these persons find themselves placed in a situation of increased vulnerability to human rights violations.[57]

The human rights that are particularly affected in cases of arbitrary deprivation of nationality are many; they include *political rights* resulting in the inability to participate politically, the right to *freedom of movement* resulting in the inability to travel and to choose a place of residence but also in the inability to access health and educational services, the right to *liberty* resulting in arbitrary arrest or detention, the right to an *effective remedy* resulting in the inability to challenge administrative or judicial decisions or acts of racial discrimination, and the right to *family life* due to limitations to the right to enter or reside in a territory.[58] Crucially, it also includes the *right to work* and the *right to education*. In this respect, it is generally accepted that a complete denial of the right to work amounts to persecution;[59] so does of the denial of a child's right to education.[60] However, lesser exclusion from these rights may not necessarily reach that threshold,[61] unless taken cumulatively with a number of other less serious violations (such as denial of the right to welfare benefits or to health). The same is true of the denial of other socio-economic rights (as a result of State action), which taken together could reach the threshold of persecution, for instance

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European Convention on Nationality (1997). For a useful summary of these conditions, see UNGA HRC 25/28 Report of the Secretary General (2013), paras.4-5; and UNHCR *Handbook on Protection of Stateless Persons*, paras.71-77.

[55] ILC Draft Articles, ibid, para.25.

[56] Ibid, para.26.

[57] UNSG report to the Human Rights Council, 'Human rights and arbitrary deprivation of nationality', A/HRC/19/43, 19 December 2011. UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: resolution / adopted by the Human Rights Council,* 16 July 2012, A/HRC/RES/20/5, para.6 - available at: http://www.unhcr.org/refworld/docid/5016631b2.html [accessed 18 January 2013].

[58] For a full discussion of these rights in the context of international human rights law instruments and treaty bodies, see UNSG report to the Human Rights Council, 'Human Rights and Arbitrary Deprivation of Nationality', A/HRC/19/43, 19 December 2011. See also, UN Human Rights Council, 'Human rights and arbitrary deprivation of nationality: resolution / adopted by the Human Rights Council', 16 July 2012, A/HRC/RES/20/5, para.7 - available at: http://www.unhcr.org/refworld/docid/5016631b2.html [accessed 18 January 2013].

[59] Foster, *International Refugee Law and Socio-Economic Rights*, at p.94.

[60] Ibid, 103.

[61] Ibid, 96-103

withdrawal of ration card and confiscation of property in combination with threat of violence; withdrawal of state benefits, in combination with inability to obtain employment or accommodation due to ethnic origin; denial of state benefits such as housing, food and clothing benefits and subsidies in a state-controlled economy; severe discrimination in 'most civil, social and economic rights' such that the applicant would suffer 'a life of destitution'.[62]

The key issue is the extent to which 'persecution is understood to be concerned fundamentally with serious violations of human dignity' in the jurisprudence of domestic courts.[63] Section 4 shows some engagement by courts with this issue when examining claims based on ethnic and racial discrimination of Faili Kurds, Roma, Rohingya of Myanmar, refugees from Bhutan, the Bidoons in the Gulf States, and Dominicans of Haitian descent in the Dominican Republic.

In sum, denationalization done arbitrarily, including on discriminatory grounds, is prohibited under international law, namely, international human rights law. In most cases, deprivation of nationality leading to statelessness will also be contrary to international norms of human rights law, stateless law and possibly also refugee law (as this paper will show). Only most exceptionally can a State lawfully deprive a national of its nationality even where such act would result in statelessness.

Article 7(1)(b), read together with article 7(3) of the 1997 European Convention on Nationality,[64] may be given as an example of a provision permitting loss of nationality even where it leads to statelessness, if nationality has been obtained by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant, under the theory of abuse of rights; these exceptions are to be interpreted restrictively.[65] In such cases, 'States are free either to revoke the nationality (loss) or to consider that the person never acquired their nationality (void ab initio)',[66] and practice varies in each Contracting State. The 1961 Statelessness Convention also allows deprivation of nationality obtained by misrepresentation or fraud even where it would lead to the person being stateless.[67] Both the 1961 Statelessness Convention and the 1997 European Convention on Nationality further provide for the possibility of a State lawfully depriving its national of nationality on grounds of 'conduct seriously prejudicial to the vital interests of the State Party'.[68] Explanatory Report to the 1997 European Convention on Nationality explains that

[62] Ibid, 105-106.
[63] Ibid, 103.
[64] Council of Europe, ETS no 166.
[65] E.g., Case C-135/08 *Rottmann v Bayern* [2010] ECR I- 1449.
[66] Explanatory Report, Article 7(1)(b), 1997 European Convention on Nationality.
[67] Article 8(2)(b), 1961 Statelessness Convention.
[68] Article 8(3)(a)ii, 1961 Statelessness Convention; Article 7(d), 1997 European Convention on Nationality. See also, UN HRC, 'Human rights and arbitrary deprivation of nationality: report of the Secretary-General', 19 December 2013, A/HRC/25/28, paras 12-13 and 18-19. Note that both the 1961 Statelessness Convention and the 1997 European Convention on Nationality also provide for lawful deprivation of nationality where a person

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

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

> conduct seriously prejudicial to the vital interests of the State can constitute a ground for deprivation of nationality only if it is an existing ground for deprivation in the internal law of the State concerned, which, at the time of signature, ratification or accession, the State specifies it will retain.[69]

International law further requires that in any cases of loss of nationality, persons arbitrarily deprived of their nationality should have the possibility to appeal and be guaranteed adequate procedural standards.[70] They should also have access to an effective remedy, including but not limited to restoration of nationality and reparation;[71] this should be made available in domestic law, and flexibility should apply when considering evidence of proof required for personal identification.

The Human Rights Council recently recalled 'that the prevention and reduction of statelessness are primarily the responsibility of States, in appropriate cooperation with the international community'.[72] It has therefore been argued that State's responsibility occurs on two levels.[73] First, State's responsibility occurs for the act of arbitrary deprivation of

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acquired nationality by naturalization and resided abroad for more than seven years without registering with the State authorities whilst abroad.

[69] On the UK's declaration under article 8(3), see Guy S. Goodwin-Gill, 'Mr Al-Jedda, Deprivation of Citizenship, and International Law', revised draft of a paper presented at a Seminar at Middlesex University on 14 February 2014, at 4 <http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf > accessed 25 June 2014. The points made in that paper were further developed in Goodwin-Gill (n 35); Goodwin-Gill, 'Deprivation of Citizenship resulting in Statelessness and its Implications in International Law – Further Comments', 6 April 2014 <http://www.ilpa.org.uk/resources.php/26116/ilpa-briefing-for-the-immigration-bill-house-of-lords-report-7-april-2014-deprivation-of-citizenship> accessed 24 April 2014; Goodwin-Gill, 'Deprivation of Citizenship resulting in Statelessness and its Implications in International Law - More Authority (is it were needed…)', 5 May 2014 <http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenship-MoreAuthority.pdf> accessed 20 June 2014.

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

[71] UN HRC resolutions 7/10 and 10/13.

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

[73] David C Baluarte, 'Denationalization as persecution: Using a human rights approach to refugee law to address the stateless legal limbo in the United States', paper to be presented at the *First Global Forum on Statelessness: New*

nationality that results in statelessness. Second, State's responsibility occurs for the continuing nature of this violation as a result of the stateless person becoming increasingly vulnerable in the society in which he or she lives. In sum, as Batchelor rightly puts it: 'If a State has legislation or practice which creates statelessness, it is that State which should resolve the problem'.[74]

2.3 Arbitrary deprivation of nationality, statelessness and refugees

The crucial point for this study is that lack of State protection is linked to the deprivation of nationality, and that the 'possession of an effective nationality and the ability to exercise the rights inherent to nationality' help to prevent forced displacement,[75] and in some cases refugeehood.

Historically, the problem of statelessness was said to be more comprehensive than the problem of refugees (following World War I and later the entry into force of the denationalization decree of the Nazi regime, 1941), with both categories found to face very similar predicament[76] and both receiving protection and assistance from international refugee organisations.[77] In addition, non-refugee stateless persons were thought to be quite few in numbers.[78] This has led some academics and drafters of the 1951 Refugee Convention to conclude that formal statelessness was a necessary criterion for refugee status; statelessness *per se* gave rise to refugee status.[79] However, this interpretation has been contested,[80] and a more cautious approach may be called for based on the fact that 'legal

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Directions in Statelessness Research and Policy, at 28, referring to *the Draft Articles of Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/10,GAOR, 56th Sess, Suppl No 10 (2001), article 14.

[74] Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *International Journal of Refugee Law*, at 169.

[75] UNGA Resolution A/RES/50/152 (21 December 1995), referred to in UNHCR and Asylum Aid, *Mapping Statelessness in the United Kingdom*, 2011, p.26.

[76] UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General*, 3 January 1950, E/AC.32/2, Article 2 - available at: http://www.refworld.org/docid/3ae68c280.html [accessed 16 January 2014]. See also, Interparliamentary Union and UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians No 22,* 2014, pp.9-10.

[77] Caroline Sawyer, 'Stateless in Europe: legal aspects of *de jure* and *de facto* statelessness in the European union', in C. Sawyer and B. K. Blitz (eds.) *Statelessness in the European Union – Displaced, Undocumented, Unwanted*, CUP 2011, 69-107, at 76.

[78] UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General*, 3 January 1950, E/AC.32/2, Article 2 - available at: http://www.refworld.org/docid/3ae68c280.html [accessed 16 January 2014]

[79] Andreas Zimmermmann and Claudia Mahler, 'Article 1 A, para.2', in A Zimmermmann (ed) *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol – A Commentary*, OUP 2011, pp.281-465, at para.675. See also UNHCR, 'Eligibility: A Guide for the Staff of the Office of the United Nations High Commissioner for Refugees', March 1962, p.81, para.78, cited in Hugh Massey, 'UNHCR and *De Facto* Statelessness', Legal and Protection Policy Research Series, April 2010, at p.10.

[80] Carol A. Batchelor, 'Statelessness and the Problem of Resolving Nationality Status', *International Journal of Refugee Law* 10 (1-2) 1998, pp.156-182, and Hugh Massey, 'UNHCR and *De Facto* Statelessness', Legal and Protection Policy Research Series, April 2010, at p.7.

categories', such as refugees, stateless persons and displaced persons, had not yet been clearly defined at the time.[81] What is certain is that the original idea of a Protocol relating to the Status of Stateless Persons, attached to the 1951 Refugee Convention, was meant to reflect the link between stateless persons and refugees, but practical considerations prevented the Conference of Plenipotentiaries to consider both issues of refugees and statelessness, with the later being postponed until 1954.

During the drafting of the 1951 Refugee Convention, States decided to leave the issue of statelessness (at the time considered to cover non-refugee stateless persons) to a later date, and they agreed to concentrate exclusively on refugees (who for the most part were also stateless but needn't be).[82] Since then, 'statelessness, the condition of being without citizenship, was distinguished from the condition of being a refugee'.[83] This is mainly because the causes of statelessness are very wide.[84] These have been identified by UNHCR as being of three kinds.[85] The first of these kinds refers to causes linked to the dissolution and separation of States and transfer of territory between States (e.g., the dissolution of the Soviet Union and Yugoslavia, and the post-colonial formation of States in Asia and Africa). The second of these kinds refers to technical causes through the operation of citizenship laws or administrative practices. The third and final cause of statelessness is discrimination and arbitrary deprivation of nationality (e.g., ethnic and racial discrimination of Faili Kurds, Roma, Rohingya of Myanmar, refugees from Bhutan, the Bidoons in the Gulf States, Dominicans of Haitian descent in the Dominican Republic etc.); in this case, discrimination is often both a cause of statelessness (e.g., the arbitrary deprivation of nationality) and an effect of statelessness on the person (e.g., the denial of human rights through discriminatory acts).[86]

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[81] This is quite evident from reading ECOSOC Resolution 248(IX) of 6 and 8 August 1949 which repeatedly refers to 'refugees and stateless persons' in the English text, but to 'réfugiés et des personnes déplacées' in the French text; in UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General*, 3 January 1950, E/AC.32/2, Article 2 - available at: http://www.refworld.org/docid/3ae68c280.html [accessed 16 January 2014].

[82] Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/SR.2 (1950), 7-8. See also, UN High Commissioner for Refugees (UNHCR) - Nehemiah Robinson, *Convention relating to the Status of Stateless Persons. Its History and Interpretation*, 1997, part two, article 1 - available at: http://www.refworld.org/docid/4785f03d2.html [accessed 17 January 2014]

[83] Guy S. Goodwin-Gill, 'Stateless Persons and Protection under the 1951 Convention or Refugees, Beware of Academic Error!' (December 1992), texte présenté au Colloque portant sur 'Les récents développements en droit de l'immigration', Barreau de Québec, 22 janvier 1993, at p.5.

[84] Office of the UNHCR, *The State of the World's Refugees 2012 – In search of solidarity*, OUP 2012, pp.97-106.

[85] Interparliamentary Union and UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians No 22*, 2014, pp. 30-42.

[86] For instance, UNHCR has referred to the 'erased persons' from Slovenia as being subjected to discrimination in two respects: the decision to erase them targeted a specific group of foreigners only, namely the citizens from the SFRY; many of the erased faced discriminatory treatment because of a lack of legal status. UNHCR Submission in *Kuric*, para.4.2.6.

Many of the stateless persons in the last category are refugees recognized by governments and/or UNHCR on a prima facie basis. This is the case, for instance, of stateless Rohingya people in Bangladesh,[87] stateless refugees from Bhutan in Nepal,[88] or Black Mauritanian in Senegal.[89] According to prima facie determination, individual members of the group are presumed refugees, and as such can benefit from the international protection and assistance provided to them by UNHCR.[90]

There can be some overlap between stateless persons and refugees but the two classifications are and should remain distinct.[91] Indeed, some refugees may also be stateless and some stateless persons may be refugees, but for the great majority of them, this is no longer the case. Indeed, most refugees today are not stateless, and most stateless persons are not refugees.[92] UNHCR's mandates on statelessness *and* refugees overlap because stateless *refugees* are protected under the provisions of the 1951 Refugee Convention.[93] Where a stateless person is simultaneously a refugee, UNHCR recommends that each claim should be assessed and both statuses should be explicitly recognized;[94] although in practice refugee status is likely to 'trump' the status of stateless person as it is more comprehensive.[95] Some academics are wary about labeling stateless refugees as stateless (as opposed simply to refugees) because 'citizenship [as a concept or 'container'] … is seldom completely empty

[87] Médecins Sans Frontières, 'Bangladesh: Violent Crackdown Fuels Humanitarian Crisis for Unrecognized Rohingya Refugees', 18 February 2010 – available at www.doctorswithoutborders.org/publications/article.cfm?id=4270 [last accessed 11.9.2013]

[88] UNHCR/WFP Joint Assessment Mission Report, 'Assistance to the Refugees from Bhutan in Nepal', March 2013 – this report is available at http://www.wfp.org/content/nepal-unhcr-wfp-jam-assistance-refugees-bhutan-nepal-march-2013 [last accessed 11.9.2013]

[89] IRIN humanitarian news and analysis, 'Mauritania-Senegal: New hope for long-suffering Mauritanian refugees' – available at http://www.irinnews.org/report/73371/mauritania-senegal-new-hope-for-long-suffering-mauritanian-refugees [last accessed 11.9.2013]

[90] Bonaventure Rutinwa, 'Prima facie status and refugee protection', UNHCR New Issues in Refugee Protection Working Paper no.69, October 2002; Matthew Albert, 'Prima facie determination of refugee status – An overview and its legal foundation', Refugee Studies Centre Working Paper Series No.55, January 2010.

[91] Interparliamentary Union and UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians No 22*, 2014, p.11.

[92] On the challenges of identifying and counting stateless persons, including mapping exercises, see Office of the UNHCR, *The State of the World's Refugees 2012 – In search of solidarity*, OUP 2012, pp.108-9, and Interparliamentary Union and UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians No 22*, 2014, p.5.

[93] UNGA Resolution 3274 (XXIX), 10 December 1974. See also UNHCR ExCom Conclusion No.78 (XVVI) 1995 and UNGA Resolution 50/152, 9 February 1996, and more generally Interparliamentary Union and UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians No 22*, 2014, pp.4445, and UNHCR *Handbook on Protection of Stateless Persons*, paras.4, 125-128. In addition, UNHCR Statute includes stateless persons in its definition of refugees, provided statelessness occurred for a reason 'other than personal convenience'. UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), Article 6A(ii) - available at: http://www.refworld.org/docid/3ae6b3628.html [accessed 21 June 2013].

[94] UNHCR *Handbook on Protection of Stateless Persons*, para.78, and Interparliamentary Union and UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians No 22*, 2014, p.27.

[95] This also means that if a stateless refugee were to cease to be a refugee, he or she may retain his or her status as a stateless person. The same is true in cases of complementary form of protection or subsidiary protection.

(statelessness) or completely full'.[96] A further compelling argument has been made that to identify refugees as stateless can weaken refugees' right to return to their country of origin in safety and in dignity, and undermine claims against their States of origin for the redress of their rights as citizens, for instance, hold accountable their state of origin for the crimes that caused their displacement or secure the restitution of lost property.[97]

This paper focuses on this overlap: when is a stateless person a refugee under Article 1A(2) of the Refugee Convention?

International law on the matter is surprisingly clear, even if at times States have sought to argue its obscurity. Article 1 of the 1951 Refugee Convention (with the omitted dateline in Article I of the 1967 Protocol) defines a refugee as any person who

> owing to well-founded of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

It is evident from this definition that a refugee can be a national (or not) of a country; nationality is irrelevant 'in its *legal* sense, to the quality of being a refugee'.[98] UNHCR's position confirms this interpretation.[99] The key points are that in the case of stateless refugees, the words 'the country of nationality' in Article 1A(2) Refugee Convention are replaced by 'the country of his former habitual residence' and the expression 'unwilling to avail himself of the protection of that country' is replaced by 'unwilling to return to it'.

The meaning of one's 'former habitual residence' is generally construed by reference 'to the length and character of the time a refugee spent in a country',[100] independently of whether residence was lawful.[101] In cases of more than one country of former habitual residence, the

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[96] Audrey Macklin, 'Who Is the Citizens' Other? Considering the Heft of Citizenship', 8 *Theoretical Inquiries in Law* 2007, pp.333-366, at 337.

[97] Megan Bradley, 'Rethinking refugeehood: statelessness, repatriation, and refugee agency', *Review of International Studies* 40(1) 2914, 101-123, at p.109.

[98] Guy S. Goodwin-Gill, 'Stateless Persons and Protection under the 1951 Convention or Refugees, Beware of Academic Error!' (December 1992), texte présenté au Colloque portant sur 'Les récents développements en droit de l'immigration', Barreau de Québec, 22 janvier 1993. On the meaning of the semicolon in Article 1A(2), see section 4.1 supra.

[99] UNHCR *Handbook*, paras.101-105.

[100] It is defined in the UNHCR Handbook, para.103, as 'the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned'. See, *Revenko v Secretary of State for the Home Department* [2001] QB 601, UK Court of Appeal, Pill LJ, at p.617; *YL (Nationality),* UKIAT 2003, para.17; United States Court of Appeal, 6th circuit, *El Assadi v Holder*, No.09-4193, 25 April 2011, p.2. See also for a full discussion of what 'country of former habitual residence' means in the academic literature: NZ RSAA Refugee Appeal No. 1/92 Re SA, 30 April 1992.

[101] German Federal Administrative Court, 26 February 2009, 10C 50.07.

Canadian Federal Court of Appeal applies the test of well-founded fear of persecution on Convention grounds in any country of former habitual residence coupled with the inability or unwillingness to return to any of the countries where he or she formerly habitually resided, so as to discount any possible safe heavens.[102] In contrast, the German Federal Administrative Court considers the last country of habitual residence alone as being relevant, especially if the applicants spent a considerable number of years (e.g., 10 years) in that last country.[103] Thus, for the German Federal Administrative Court, it is in principle sufficient to demonstrate a well-founded fear of persecution in relation to the last country of former habitual residence, and to be granted refugee status on that basis.[104] The benefit of the doubt principle should then be applied with regard to all other countries to avoid possible risks of indirect *refoulement*.

In sum, the key elements in any assessment of a claim to refugee status by a stateless person are no different from those applicable to claimants with a nationality, namely, a well-founded fear of persecution attributable to the person's country of former habitual residence for a reason listed in Article 1A(2), and whether or not they are able to or willing to return to it, in other words, whether protection is afforded there. How have the courts applied these elements to stateless persons?

This paper now turns to landmark judicial decisions in selected jurisdictions on whether arbitrary deprivation of nationality, either on its own or when taken with other forms of harm, amounts to persecution within the meaning of Article 1A(2) Refugee Convention, and if so on what grounds. Relevant cases were primarily located on Refworld.[105] The research was complemented with case law found on EDAL,[106] and the IARLJ database.[107]

3 ARBITRARY DEPRIVATION OF NATIONALITY IN THE JURISPRUDENCE OF INTERNATIONAL COURTS

International case law can be found in the regional systems for the protection of human rights. The Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child, the European Court of Human Rights, and the Court of Justice of the European Union have all issued important judgments, decisions or opinions on nationality-related issues. This case law focuses mainly on issues of reparation and remedies for victims of violations of arbitrary

[102] *Thabet v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 21, Canada: Federal Court of Appeal, 11 May 1998, available at: http://www.refworld.org/docid/47bda9972.html [accessed 4 June 2013]. See also in Australia, case no. 0908992 [2010] RRTA 389, 14 May 2010, at para.127. This position is also that held by James C. Hathaway in *The Law of Refugee Status*, Butterworths, 1991, at p.62.
[103] German Federal Administrative Court, 26 February 2009, 10C 50.07.
[104] For a detailed analysis of what is 'the country of former habitual residence' in the doctrine, see New Zealand, Refugee Status Appeal Authority, *Refugee Appeal No.1/92 Re SA*, decision of 30 April 1992.
[105] http://www.refworld.org
[106] http://www.asylumlawdatabase.eu
[107] https://www.iarlj.org/general/database

deprivation of nationality, and not specifically on refugee status.

3.1 The Inter-American Court of Human Rights

Of the three main regional instruments - the 1969 American Convention on Human Rights (ACHR), the 1981 African Charter on Human and Peoples' Rights (ACHPR), and the 1950 European Convention on Human Rights (ECHR) - the ACHR is alone in providing explicitly the right to a nationality (Article 20(1)). It also takes the leading step of seeking to combat statelessness by securing the right of children to acquire a nationality (Article 20(2)).[108]

Article 20 – Right to Nationality

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

The Inter-American Court of Human Rights has not so far considered cases relating to nationality in the context of a claim for refugee status.[109] However, it has dealt with a number of cases relating to arbitrary deprivation of nationality, in which it held the right to nationality, as recognized by international law, to be a right of the individual:

> Nationality is a fundamental human right enshrined in the American Convention … and is non-derogable in accordance with Article 27 of the Convention.[110]

The Court also considers that:

> it allows the individual to acquire and exercise rights and obligations inherent in membership in a political community. As such, nationality is a requirement for the exercise of specific rights.[111]

It further acknowledges that nationality has 'gradually evolved' from a State's attribute to 'a

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[108] It may be noted that, unlike Europe for instance, almost all countries in the Americas base their nationality legislation primarily on the jus soli principle. R. de Groot, 'The Acquisition and Loss of Nationality and the African Charter on Human and Peoples' Rights: Lessons from the European Experience', *Africa Legal Aid*, July-September 1996, 16-20, at 18.

[109] In the case *Family Pacheco Tineo v Bolivia* (judgment of 25 November 2013), the Inter-American Court of Human Rights considered for the first time due process in asylum and non-*refoulement* decisions, recognizing the right of asylum seekers to enjoy a fair asylum process and to be detained only following an individual case-by-case examination of their case.

[110] *Case of the Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005, para.136 - available at: http://www.refworld.org/docid/44e497d94.html [accessed 10 June 2013].

[111] *Case of the Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005, para.137 - available at: http://www.refworld.org/docid/44e497d94.html [accessed 10 June 2013].

conception of nationality which, in addition to being the competence of the State, is a human right'.[112] Thus, the powers of States to regulate matters of nationality are determined by their obligations under human rights law.

Regarding Article 20 (right to nationality) ACHR, more specifically, the Inter-American Court of Human Rights has held that it includes two elements:

> The right to a nationality provides the individual with a minimum measure of legal protection in international relations, through the link his nationality establishes between him and the State in question; and second, the protection therein accorded the individual against the arbitrary deprivation of his nationality, without which he would be deprived for all practical purposes of all his political rights as well as those civil rights that are tied to the nationality of the individual.[113]

Accordingly, in the case *Bronstein v Peru*, the Court found the act of acquiring Peruvian nationality to link both Mr Bronstein and his family 'to the political society, the culture, the way of life and the values of Peru'.[114] It also found the right to nationality to be a requirement for the exercise of his rights, such as in this case the right to freedom of thought and expression. The case involved a former Israeli national (Baruch Ivcher Bronstein) who renounced his Israeli nationality to take on Peruvian nationality; he was also a majority shareholder as well as director and president of Channel 2 of the Peruvian television network. Following his broadcast of reports critical of the Peruvian government concerning human rights violations and corruption, his Peruvian nationality was revoked in order to remove him from the editorial control of Channel 2. Soon after, all critical journalists were removed from Channel 2 also. The State of Peru sought to justify its act of deprivation of nationality under the cover of a routine review.

The Inter-American Court of Human Rights found the deprivation of nationality to constitute a violation of Article 20 of the ACHR (right to nationality) because the annulment of his nationality was not consensual and the procedure used to annul the nationality did not comply with provisions of domestic law, therefore it was arbitrary. The Court also found the act of deprivation of nationality to violate Article 8 (right to a fair trial) because this provision is not restricted to judicial remedies but applies also to a number of requirements that must be observed by the procedural bodies.[115] The Court found the deprivation of nationality to violate Article 13 (freedom of thought and expression) because by depriving

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[112] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, OC-4/84, Inter-American Court of Human Rights (IACrtHR), 19 January 1984, paras. 32 and 33 - available at: http://www.refworld.org/docid/44e492b74.html [accessed 10 June 2013]

[113] *Castillo Petruzzi et al. Case*, Inter-American Court of Human Rights (IACrtHR), 30 May 1999, para.100, available at: http://www.refworld.org/docid/44e494cb4.html [accessed 19 July 2013]. See also, *Constitution of Costa Rica*, OC-4/84, Inter-American Court of Human Rights (IACrtHR), 19 January 1984, para.34 - available at: http://www.refworld.org/docid/44e492b74.html [accessed 10 June 2013]

[114] *Bronstein v Peru*, Inter-American Court of Human Rights, 6 February 2001, para.93.

[115] *Bronstein v Peru*, para.102.

Mr Bronstein of his Peruvian nationality (and later removing critical journalists from Channel 2) the State of Peru had restricted freedom of expression by indirect methods. The Court further found a violation of Article 21 (right to private property, to include participation in share capital). Citing a judgment of the European Court of Human Rights, the Inter-American Court established that it 'should not restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced', namely, all the consequences of the act of deprivation of nationality.[116] Finally, the Court found the State of Peru to have failed in its general obligation to respect the rights and freedoms recognized in the ACHR and its duty to organize the public authorities in order to ensure to all persons subject to its jurisdiction enjoy the free and full exercise of human rights. Peru's international responsibility was therefore engaged under international human rights law.[117] As a result, Mr Bronstein's nationality was restored, and repairs and payment of compensation granted.

Another landmark case is *Yean and Bosico Children v Dominican Republic*,[118] in which the Inter-American Court of Human Rights found that the Dominican Republic had applied the laws relating to nationality and birth registration in a discriminatory manner, leaving the two girls of Haitian descent, stateless and therefore in a situation of extreme vulnerability. The Court also found the Dominican Republic to have violated their right to nationality, the right to juridical personality and to a name, and the right to equal protection, all in relation to the rights of the child.[119] More specifically, the Court held that by imposing certain requirements, not needed in the case of children under the age of 13 in order to obtain nationality, the State acted arbitrarily and in a way that conflicted with the primary interest of the child; such acts therefore constituted discriminatory treatment of the two girls (10 months old and 12 years old, respectively).[120] The Court further held that 'the vulnerability arising from statelessness affected the free development of their personalities, since it impeded access to their rights and to the special protection to which they are entitled'.[121] For the Court, the discriminatory treatment suffered by the two girls must be situated within the broader context of the vulnerable situation of the Haitian population and Dominicans of Haitian origin in the Dominican Republic, which has been going on for decades.[122] Hence,

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[116] *Bronstein v Peru,* para.124.

[117] Ibid, para.168.

[118] *Case of the Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005, para.137 - available at: http://www.refworld.org/docid/44e497d94.html [accessed 10 June 2013]

[119] To read on the background of this case, see Office of the UNHCR, *The State of the World's Refugees 2012 – In search of solidarity*, OUP 2012, pp.104-5.

[120] *Case of the Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005, para.166 - available at: http://www.refworld.org/docid/44e497d94.html [accessed 10 June 2013].

[121] *Yean and Bosico Children,* para.167.

[122] *Yean*, ibid, para.168. The situation does not appear to have improved since this decision was made, judging by the latest judgment 168-13 of the Dominican Constitutional Court denationalizing Dominican children of undocumented immigrants of Haitian origin.

the Court considered that the State of the Dominican Republic must adopt all necessary positive measures to facilitate access by the two victims to (late) registration procedures, in equal and non-discriminatory conditions, and to benefit from the full exercise and enjoyment of the right to Dominican nationality. Any requirement of proof of birth on Dominican territory should be reasonable and not constitute an obstacle to accessing the right to nationality.[123] Thus, it is not sufficient for the State to respect the rights in the ACHR, it must also adopt all appropriate measures to guarantee them. By denying the right to nationality (including a birth certificate) for discriminatory reasons, the State was found responsible for placing the two children in a 'situation of extreme vulnerability', with no protection from the State, no access to the benefits due to them, living in the constant fear of being expelled and separated from their families.[124] The State was also found responsible for consequentially violating the rights to juridical personality and to a name.[125] Under the rules relating to the international law on State responsibility, it was asked to pay compensation to the victims, to publish the pertinent part of the judgment, to organize a public act of apology that would serve as a guarantee of non-repetition, in addition of course to recognizing their nationality.[126]

Finally, in *Gelman v Uruguay*,[127] the Court considered the case of a child who had been kidnapped from her Argentinian parents and transferred to another family of Uruguayan citizenship resulting in the loss of her true identity. The Court recalled that a child is entitled to special protection under the ACHR as interpreted in harmony with provisions in the UN Convention on the Rights of the Child.[128] It held that the right to identity under Article 8 of the Convention on the Rights of the Child encompasses the right to nationality, to a name, and to family relationships,[129] hence children should be able to enforce these rights in a court of law and seek compensation from offending States.

In sum, the case law of the Inter-American Court of Human Rights indicates that 'nationality' no longer is simply a State's attribute; it is also now a human right. The approach of the Inter-American Court of Human Rights is to look at both the act of denial of nationality in relation to the right to nationality and the consequences of the denial of nationality in relation to other human rights set out in the American Convention on Human Rights. In assessing the consequences of the denial of nationality, the Court takes account of

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[123] *Yean*, ibid, para.171.
[124] *Yean*, ibid, para.173.
[125] *Yean*, ibid, para.187.
[126] Note a recent decision of the Constitutional Tribunal of the Dominican Republic, running contrary to the *Yean and Bosico Children* ruling by the Inter-American Court of Human Rights, in that it ruled that a 29-year old woman who was officially registered as a Dominican citizens at birth, did not in fact meet the criteria for the acquisition of the Dominican nationality, and 'requested the authorities to identify similar cases of Dominicans of Haitian descent formally registered as Dominicans as far back as 1929 who would not qualified as citizens under the Tribunal's criteria'. UNHCR Press Release 1 October 2013 available at http://www.unhcr.org/524c0c929.html [accessed 24 October 2013].
[127] *Gelman v Uruguay*, Inter-American Court of Human Rights (IACtHR), 24 February 2011.
[128] *Gelman*, para.121.
[129] *Gelman*, para.122.

the broader context of discrimination and vulnerability of the stateless person in a particular country, particularly if this has been going on for many years; in cases involving children it relies on the Convention on the Rights of the Child in order to give further content to the right to nationality. This is a welcome application of the principle of indivisibility of rights by the Court. According to this principle, no human right can be fully realized without the full realization of all other human rights. In other words, 'states cannot pick and choose among rights'.[130] For the Inter-American Court, the realization of each human right imposes a tri-partite obligation on states: to respect, protect and fulfill. A violation of any of these would entail states' international responsibility, and a duty of reparation ranging from recognition of nationality to the payment of compensation for the damage sustained, and even an act of apology.

3.2 The African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child

The 1981 African Charter on Human and Peoples' Rights (ACHPR) does not include an explicit provision on the right to a nationality. However, the African Commission on Human and Peoples' Rights has held the right to a nationality to be a key component of the African human rights system. It has ruled that Article 5 of the ACHPR, which states that 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status', includes the right to a nationality and protection against arbitrary deprivation of nationality.[131] The Commission has held that the due process protections included in the African Charter apply to everyone, including non-nationals.[132] The Commission has also ruled in several cases that mass expulsions on the basis of ethnicity, specifically prohibited by Article 12(5) of the ACHPR, 'constitute a special violation of human rights'.[133] In addition, Article 6 of the African Charter on the Rights and Welfare of the Child provides for the right of children to a name, to be registered immediately after birth and to acquire a nationality. It requires States:

> to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

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

[131] African Commission on Human and Peoples' Rights, *234: Resolution on the Right to Nationality*, 23 April 2013 available at: http://www.refworld.org/docid/51adbcd24.html [accessed 23 July 2013]

[132] Union Inter-Africaine des Droits de l'Homme, *Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola*, African Commission on Human and Peoples' Rights, Comm. No. 159/96 (1997), para.18 – available at: www1.umn.edu/humanrts/africa/comcases/159-96.html (last accessed 23 July 2013).

[133] Union Inter-Africaine des Droits de l'Homme, *Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola*, African Commission on Human and Peoples' Rights, Comm. No. 159/96 (1997), para.16 – available at: www1.umn.edu/humanrts/africa/comcases/159-96.html (last accessed 23 July 2013).

Article 2 of the ACHPR and Article 6 (g) and (h) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa establish the equal right of men and women to acquire their partner's nationality. Finally, persons arbitrarily deprived of nationality are protected by the Convention Governing the Specific Aspects of Refugee Problems in Africa, in addition to the two key international treaties: the 1954 Convention relating to the Status of Stateless Persons and the 1951 Refugee Convention.

One of the leading cases on nationality in Africa is *Malawi African Association and Others v. Mauritania* (2000).[134] The case deals with the circumstances surrounding the deprivation of nationality of Black Mauritanians by the Mauritanian government and it is authority for States' obligation to provide reparation for the harm caused by the deprivation of citizenship. Following years of systematic violations of human rights, ethnic discrimination, arbitrary deprivation of nationality and forced expulsion to Senegal and Mali, the African Commission on Human and Peoples' Rights received a series of communications brought on behalf of those who were expelled.
The Commission held:

> 126. Evicting Black Mauritanians from their houses and depriving them of their Mauritanian citizenship constitutes a violation of article 12,1.[135] The representative of the Mauritanian government described the efforts made to ensure the security of all those who returned to Mauritania after having been expelled. He claimed that all those who so desired could cross the border, or present themselves to the Mauritanian Embassy in Dakar and obtain authorisation to return to their village of birth. He affirmed that his government had established a department responsible for their resettlement. The Commission adopts the view that while these efforts are laudable, they do not annul the violation committed by the State.

The Commission further held:

> 128. The confiscation and looting of the property of black Mauritanians and the expropriation or destruction of their land and houses before forcing them to go abroad constitute a violation of the right to property as guaranteed in article 14.[136]

In its 2000 findings, the Commission recommended that the government of Mauritania:

> take diligent measures to replace the national identity documents of those Mauritanian citizens, which were taken from them at the time of their expulsion and ensure their

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[134] *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000).
[135] Note that Article 12(1) provides: 'Every individual shall have the right to freedom of movement and residence within the borders of the State provided he abides by the law'.
[136] Article 14 of the Charter reads as follows:
The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

return without delay to Mauritania as well as the restitution of the belongings looted from them at the time of the said expulsion; and to take the necessary steps for the reparation of the deprivations of the victims of the above-cited events; take appropriate measures to ensure payment of a compensatory benefit to the widows and beneficiaries of the victims of the above-cited violations; reinstate the rights due to the unduly dismissed and/or forcibly retired workers, with all the legal consequences appertaining thereto.

Following years of non-compliance with these findings, a change of government led to a tripartite agreement between Mauritania, Senegal and UNHCR for the repatriation of the refugees being signed and implemented (starting in January 2008). The voluntary repatriation of 24,000 Mauritanian refugees in Senegal was completed in March 2012. However, many of the returnees still face severe 'difficulties in obtaining identification papers and proof of their Mauritanian nationality, with consequences for the reclamation of their property and their access to public services in Mauritania'.[137] Furthermore, as of today, there are still more than 12,000 Mauritanian refugees registered in Mali, of whom some 8,000 have expressed the wish to return.[138]

Another landmark decision is *Nubian Children v Kenya* (2011), delivered by the African Committee of Experts on the Rights and Welfare of the Child.[139] The case concerned the situation of Kenyan Nubians who, despite having been brought to Kenya more than one hundred years ago to serve in the British colonial army, still had an uncertain citizenship status in Kenya preventing them from enjoying many of their rights. Most affected were Nubian children, who for many were not registered as Kenyan citizens at birth due to discriminatory practices, and who as a result lived in poverty with little access to education, health care, and public services. The African Committee found that Kenya's failure to recognize these children as Kenyan citizens violated key provisions of the African Charter on the Rights and Welfare of the Child, (African Children Charter), particularly Articles 3 (non-discrimination) and 6 (right to a name and nationality, and protection against statelessness).

In relation to Article 6, the African Committee explained that in order for Kenya to make sure that all children are registered immediately after birth, not only did it have to pass laws and policies, it also had to address all practical limitations and obstacles to birth registration,

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[137] Summary of remarks on 'The African Charter and the Right to a Nationality', Report of a meeting held in Banjul, The Gambia, 14 May 2010.

[138] 2013 UNHCR country operation profile – Mauritania, available at http://www.unhcr.org/pages/49e486026.html (last accessed on 26 April 2013)

[139] African Committee of Experts on the Rights and Welfare of the Child, *The Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian Descent in Kenya) v Kenya*, Decision No.002/Com/002/2009. The Committee was created in 1999; one of its functions is to interpret the African Charter on the Rights and Welfare of the Child. To read more on this, see Gina Bekker, 'The African Committee of Experts on the Rights and Welfare of the Child', in Manisuli Ssenyonjo (ed.), *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples' Rights*, Martinus Nijhoff Publishers, 2011, pp.249-263.

namely to implement the principle of non-discrimination.[140] For the Committee, 'the practice of making children wait until they turn 18 years of age to apply to acquire a nationality cannot be seen as an effort on the part of the State Party to comply with its children's rights obligations'.[141] It considers 'being stateless as a child is generally antithesis to the best interests of children' in that it prevents children from developing through realizing their essential socio-economic rights (e.g., access to health and education).[142]

In relation to Article 3, the African Committee held this provision to be no exception to the general rule that 'racial and ethnic discrimination are prohibited as binding *jus cogens* norm of international law'.[143] Recalling the findings of the Inter-American Court of Human Rights in *Yean and Bosico v Dominican Republic*,[144] and the conclusions of the Kenya National Commission on Human Rights,[145] it found the practice that led children to be stateless for such a long period of time, and the resulting discriminatory treatment of Kenya in relation to children of Nubian descent, to be disproportionate and unnecessary to the protection of the State interest.[146]

Having found a violation of both Articles 6 and 3 of the African Children Charter, the African Committee went on to consider the consequential violations; just like at the Inter-American Court of Human Rights, this is a welcome application of the principle of indivisibility of rights by the Committee. For the Committee, 'All Charter rights generate obligations to respect, protect, promote and fulfill. This is no less so in respect of the rights implicated when nationality and identity rights are violated'.[147] The discriminatory treatment of the children affected by Kenya's practice 'has had long standing and far reaching effects on the enjoyment of other Charter rights'.[148] As 'the African Commission on Human and Peoples' rights has confirmed, in the African context, collective rights and economic and social rights are essential elements of human rights in Africa'.[149] In the case *Nubian Children v Kenya*, these were found to be the right to health[150] and the right to

[140] *Nubian Children v Kenya*, para.40.
[141] *Nubian Children v Kenya*, para.42.
[142] *Nubian Children v Kenya*, para.46.
[143] *Nubian Children v Kenya*, para.56.
[144] 'the refusal and placing of unfair obstacles by local officials to deny birth certificate and recognition of the nationality of Dominicans of Haitian descent as part of a deliberate policy which effectively made the children stateless constituted racial discrimination'. *Nubian Children v Kenya*, para.56 - referring to *Yean and Bosico v. Dominican Republic*, I-ACtHR Judgment of 8 September 2005.
[145] 'the process of vetting... Nubians... is discriminatory and violates the principle of equal treatment. Such a practice has no place in a democratic and pluralistic society'. *Nubian Children v Kenya*, para.56 - referring to KNCHR, 'An Identity Crisis? Study on the issuance of national identity cards in Kenya' (2007), iv.
[146] *Nubian Children v Kenya*, para.57.
[147] *Nubian Children v Kenya*, para.58.
[148] *Nubian Children v Kenya*, para.58.
[149] *Nubian Children v Kenya*, para.58 - referring to *SERAC v Federal Republic of Nigeria*, Communication No.155/96, para.68.
[150] Guaranteed under Article 14, African Children Charter, which is equivalent to Article 16, African Charter on Human and Peoples' Rights, and interpreted widely to include the right to health care and the right to the underlying conditions of health (e.g., electricity, drinking water and medicines), para.59 of Nubians judgment,

education.[151] Both should be guaranteed to Nubian children on equal terms with children in comparable communities.

Finally, the African Committee explained that when assessing the consequences of the non-recognition of the nationality of children of Nubian descent, the widespread and systematic denial of the right of nationality over several generations, calls for actions that address the long-term effects of this past practice.[152]

In sum, case law in Africa resonates with that in the Americas. African bodies entrusted with ensuring State compliance with human rights have emphasized that each human right (including nationality, identity, and non-discrimination) creates obligations on the part of the State to respect, protect and fulfill. Hence, the consequential violations of the rights to nationality and/or non-discrimination are very much part of the case law analysis. This is a worthy application of the principle of indivisibility of rights according to which discriminatory treatment and/or denial of nationality impacts on the enjoyment of other human rights, often with harmful effects. Thus, the African Commission on Human and Peoples' Rights has held States accountable to provide reparation for the harm caused by the arbitrary deprivation of nationality in the context of systematic violations of human rights, ethnic discrimination and forced expulsion. It considers that whilst the recognition of the right to return in safety must be welcome, it is not enough to annul the violation committed by the State. Diligent measures should include amongst others, the issuance of new ID documents and the restitution of the belongings looted from them after they were expelled, compensation for the damage sustained, and the reinstatement of the rights to work. The African Committee of Experts on the Rights and Welfare of the Child too assesses both the act of denial of nationality and the consequences of the act. Thus, it found the denial of citizenship of Nubian children to violate the right to nationality, the right to a name, protection against non-discrimination and protection against statelessness. It then considered the consequences of the non-recognition of the nationality of children of Nubian descent, by reference to the widespread and systematic denial right of nationality over several generations, and held that the principle of non-discrimination requires the children affected to be recognized their essential socio-economic rights (i.e., health and education), on equal terms with children in comparable communities.

3.3 The European Court of Human Rights

The 1950 European Convention on Human Rights (ECHR), like the African Charter on Human Rights, does not include an explicit provision on nationality. However, the Council

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referring to two judgments of the African Commission on Article 16 of the African Charter on Human and Peoples' Rights: *Purohit and Moore v The Gambia*, Communication 241/2001; and *Free Legal Assistance Group and Others v Zaire*, Communications No 25/89,47/90, 56/91, 100/93.

[151] Article 13, African Children Charter, also interpreted widely to include access to free (and compulsory) basic education in schools, with qualified teachers and necessary equipment. Paras.63-4, referring to the judgment of the African Commission in *Free Legal Assistance Group and Others v Zaire*, Communications No 25/89,47/90, 56/91, 100/93.

[152] *Nubian Children v Kenya*, para.68.

of Europe has since adopted the European Convention on Nationality (1997), which guarantees such a right. Article 4 provides the following principles:

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

The European Convention on Nationality provides further specific rules on the acquisition of nationality by children at birth in accordance with the principles of jus sanguinis and jus soli (Article 6). However, the application of this Convention is limited by the absence of any form of independent reviewing and enforcement mechanism. In addition, the Council of Europe has adopted the Convention on the Avoidance of Statelessness in relation to State Succession (2006), as well as an array of Recommendations from the Parliamentary Assembly (PA) and the Council of Ministers (CM) on nationality matters, including PA Recommendation 696 (1973) on certain aspects of the acquisition of nationality and PA Recommendation 194 (1959) on the nationality of children of stateless persons, CM Recommendation (83) 1 on stateless nomads and nomads of undetermined nationality, CM Recommendation (84) 21 on the acquisition by refugees of the nationality of the host country, CM Recommendation (99) 18 on the avoidance and reduction of statelessness, and CM Recommendation (2009) 13 on the nationality of children.

Key to an effective protection of stateless persons against forced removal and/or the conditions of removals from members of the Council of Europe, are binding judgments of the European Court of Human Rights (Strasbourg) in its interpretation of the ECHR. In 1999, the European Court of Human Rights held, in principle, that 'an arbitrary denial of a citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual'.[153] A few years later, violation of Article 8 was found on this ground in a number of cases.[154] For example, in *Genovese v Malta*, the Court recognized nationality as an inherent part of a person's social identity, protected as such as an element of private life.[155] In *Andrejeva v Latvia*, a case involving a stateless person who was permanently resident non-citizen under Latvian law and denied pension entitlements equal to those of citizens, the European Court of Human Rights found this treatment to be discriminatory (violation of Article 14) in conjunction with the applicant's property rights (Article 1, Protocol 1).[156]

[153] *Karassev and Family v Finland,* application no. 31314/96, decision of 12 January 1999, at p.10 (inadmissible).
[154] See, *Sisojeva and Others v Latvia*, application no. 60654/00, judgment of 16 June 2005, and *Kaftailova c Lettonie*, application no. 59643/00, judgment of 22 June 2006 (State authorities have an obligation under Article 8 of the Convention to regularize the stay of aliens but not to give them a choice of legal status or residence permit).
[155] *Genovese v Malta*, Application No.53124/09, European Court of Human Rights, 11 October 2011.
[156] *Andrejeva v Latvia*, Application No.55707/00, European Court of Human Rights, 18 February 2009.

In *Amie and Others v Bulgaria*,[157] the Strasbourg Court considered an application submitted by a family of refugees (four of whom were stateless; one of whom had acquired Bulgarian nationality at birth) against a deportation order to Lebanon on ground of national security. When considering whether the first applicant's detention, with a view to deportation, had been 'lawful' pursuant to Article 5(1) ECHR, the Court made the following statement with regard to the right to return and the lack of travel documents:

> 77. It appears that the only steps taken by the authorities during that time were to write four times to the Lebanese Embassy in Sofia, asking it to issue a travel document for the applicant. It is true that the Bulgarian authorities could not compel the issuing of such a document. However, there is no indication that they pursued the matter vigorously or endeavoured entering into negotiations with the Lebanese authorities with a view to expediting its delivery […]. Moreover, the Government have not provided evidence of efforts being made to secure the first applicant's admission to a third country. Although the authorities apparently asked him to specify such a country, there is no indication that they took any steps to themselves explore that option. The Court is aware that, as noted by the United Nations High Commissioner for Refugees, the enforcement of expulsion measures against refugees – the Court would add, especially ones who are stateless – may involve considerable difficulty and even prove impossible because there is no readily available country to which they may be removed. However, if the authorities are – as they surely must have been in the present case – aware of those difficulties, they should consider whether removal is a realistic prospect, and accordingly whether detention with a view to removal is from the outset, or continues to be, justified.

It follows that the 47 Contracting Parties to the ECHR have a positive obligation to secure an applicant's admission and entry into a third country, prior to deportation. This is even more so where the applicant is stateless. In such cases, the deporting State must do all they can to ensure the issuance and delivery of a travel document to the applicant by the former country of residence or country of birth. One can infer from this judgment that should removal not be possible practically (because of lack of travel documents), the deporting State should lawfully admit the applicant into its territory,[158] and facilitate naturalization.[159] This position may be contrasted with that of US courts. Thus, the US Supreme Court does not normally require a target country's permission before it is designated as a country for removal.[160]

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[157] *Amie and Others v Bulgaria*, Application no. 58149/08, European Court of Human Rights, judgment of 12 February 2013, 4th Section.

[158] This case builds on *Amuur v. France*, Application No. 19776/92, judgment of 25 June 1996, and *Saadi v. UK*, Application No.13229/03, judgment of the Grand Chamber of 29 January 2008. In an EU context, see also Article 15 of the Directive 2008/115/EC of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals, limiting the maximum period of detention for removal purposes to six-months. Case C-357/09, *Saïd Shamilovich Kadzoev v. Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti*, ECJ, 30 November 2009.

[159] As recommended by the UNHCR, *Handbook on Protection of Stateless Persons*, para.168.

[160] *Jama v. Immigration & Customs Enforcement*, 543 U.S. (2005) 335. According to US law, aliens ordered to be removed on criminal grounds (including stateless persons) should be removed to the country of their choice, or

However, this does not mean that removal is practical, and cases where stateless persons were put on a plane to then be denied entry in the target country and find themselves flown back to the US or stranded in a third country, have been reported.[161] Furthermore, persons (including stateless persons) ordered to be removed from the US (based on criminal convictions) can be detained for a period of up to six months, or indeed even longer, followed by supervised release, if there is no country to remove them to.[162]

The European Court of Human Rights tackled the issue of effective and adequate remedies in the case of *Kuric and Others v Slovenia*.[163] The case involved eight applicants from Slovenia (two of whom were stateless) deprived of their permanent residency status in 1992 (the 'erased'). The erasure, which affected not only the applicants but thousands of other persons as well, was found to be unlawful and unconstitutional by the Slovenian Constitutional Court in 1999.[164] Governmental reforms followed, aiming at regularizing the legal status of the erased living in Slovenia or abroad, through retroactive permanent residence permit being granted. UNHCR found the new process to be deficient in several aspects.[165]

The case deals with a number of important issues, including the impact of the erasure (and for some, statelessness) in terms of enjoyment of other rights than permanent residence status.

Firstly, the Court considered the applicants to be 'victims' under Article 34 ECHR despite the fact that they had been issued permanent residence permits. It thus reversed the finding of the Chamber that issuance of the retroactive residence permits constituted an adequate and sufficient remedy for the applicants. The Court justified departure from its previous case law by relying on all the circumstances of the case, namely, the seriousness and the widespread human-right concern of the 'erasure', and the fact that none of the 'erased' had been awarded compensation for the damage sustained.[166]

Secondly, the Court found a violation of Article 8 ECHR on the ground that applicants had been arbitrarily deprived of the possibility of preserving their legal status as permanent residents in Slovenia. In a rare decision, it found the interference (the legislative measure)

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to the country of which they are citizens, or to the country with which they have a lesser connection, or to any other country whose government will accept them (*Jama v. Immigration & Customs Enforcement*, 543 U.S. (2005) 335, at 341).

[161] *Jama v. Immigration & Customs Enforcement*, 543 U.S. (2005) 335 is one such case. See also, the story of Igor Skrijevski and Galina Skrijevskaia , blog of 23 July 2012 available at http://www.statelessness.eu/blog/stateless-netherlands-stuck-paradise [last accessed on 21 March 2014]

[162] *Zadvydas v. Davis*, 533 U.S. (2001) 678; and *Clark v. Martinez*, 543 U.S. (2005) 371.

[163] Application no. 26828/06, Grand Chamber, judgment of 26 June 2012.

[164] Decisions No U-I-284/94 of 4 Feb 1999 and No U-I-246/02-28 of 3 April 2003.

[165] UNHCR, Submission in *Kuric and Others v Slovenia*, pp.1-10. UNHCR found the procedure to be excessively complex; the requirement of proof to be unreasonable since these were *illegally* deprived of their legal status; the erased bear the entire burden of proof; the required documents might be difficult to produce since many of the erased were denied core basic rights (to work or to receive health insurance); fee of around 75 euros; if the erased is abroad, difficulty in obtaining entry visas for the sake of following up their application.

[166] *Kuric and Others v Slovenia*, para.267.

not to be 'in accordance with the law' in that it lacked the necessary standards of foreseeability and accessibility.[167] In any ordinary case, this lack of sufficient legal basis would have suffice for a measure to be found to violate Article 8, however, 'given the widespread repercussions of the "erasure" ', the Court chose to examine also whether the measure pursued a legitimate aim and was proportionate to it. It found the absence of regularization of the residence status of former SFRY citizens and the prolonged impossibility of obtaining valid residence permits not to be 'necessary in a democratic society' in order to achieve the legitimate aim of the protection of Slovenia's national security.[168]

Thirdly, the Court found the government of Slovenia to have failed to establish adequate and effective remedies available to the applicants under Article 13 ECHR in order to redress violation of Article 8 ECHR (ie, individual constitutional appeals were denied to them).[169]

Finally, considering the importance of the discrimination issue in the case, the Court also discussed Article 14 ECHR. It noted that, whilst the Aliens Act regulated the status of citizens of states other than the former SFRY ('real' aliens), it failed to do the same for citizens of other SFRY republics who were residing in Slovenia, thereby creating a 'legal vacuum' that resulted in the erasure of this latter group and their unlawful stay in Slovenia. [170] The Court found this distinction to lack any objective and reasonable justification; these requirements must be interpreted as strictly as possible when the difference in treatment is based on race, colour or ethnic origin.[171] For the Court, 'a failure to apply for citizenship cannot be considered a reasonable ground for depriving a group of aliens of their residence permits'.[172]

Thus, arbitrary deprivation of legal status or citizenship was found to breach Article 8 ECHR because of the impact of such denial on the private life and/or family life of an individual. In addition, arbitrary deprivation was found to be discriminatory and, therefore, in breach of Article 14 because persons in relevantly similar situations were being treated differently, without an objective and reasonable justification.[173]

In sum, the European Court of Human Rights treats arbitrary deprivation of nationality as a very serious violation of human rights that requires States parties to the ECHR to take positive and non-discriminatory action; the right to a nationality is an essential and practical element of one's legal identity. In particular, the Court requires States to ensure (actively) that persons deprived of nationality are granted the necessary documents allowing them to

[167] Ibid, para.346.
[168] Ibid, paras.359-361.
[169] Ibid, para.371.
[170] Ibid, para.390.
[171] Ibid, para.386.
[172] Ibid, para.393. See also para.357.
[173] Pursuant to Article 46 ECHR, the European Court of Human Rights ordered that the 'Government should, within one year, set up an *ad hoc* domestic compensation scheme', *Kuric*, para.415.

re-enter their country, before deporting them, and if this cannot be guaranteed, to suspend deportation and therefore detention with a view to deportation, and to regularize their stay. The Court also requires States to award effective and adequate remedies; these cannot be limited to the issuance of retroactive residence permits but must also include full compensation for the harm caused by the arbitrary deprivation of nationality. For the Court, a failure to apply for citizenship is not a reasonable ground for depriving a group of aliens of their residence permits. Such discriminatory treatment has been found to violate the right to private life and/or family life as well as property rights.

3.4 The Court of Justice of the European Union

Article 67(2) of the Treaty on the Functioning of the EU (TFEU) in conjunction with Article 352 TFEU provide the legal basis for EU competence regarding stateless persons. While some secondary legislation assimilates stateless persons with third-country nationals (e.g., qualification for international protection directive 2004/83/EC and 2011/95/EU (recast), or long-term residence directive 2003/109/EC), others treat them on an equal footing with EU citizens (e.g., regulation 883/2004 regarding social security benefits).[174]

According to the Court of Justice of the EU (CJEU), it is the duty of the Member States to lay down the conditions for the acquisition and loss of nationality, with due regard to EU law.[175] The CJEU describes citizenship of the Union as the fundamental status of nationals of the Member States.[176] In the case *Rottmann v Bayern*, Dr Rottmann, an Austrian national by birth, had obtained German nationality by naturalization. This was then withdrawn because it had been obtained fraudulently, through deception. According to Austrian law, he lost his Austrian nationality upon acquiring German nationality, without being entitled to recover it automatically should his German naturalization be withdrawn. He was therefore made stateless. The CJEU found the German decision to be consistent with EU law and human rights law more generally, including Article 8(2) of the Convention on the Reduction of Statelessness and Article 7(1) and (3) of the European Convention on Nationality according to which a person may be deprived of the nationality of a Contracting State if he or she has acquired that nationality by means of misrepresentation or act of fraud. The CJEU further found this to be in keeping with 'the general principle of international law that no one is arbitrarily to be deprived of his nationality' (i.e., Article 15(2) UDHR, and Article 4(c) of the European Convention on Nationality). For the CJEU, 'When a State deprives a person of his nationality because of his acts of deception, legally established, that deprivation cannot be considered to be an arbitrary act',[177] even if he thus becomes stateless.[178] However, any such

[174] See, European Network on Statelessness, 'Submission to the European Commission Consultation on the future of Home Affairs policies: An open and safe Europe – what next?', January 2014.
[175] Case C-369/90 *Micheletti and Others* [1992] ECR I-4239, para.10; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, para.37; Case C-135/08 *Rottmann v Bayern* [2010] ECR I-1449, para.39.
[176] Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para.31; Case C-413/99 *Baumbast* and R [2002] ECR I-7091, para.82; *Rottmann*, para.43.
[177] *Rottmann*, para.53.
[178] Ibid, para.52.

decision must be guided by the general principles of proportionality and the avoidance of arbitrary decision-making in the light of EU law and national law,[179] in particular, it must assess 'the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union'.[180] A national court may therefore decide, prior to ordering a decision withdrawing naturalization to take effect, to afford the person concerned a reasonable period of time in order to try to recover the nationality of his Member State of origin.[181] Thus, the CJEU ruling leaves no doubt that EU Member States' nationality policy is not beyond the scrutiny of EU institutions.

Finally, on the issue of persecution, it took some time for the CJEU to deal with questions of interpretation relating to Article 1A(2) of the Refugee Convention (as incorporated in the EU Qualification Directive) but, it recently gave guidance on the concept of 'persecution' in the contexts of a religious persecution[182] and of a particular social group and gay concealment.[183] According to Article 9(1) EU Qualification Directive, 'acts of persecution' within the meaning of Article 1A(2) of the Refugee Convention must:

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

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[179] Ibid, para.55.

[180] Ibid, para.56. In particular, the court will assess whether withdrawal of naturalization or loss of nationality is justified in relation to the gravity of the offence, the lapse of time between the naturalization decision and the withdrawal, and the possibility (or not) of recovering the original nationality.

[181] Ibid, para.58.

[182] Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z*, judgment of 5 September 2012. The Court found that not all infringements of freedom of religion constitute an act of persecution, but:

- 'there may be an act of persecution as a result of interference with the external manifestation of religious freedom', and
- for the purpose of determining whether interferences with freedom of religion constitute an act of persecution, 'the competent authorities must ascertain, in the light of the personal circumstances of the person concerned, whether that person, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted of subject to inhuman or degrading treatment or punishment. It is not reasonable to expect people to refrain from religious practices that may expose him/her to a real risk of persecution (para.81 of the judgment).

The CJEU also rejected the distinction between core and non-core areas of the right to religious freedom (paras.62 and 63 of the judgment).

[183] Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z*, judgment of 7 November 2013. The Court found:

- 'the existence of criminal laws … which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group';
- the criminalisation of homosexual acts per se does not constitute an act of persecution, unless the sanction or punishment of such acts is disproportionate or discriminatory'; and
- applicants for asylum cannot reasonably be expected to conceal this homosexuality in their country of origin or to exercise reserve in the expression of their sexual orientation (para.79 of the judgment).

In addition, Article 9(2) Qualification Directive lists as acts of persecution:
(a) acts of physical or mental violence …;
(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
(c) prosecution or punishment which is disproportionate or discriminatory;
(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
…

It follows that persons specifically targeted by laws or practices of denationalization could be found to fear discriminatory treatment amounting to persecution *with or without* other violations of human rights in light of the formulation of the Article. 'Arbitrary deprivation of nationality' is not currently listed as an act of persecution in Article 9(2) of the EU Qualification Directive; a desirable option would be to have such acts explicitly included in the definition as a matter of policy.[184]

In sum, the CJEU has not yet dealt with a claim for refugee status based on arbitrary deprivation of nationality. Should this ever happen, there would be room for recognizing arbitrary deprivation of nationality to constitute persecution for a Convention reason, based on the wording of Article 9 of the EU Qualification Directive and the recent guidance given on the interpretation of the Article by the Court.

4 ARBITRARY DEPRIVATION OF NATIONALITY IN THE JURISPRUDENCE OF DOMESTIC COURTS

By far the most developed case law on statelessness and refugee status, of the examined jurisprudence, exists in the UK. Landmark cases can also be found in the United States, Canada, Australia, and New Zealand. Further isolated cases were found in Ireland, Germany, Spain, and Belgium. An in-depth analysis of courts' decisions in claims to refugee status based on arbitrary deprivation of nationality reveals that judicial bodies around the world are wrestling mainly with two legal issues.

The first issue concerns the right to return and the inability to secure entry or admission in the country of former habitual residence. Under this scenario, a stateless person is unable to return to his or her country of habitual residence (due to lack of nationality, or proper ID or travel documents) and as a result is refused entry into his or her country of habitual residence. Courts' jurisprudence around the world is consistent in denying protection if the obstacles are purely practical; statelessness *per se* is not a ground for refugee status under the 1951 Refugee Convention (technically, the 1954 Stateless Status Convention should provide the appropriate legal framework for protection). However, in some cases, the refusal of entry on ground (of lack of) nationality has been found to amount to persecution based on the violation of the right to leave and re-enter one's country, linked closely to the arbitrary deprivation of nationality. The principle of non-*refoulement* further requires the removing

[184] I thank Hugo Storey for this point.

State to take all necessary steps to secure admission and entry into the country of habitual residence, prior to removal.[185]

The second legal issue concerns the denial or deprivation of nationality and the unwillingness to return to the country of former habitual residence. This scenario covers situations where stateless persons are unwilling to return to their country of habitual residence because of a well-founded fear of persecution in that country, independently from considerations of re-entry and ability to return. As held by Stanley-Burton LJ, 'Deprivation of nationality may lead to inability to return to one's country of nationality, but they are not identical'. [186] Courts' jurisprudence on this second legal issue is far from consistent.

Underlying all of these issues lies the consideration of whether discrimination is the same as persecution, and if not, where does the difference lie in cases involving statelessness. Combatting discrimination is a fundamental purpose of the 1951 Refugee Convention, as expressed in the Preamble; 'discrimination is an aspect of persecution'. [187] Thus, anti-discrimination norms supply an important baseline in determining a claim for refugee status.

It has been noted that the word discrimination has a different meaning depending on the legal context. [188] In international refugee law, where the term persecution still lacks a common definition (except in the European Union), [189] discrimination is often used to support the individualized or targeted character of persecutory acts, in contrast with the indiscriminate character of generalized violence.[190]In this context also, discrimination is often used to indicate a form of harm that is less serious in terms of its intensity or gravity than

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[185] Interparliamentary Union and UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians No 22,* 2014, p.27. See, e.g., *Amie and Others v Bulgaria*, Application no. 58149/08, European Court of Human Rights, judgment of 12 February 2013, 4th Section.

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

[187] *Revenko*, [2001] QB p.606-A-B (Steven Kovats for the Secretary of State). See also, Justice McHugh in *Applicant A & Anor v MIEA A Anor*: 'Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group', *A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225; (1997) 142 ALR 331 (24 February 1997).

[188] Rebecca Dowd, 'Dissecting Discrimination in Refugee Law', 23 *International Journal of Refugee Law* 2011, pp.28-53.

[189] A consensus exists that 'human rights are the correct point of departure', however, jurisprudential and scholarly divergence remains regarding which human rights to consider, including issues of intensity of the acts, their duration and their cumulative effect, see Andreas Zimmermann and Claudia Mahler, 'Article 1 A, para.2', in A Zimmermmann (ed) *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol – A Commentary*, OUP 2011, pp.282-465, at paras.216-233. See also, Jane McAdam, 'Rethinking the Origins of 'Persecution' in Refugee Law' (2014) 25 *International Journal of Refugee Law* 667-692. In the context of the EU, a legal definition of persecution now exists in Article 9 of the EU Qualification Directive; see Storey, 'Persecution: Towards a Working Definition'.

[190] Hélène Lambert, 'The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence' (2013) 15 *International Journal of Refugee Law* 207-234.

persecution, on par with harassment.[191] For instance, this view has long been that of the UNHCR which has advocated a 'cumulative grounds' approach in cases involving discriminatory measures not in themselves amounting to persecution.[192] It has been argued that 'The idea that there are degrees of severity when it comes to discrimination is unique to refugee law'.[193]

From the perspective of international human rights law, the principle of non-discrimination (which is enshrined in all core human rights treaties) is generally used in conjunction with another human right. With the exception of Article 26 ICCPR and Article 24 American Convention on Human Rights, it is not a self-standing provision in that it guarantees the equal recognition, enjoyment and exercise of *other human rights*. The key question therefore becomes whether or not discrimination is affecting the meaningful enjoyment of an individual's rights (such as his or her rights to life, not to be tortured, to work, to education etc.). If it is, no matter what right is affected (e.g., economic, social or cultural), the discriminatory basis makes such matters also a violation of civil and political rights.[194] In some cases, discrimination may also constitute a serious violation of human rights in itself, e.g., racial discrimination, based on the 'consequences of a substantially prejudicial nature for the person concerned'.[195] Such instances are evidence that the meaning of discrimination in human rights law can in fact be similar to that in refugee law 'cumulatively' or 'in certain circumstances'.

Similarities exist between the UNHCR's 'cumulative grounds' or 'circumstantial' approach (understood as establishing an objective test and not a subjective test as sometimes suggested) and the human rights approach whereby for a violation of fundamental rights to constitute persecution within the meaning of Article 1A(2) of the Refugee Convention, it must be sufficiently serious.[196] Indeed, since *Ireland v UK* (1978), the Court's leitmotiv in all Article 3 cases has been its 'obligation to consider all the relevant circumstances of the case'. Thirty years later, in the leading case *NA v UK*,[197] the Court explained that this means that *all relevant factors taken cumulatively* should be considered, and that include all personal circumstances as well as the general situation in the country of destination. In this case, the Strasbourg Court accepted the argument, which had been made by UNHCR regarding the Refugee Convention that individual acts of harassment taken together might constitute persecution, and it applied it to Article 3 ECHR. The cumulative approach was confirmed in

[191] Dowd, 'Dissecting Discrimination in Refugee Law', at p.32.
[192] UNHCR Handbook, para.53.
[193] Dowd, 'Dissecting Discrimination in Refugee Law', at p.35.
[194] Neier, *The International Human Rights Movement*, p.80 referring to the judgment by the Constitutional Court of South Africa *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC), 5 July 2002.
[195] UNHCR Handbook, para.54. See also application 4403/70, *East African Asians v UK*, judgment of the European Court of Human Rights, 14 December 1973, [1973] ECHR 2.
[196] For a compelling discussion on this point, see Storey, 'Persecution: Towards a Working Definition'.
[197] *NA v UK*, judgment of the European Court of Human Rights, 17 July 2008, 4th section.

RC v Sweden.[198]

The discriminatory denial by a State of rights arising out of nationality, such as the deprivation of identity documents and the refusal to re-document a national, has been found to be successful ground for refugee status in a number of domestic cases. How and why did such cases succeed where others fail? I shall take the two possible scenarios in turn and discuss them in the light of domestic case law.

4.1. The right to return and secure entry in the country of former habitual residence, and persecution

This section examines the predicament of a stateless person who is unable to return to his or her country of habitual residence due to practical obstacles (e.g., lack of proper ID or travel documents) and/or discriminatory treatment by the State of former habitual residence based on (lack of) nationality.

The issue of whether Article 1A(2) of the Refugee Convention should be read literally in the case of stateless persons or whether this provision must be interpreted in a purposive way, has been a matter of controversy in several jurisdictions (i.e., the exact meaning of the semicolon in Article 1A(2)). This issue boils down to asking the question: Does the inability to return to one's country of habitual residence, *per se*, amount to persecution under the Refugee Convention? All the jurisdictions that have considered the issue have answered 'no' to this question.

The UKBA's Asylum Policy Instructions provide that 'issues of statelessness and whether or not an individual is returnable should not affect the decision maker's decision on whether to grant asylum, as they are not relevant factors in the refugee determination process'.[199] What matters is whether the stateless person can demonstrate a well-founded fear of persecution on the five grounds listed in Article 1A(2) of the Refugee Convention. Clarke LJ explains: 'It is, I think, clear that the purpose of the 1951 Convention was not to afford general protection to stateless persons'.[200] Refugee status is meant to offer protection against persecution to persons with or without a nationality, whereas the 1954 Stateless Status Convention exists to protect persons without a formal nationality.

The leading authority on the question of whether an individual's inability to return to their country of former habitual residence can found a claim for refugee status in the UK is

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[198] *RC v Sweden*, judgment of the European Court of Human Rights, 9 March 2010, 3rd section. However, the cumulative approach to risk assessment has not been applied consistently by the Court, see *FH v Sweden*, judgment of the European Court of Human Rights, 29 January 2009, 3rd section.

[199] UKBA, Asylum Policy Instructions, *Considering Asylum Claims and Assessing Credibility*, p.22. Available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/guidance/considering-protection-.pdf?view=Binary, section 5.4 [last accessed on 18 January 2013]

[200] *Revenko v Secretary of State for the Home Department* [2000] EWCA Civ 50; [2001] Q.B. 628-H.

Revenko v. Secretary of State for the Home Department.[201] The case involved an applicant who was born in Moldova, then a part of the USSR. Under the new rules of citizenship he was not considered a citizen of Moldova, and following a visit to the UK, he was unable to re-enter his country. His application for asylum was rejected because 'not all stateless persons are refugees'.[202] To be a refugee in accordance with Article 1A(2) of the Refugee Convention he would need to show a well-founded fear of persecution for reasons of race, religion, nationality, membership to a particular social group or political opinion if, hypothetically, he were to be returned to Moldova.

The Court of Appeal held that the purposive approach is the proper approach in such cases: 'The text of article 1A(2) should be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the treaty'.[203] Accordingly, Article 1A(2) sets 'a single test for refugee status', namely, the need to show a well-founded fear of being persecuted; this test applies to everyone claiming refugee status, irrespective of whether they have a nationality or not.[204] In addition, both categories of person must show that they are outside their country (of origin or residence) and that they are unable, or owing to such fear, unwilling to return to it. Pill LJ explains, 'Though they may be related, the phenomenon of statelessness is distinct from that of persecution giving rise to a right of asylum'.[205] Indeed, the 1954 and the 1961 Statelessness Conventions are immaterial to a proper construction of Article 1A(2);[206] the 1961 Convention was designed to reduce new cases of statelessness from arising, the 1954 Convention was designed to confer rights (civil, economic, social and cultural rights) on stateless persons who found themselves in the territory of a Contracting State (whether inside or outside their country of habitual residence) although, as with the 1951 Refugee Convention, some provisions are not restricted to persons in the territory.

Accordingly, 'mere statelessness or inability to return to one's country of former habitual residence is not sufficient of itself to confer refugee status under the [Refugee] Convention'.[207] However, this does not mean that issues of nationality are entirely irrelevant to an assessment of persecution under Article 1A(2). In *YL (Eritrea) v Secretary of State for the Home Department*, the UK Asylum and Immigration Tribunal (AIT) recalled that the burden of proof rests on the claimant and held that it is always relevant to consider the steps taken by claimants to apply for nationality of the country of formal habitual residence and

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[201] *Revenko v SSHD* [2001] Q.B. 601. See also *EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809; *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289; *ST (Ethiopia) v SSHD* [2011] UKUT 252 (IAC), discussed below.

[202] *Revenko*, [2001] QB 603-H, referring to paras 101 and 102 of the UNHCR Handbook.

[203] Pill LJ, *Revenko,* 621-H.

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

[205] *Revenko*, 610-A.

[206] *Revenko*, 604-G.

[207] *Revenko,* 601-E. The UK is nonetheless required to secure admission and entry into the suggested country prior to removal (see *Amie and Others v Bulgaria*, judgment of the European Court of Human Rights discussed above in section 3.3)

whether these steps have been successful.[208] The reasons that such steps are unsuccessful may go some way towards establishing persecution under Article 1A(2) Refugee Convention (or serious harm under Article 3 ECHR), and indeed, may provide a good indication of persecution at its extreme, namely, denial of membership in society.

In *ST (Ethiopia)*, the UK Upper Tribunal (UKUT) explained that the mere removal of an ID card does not generally constitute persecution.[209] However, such an act constitutes persecution when placed in the context of evidence of treatment by Ethiopian authorities of persons in the appellant's position, where the removal of the ID card is part of an ongoing deprivation of nationality that has had a very serious effect on the appellant, and is therefore discriminatory.[210] Accordingly, the appellant was required to establish that there was a persecutory denial of the nationality right. This case follows the UK Court of Appeal judgment in *EB (Eritrea)* where it held that *discriminatory* removal of ID documents itself can constitute persecution within the meaning of the Refugee Convention if 'done as it was with the motive of making it difficult for EB [the appellant] in future to prove her Ethiopian nationality' and if done by the authorities.[211] This is because the ability 'freely to leave and freely to re-enter one's country' is considered a basic right, explained the UK Court of Appeal.[212] With this judgment, therefore, the Court of Appeal is recognizing that persons without nationality are entitled to refugee status if they can show that they have been arbitrarily deprived of their nationality *for discriminatory reasons* (that is, linked a protected Convention ground).[213] It is further envisaged that the inability 'freely to leave and freely to re-enter one's country' on discriminatory grounds, itself, amounts to persecution.

EB (Ethiopia) can be contrasted with *MA (Ethiopia) v Secretary of State for the Home Department)*,[214] where the UK Court of Appeal did not find the deprivation of nationality to constitute ill-treatment in the case of an appellant who had been able to leave Ethiopia under her own passport and who had voluntarily left her passport to the agent who helped her leave. Moreover, when asked to present herself to the Ethiopian embassy, she wrongly told the staff that she was Eritrean. The UK Court of Appeal explained that 'refugee status is not a matter of choice. A person cannot be entitled to refugee status solely because he or she refuses to make an application to her embassy, or refuses or fails to take reasonable steps to

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[208] *YL (Eritrea) v SSHD*, UKAIT, 30 June 2003, paras.45-46, referring to the Bradshaw principle as it extends to asylum cases, that there may be valid reasons for a claimant not to approach his or her embassy or consulate, or the authorities of the country direct, regarding an application for citizenship. But see, *MA (Ethiopia) v. Secretary of State for the Home Department*, [2009] EWCA Civ 289, discussed below.

[209] *ST (Ethnic Eritrean – nationality – return) Ethiopia GC* [2011] UKUT 252.

[210] The general context referred to in *ST (Ethiopia)* can be read further in Eritrea Ethiopia Claims Commission, *Final Award, Eritrea's Damages Claims between The State of Eritrea and The Federal Democratic Republic of Ethiopia*, 17 August 2009, The Hague.

[211] UKCA, *EB (Ethiopia)* 2007, para.63.

[212] UKCA, *EB (Ethiopia)* 2007, Longmore LJ, para.67.

[213] Shauna Gillan, 'Refugee Convention – whether deprivation of citizenship amounts to persecution', *Journal of Immigration, Asylum and Nationality Law* 21 (4) 2007, 347-350.

[214] *MA (Ethiopia) v. Secretary of State for the Home Department*, [2009] EWCA Civ 289.

obtain recognition and evidence of her nationality'.[215] Thus, it is harder for a person to show that they are stateless if they haven't made any steps to claim nationality. The Court confirmed that 'denial of return is not of itself persecution', but that deprivation of nationality would amount to persecution if the consequences were sufficiently serious.[216] 'The legal and practical consequences for any person of the deprivation of nationality in a foreign state are questions of fact'.[217] Similar findings have been made by the UK Asylum and Immigration Tribunal (UK AIT), the UK Court of Appeal, the UK Supreme Court, and the Irish High Court in cases involving stateless Palestinians from the West Bank.[218]

It should be noted that this position is in stark contrast with the approach of the European Court of Human Rights in its application of Article 3 ECHR to rejected asylum seekers. The Strasbourg Court requires that 'substantial grounds' be shown for believing that an asylum seeker would face 'a real risk' of being subject to treatment contrary to Article 3, if returned to his or her country of origin.[219] The requirement of 'substantial grounds' has been interpreted by the European Court of Human Rights in Strasbourg to mean that reasonable grounds exist that expulsion is going to take place, namely that it is certain and imminent.[220] Hence, the Strasbourg Court has failed to recognize as 'victims' under Article 35 ECHR, rejected asylum seekers against whom an expulsion order has not yet been made.[221]

It follows that in relation to protection under the Refugee Convention, persecution must be established in order to ascertain whether the applicant would be re-admitted to her country of former habitual residence; however, in relation to protection under human rights law, 'the issue of whether there would be serious obstacles to re-admission must remain central to the question of whether there is a real risk of serious harm'.[222] This key difference may be explained by the fact that Article 3 ECHR has been interpreted to offer protection to a *rejected* asylum seeker against *refoulement* to his or her country of origin (he or she having otherwise

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[215] *MA (Ethiopia) v. Secretary of State for the Home Department*, [2009] EWCA Civ 289, UK, 2 April 2009, para.83 - available at: http://www.refworld.org/docid/49da220e2.html [accessed 19 June 2013]

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

[217] *MA (Ethiopia),* para.66. To read more on this case, see John R. Campbell, 'The Enduring Problem of Statelessness in the Horn of Africa', 23 *International Journal of Refugee Law* 2011, 656-679.

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

[219] *Chahal v UK*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, available at: http://www.refworld.org/docid/3ae6b69920.html [accessed 24 September 2013]; *Saadi v Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: http://www.refworld.org/docid/47c6882e2.html [accessed 24 September 2013]

[220] Hélène Lambert, 'Protection against *Refoulement* from Europe: Human Rights Law Comes to the Rescue', *International and Comparative Law Quarterly* 48 (1999), 515-544, at 538-9.

[221] E.g., *Vijayanathan and Pusparajah v. France*, 75/1991/327/399-400, Council of Europe: European Court of Human Rights, 26 June 1992, available at: http://www.refworld.org/docid/3ae6b6f98.html [accessed 18 June 2013].

[222] *YL (Eritrea) v SSHD*, UKAIT, 30 June 2003, para.64.

no other claim to a status in the country of refuge), hence the ability to reach that country is key to an interpretation of Article 3 ECHR, whereas Article 1A(2) 1951 Refugee Convention is about status determination and the rights and obligations within the country of asylum, of which guarantee against *refoulement* is one.

In Canada, the Federal Court of Appeal held that 'people are not refugees solely by virtue of their statelessness. They must still bring themselves within the terms of the definition set forth in the Convention … Statelessness does not give a person an advantage over those refugees who are not stateless'.[223] The Court highlighted the key distinction between refugees who are nationals of a State and those who are stateless, namely, that in the case of the former the Convention definition talks about the unwillingness 'to avail himself of the protection of that country', whereas in the case of the latter it talks about the unwillingness 'to return to' the country of his former habitual residence.[224] The point being that both groups of people must also have a well-founded fear of persecution on one of the Convention grounds if they are to be successful under the 1951 Convention. The implication being that protection needs in cases where no persecution exists be determined under relevant legal provisions on statelessness. The same conclusion was reached in New Zealand (see below).[225]

The Federal Court of Appeal of Canada recognizes that denial of the right to return to a country can in itself be an act of persecution, provided persecutorial intent or conduct can be shown, namely, discriminatory treatment on a Convention ground.[226] According to the Federal Court of Appeal, the fundamental question to ask comes down to 'why the applicant is being denied entry to a country of former habitual residence'.[227] If the answer to this question is simply the lack of a valid residency permit, the person in question should not be granted refugee status.[228]

Similarly, in Australia, the two leading cases, *Diatlov v. Minister for Immigration & Mutlicultural Affairs* and *Savvin v. Minister for Immigration and Multicultural Affairs*,[229]

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[223] *Thabet v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 21, Canada: Federal Court of Appeal, 11 May 1998, available at: http://www.refworld.org/docid/47bda9972.html [accessed 4 June 2013]

[224] Ibid.

[225] NZ RSAA *Appeal No.72635/01* 2002, paras.65-68. See also NZ RSAA *Appeal No. 76187*, 18 June 2008, denying refugee status to a stateless person who voluntarily renounced his USA citizenship on the ground that meaningful State protection would be available upon his return to his country of former habitual residence (i.e., the USA).

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

[227] E.g., *Thabet v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 21, Canada: Federal Court of Appeal, 11 May 1998, available at: http://www.refworld.org/docid/47bda9972.html [accessed 4 June 2013]

[228] As decided by the Fed Court of Appeal of Canada in *Thabet v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 21, Canada: Federal Court of Appeal, 11 May 1998, available at: http://www.refworld.org/docid/47bda9972.html [accessed 4 June 2013]

[229] Both cases were decided by the Federal Court of Australia. *Diatlov v Minister for Immigration & Multicultural Affairs* [1999] FCA 468, (1999) 167 ALR 313; and *Savvin v. Minister for Immigration and Multicultural Affairs* (2000) 171 A.L.R. 483 – in this case Katz J. came to the same conclusion reached by the EWCA in *Revenko*, but by

concluded that even a stateless person who is unable to return to the country of his former habitual residence has to show a well-founded fear of persecution for a 1951 Convention reason. The case of *Diatlov* involved an ethnic Russian who was born in the former Soviet Union but outside the borders of Estonia, and who had lived in Estonia for most of his life. His claim for refugee status (based on persecution on ground of ethnicity in Estonia, his ineligibility to live in Russia, and his inability to obtain Estonian citizenship) was refused. Diatlov is authority for a reading of Article 1A(2) of the Refugee Convention that for a person without a nationality to come within the definition of a refugee, such a person must satisfy two *cumulative* conditions: one, he must be outside his country of residence owing to a well-founded fear of being persecuted on specific grounds; two, he must be unable to return to that country, or owing to such fear be unwilling to return to it. Thus, the fear of being persecuted is an essential element of the definition; it is 'the talisman of the definition'.[230] This element applies to both categories of persons to whom the definition is directed: those with a nationality and stateless persons.

The Federal Magistrates Court of Australia examined the issue of returnability in *DZABG v Minister for Immigration & Anor*,[231] a case concerning a Kuwaiti Bidoon who claimed to be a stateless person and requested refugee status upon his arrival on Christmas Island. The Court found the applicant to be a *documented* Bidoon because he had left Kuwait on a form of passport delivered by the Kuwaiti authorities.[232] However, following the destruction of his travel document and the inability to replace it, the crucial question arose as to whether the prospect of the applicant being refused re-entry to Kuwait could amount to persecution. The court accepted that many Bidoons are subject to systematic discrimination within Kuwait arising from their lack of entitlement to Kuwaiti citizenship. However, it considered that, in this case, the applicant had been *documented*, he had received ten years of education in Kuwait and his children also attended school there, therefore, any restrictions that he would face (such as the absence of public places for Bidoons to practice religion) did not amount to persecution. For the Australian Federal Magistrates Court, more was needed 'to satisfy the [Refugee] Convention than merely being outside one's country of former habitual residence and an inability to return there'.[233]

One decision of the Refugee Review Tribunal of Australia (RRTA) may be flagged as good practice. It concerns an Article 1D / Article 1A(2) assessment in a case involving a stateless Palestinian refugee. The RRTA recalled that statelessness and being unable to return to a country of former habitual residence (namely, Jordan) are not sufficient ground for refugee status.[234] It then recognized that 'the Jordanian government's refusal to renew the applicant's passport is amongst a long list of discriminatory treatments it subjects Palestinian refugees

applying a literal interpretation to Article 1A(2) of the Convention. For an application of *Savvin* by the Tribunal, see case no. 0908992 [2010] RRTA 389, 14 May 2010, at para.123.

[230] Spender J, in *Savvin*, 171 ALR 483, at 485.

[231] *DZABG v Minister for Immigration & Anor* [2012] FMCA 36.

[232] Ibid, paras.30-31.

[233] Ibid, para.121.

[234] Appeal No. 0805551 [2009] RRTA 24, 15 January 2009.

to'.[235] Hence, the Tribunal explicitly held the refusal of entry, as a result of lack of citizenship, to be discriminatory treatment that could, *together* with other discriminatory treatments, amount to persecution. It concluded that the restrictions and discriminatory measures adopted by Jordan, particularly with regard to employment, would cause the applicant 'significant economic hardship threatening his capacity to subsist' in that he would be denied 'access to basic services and the capacity to earn a livelihood', and would constitute persecution for reasons of the applicant's Palestinian ethnicity.[236]

However, the RRTA reached a different conclusion in the case of a stateless Palestinian from Kuwait who, after arriving in Australia, became unable to return to Kuwait following the termination of his contract of employment by his employer in Kuwait. The Tribunal argued that 'a Kuwaiti law in relation to non residents could be considered to be a law of general application', the enforcement of which does not ordinarily constitute persecution no matter how oppressive or repugnant that law is to the values of society.[237] What is important for the purpose of showing a well-founded fear of persecution is whether the law operates in a discriminatory fashion, which in the context of refugee law refers to 'the notion of the legitimacy of the objective of the law and whether the law is appropriate and adapted to achieve the objective'.[238] Thus, a 'legitimate object will ordinarily be an object the pursuit of which is required in order to protect or promote the general welfare of the State and its citizens', as opposed to the oppression of the members of a race, religion or nationality.[239] For the Tribunal, 'there can be no persecution where there is a relevant reason for the different treatment and a relevant reason will always exist where the law in question has a legitimate objective and is appropriate and adopted to achieve this'.[240] In any such assessment, 'international human rights standards as well as the laws and culture of the country are relevant matters'.[241] The Tribunal concluded that the law in relation to Palestinians applies to all non-Kuwaiti citizens. Whilst Palestinians may be subject to potentially indefinite detention (unlike non Palestinians) *this is due to the fact that there is no country to deport them to*; this is not due to a reason of a Convention ground.[242] Hence, the applicant lacks a well-founded fear of persecution for Convention reasons.[243] It may be noted that this decision is at odds with the previously mentioned decision by the same Authority (Appeal No. 080551), as well as with its decision on undocumented Bidoons (Appeal No. 74467). In fact, it comes very close to the finding by the New Zealand Authority in Appeal No. 72635/01, which I turn to now.

In an early decision, the New Zealand Refugee Status Appeals Authority (RSAA) held that

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[235] Ibid, para.56.
[236] Ibid, para.60.
[237] Appeal No. 0808284 [2009] RRTA 454, 21 May 2009, paras.97-100.
[238] Ibid, para.105.
[239] Ibid, paras.107-108.
[240] Ibid, para.109.
[241] Ibid, para.111.
[242] Ibid, para.112.
[243] He was nonetheless recommended for humanitarian considerations to the Minister.

where a Bidoon is denied the right to return to Kuwait, and is arbitrarily denied re-entry, he cannot be considered at real risk of persecution under the Refugee Convention because 'if the country of origin refuses to admit or accept the return of the refugee claimant, the fear of being persecuted is similarly not well-founded in that country'.[244] This determination was subsequently rejected for its lack of critical analysis concerning the discriminatory treatment of Bidoons in Kuwait,[245] and the RSAA has since confirmed the importance of assessing persecutory treatment in the (hypothetical) event of return (see section 4.2).

In Ireland, the High Court, considered both the purposive approach adopted by Pill LJ in *Revenko* and the literal approach adopted by Katz J in *Savvin*, to be appropriate since both approaches led to the same conclusion: a stateless person who is unable to return to the country of his former habitual residence, is not, by reason of those facts alone, a refugee within the meaning of Article 1A(2); he or she needs to show a present well-founded fear of persecution (for instance, based on lack of nationality) on a Convention ground.[246] In this case, the High Court granted leave to bring judicial review on the ground that the reason the applicant was outside Kuwait was because he had been refused entry for a Convention reason, and this refusal itself may amount to 'persecution'.

Finally, the courts in the United States also preclude the mere condition of being stateless (with 'no nationality') as a basis for refugee status.[247]

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

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[244] New Zealand Refugee Status Appeals Authority (RSAA) chaired by Mr R Haines QC, *Appeal No. 72635/01* of 6 September 2002, para.149, [2003] INLR 629. See also, NZ RSAA again chaired by Mr R Haines QC, Appeal No. 1/92, 30 April 1992, in the case of a stateless Palestinian from Morocco. For a similar Australian ruling, see RRTA Appeal No. 0808284 discussed above. Note that this view is shared by James C. Hathaway in *The Law of Refugee Status*, Butterworths, 1991, at p.62.

[245] NZ RSAA, *Appeal No. 74467* of 1 September 2004, para.81.

[246] *A.A.A.A.D. v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2009] IEHC 326. The case involved a Bidoon from Kuwait. Kuwait became fully independent in 1961, following 41 years of British protectorate. A system of individual registration, initiated under British rules, resulted in the non-registration of a large number of people, with their descendants. Those who did not possess a nationality were known as Kuwaiti Bidoons (or bedoon or bidun, meaning 'the without'); in Arabic, they are *bidun jinsiya* (without nationality or without citizenship).

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

refused entry because they had been deprived of their nationality arbitrarily, the courts found this to constitute discrimination amounting to persecution.. This is the case, for instance, of UK case law on undocumented Bidoons, which considers the issue of whether denial of return to Kuwait constitutes persecution, to be a question of fact. It accepts that 'documented' and 'undocumented' are not synonymous terms for the distinction between 'registered' and 'unregistered', because some Bidoons may have obtained false passports. As further discussed in the next section, in all cases where the Kuwaiti Bidoons have been able to provide evidence of their statelessness and *undocumented* status,[248] the denial of the right of return was found to constitute persecution based on the seriousness of the effects of this denial in the country of return.[249]

4.2. (Arbitrary) Deprivation of nationality and persecution

This section considers the situation of an asylum seeker who is unwilling to return to his or her country of habitual residence because of persecution resulting from the deprivation of nationality. It is therefore interested in the argument and courts' ruling on whether deprivation of nationality can amount to persecution, independently from considerations of re-entry and ability to return. Here domestic courts have focused primarily on the *causes* and *consequences* of the deprivation or denial of nationality:[250] Why did the state authorities deny the appellant's claim to citizenship, and what are the consequences of such denial?

UK courts have long recognized that, in some circumstances, deprivation of nationality may amount to persecution within the meaning of Article 1A(2) of the Refugee Convention (taken together with Article 9 of the EU Qualification Directive), if the act of deprivation or revocation can be said to be a willful denial of nationality for a 'capricious or discriminatory reason' and, the denial is for a Refugee Convention reason.[251] However, the requirement of 'willful denial of nationality' is not met where the deprivation/revocation is the result of a mistake or an error of interpretation of the legislation by the authority.[252] In other words, there exist many instances in which the authorities have a policy, which is or appears to be at odds with the text of the law; if intentional, the act of deprivation would constitute persecution, but if not intentional, the traditional rule that State authorities have significant discretion to decide who is eligible for nationality would apply.

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[248] Note that following *NM (documented/undocumented Bidoon: risk) Kuwait CG* [2013] UKUT 00356(IAC), the key distinction between documented and undocumented Bidoons established in *BA* [2004] UKIAT 00256 and *HE* [2006] UKAIT 00051 is maintained, but the relevant crucial document, upon which depends a range of benefits, is the security card (or green card) rather than the civil identification card. The security card identifies the holder with names, address and birth date, but does not serve as proof of identity; it must be renewed yearly or every two years. The evidence shows that possession of a security card is crucial for potentially accessing civil documents, and therefore a whole range of benefits.

[249] *BA and others (Bedoon-statelessness-risk of persecution) Kuwait* CG [2004] UKIAT 00256, and *HE (Bidoon-statelessness-risk of persecution) Kuwait* CG [2006] UKAIT 00051 – which applies BA 2004.

[250] E.g., UKCA *EB (Ethiopia)* 2007, para.54: 'An analysis is required of the circumstances including the loss of rights involved in the particular case and the causes and consequences of them'.

[251] *JV (Tanzania) v SSHD* UKCA 2007, paras.6 and 10. See also *Lazarevic v SSHD*, [1997] EWCA Civ 1007.

[252] *JV (Tanzania) v SSHD* UKCA 2007, para.10.

In *BA and others (Bedoon – Kuwait) v SSHD*,[253] a case involving two *undocumented* Bidoons, the then UK Asylum and Immigration Tribunal (AIT) stated that:

> whether denial of nationality amounts to persecution is a question of fact and depends upon the practical consequences for an individual in the country in which he is being denied nationality. At one end of the spectrum there are countries in respect of which denial of nationality may have few practical consequences for a person's civil, political, social, economic and cultural situation. At the other end of the spectrum there are countries in respect of which the consequences may be comprehensive and dire.[254]

For the UK Tribunal, denial of nationality *per se* does not amount to persecution unless the practical consequences of such denial are severe enough to constitute persecution.[255] This is because:

> [t]he denial of human rights … is not the same as persecution, which involves the infliction of serious harm. The 1951 Convention was concerned to afford refuge to victims of certain kinds of discriminatory persecution, but it was not directed to prohibit discrimination as such nor to grant refuge to the victims of discrimination.[256]

As further explained by Lord Hope of Craighead in *Shah and Islam*:

> persecution is not the same thing as discrimination. Discrimination involves the making of unfair or unjust distinctions to the disadvantage of one group or class of people as compared with others. It may lead to persecution or it may not. And persons may be persecuted who have not been discriminated against, if so, they are simply persons who are being persecuted.[257]

In *BA and Others*, the UKAIT held the denial of nationality to be a decisive factor because of the very strong objective evidence detailing the widespread and systematic discrimination of undocumented Bidoons *as non-citizens*, and the resulting violations of civil, political,

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[253] *BA and Others (Kuwait) CG v SSHD* [2004] UK AIT 00256.

[254] *BA*, para.63. See also *HE (Bidoon) Kuwait CG* [2006] UKAIT 00051 for an application of *BA and Others* (2004) and a finding of no material change since the country guidance decision in *BA* despite improvements in education and health care.

[255] 'It may be that the right to a nationality is an emerging norm, but it has plainly not yet become part of international law', *BA*, para.63.

[256] I*slam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, as per Lord Millet - available at:
http://www.refworld.org/docid/3dec8abe4.html [accessed 12 June 2013]

[257] *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999 - available at:
http://www.refworld.org/docid/3dec8abe4.html [accessed 12 June 2013]

economic, social and cultural rights protected by the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights.[258] Put in a historical context of marginalization and forced displacement, these measures constitute persecution. [259] However, *documented* Bidoons are entitled to a range of benefits, and although not treated equally in terms of entitlements to Kuwaiti citizens, this discriminatory treatment, and the fact that they are denied citizenship, has not been found to amount to persecution.[260] The Tribunal further acknowledged that 'stateless Kuwaiti Bidoons' constitute a particular social group as 'a collection of (mainly) stateless persons' but found 'race' to be a more relevant option on the ground that 'the Bedoon have an extended tribal identity and so cannot be reduced to persons defined simply by their statelessness'.[261] This interpretation must be welcome for it emphasizes the distinct identity of Kuwaiti Bidoons and the nature of their struggle inside Kuwait in clearer and stronger terms than the acceptance of their membership to the wide category of stateless people.[262]

The position of *undocumented* Bidoons must be sharply contrasted with that of stateless Palestinians, to whom the UKAIT has generally denied protection under the Refugee Convention (and the ECHR) on the ground that even though 'other foreign nationals are not discriminated against to the same extent in Lebanon as the Palestinians are, there is a lack of evidence as to whether or not they are in fact in the same position, especially as regards employment and access to legal services'.[263] The UKAIT further held: 'the treatment of aliens or stateless persons different from and less favourable than that accorded by the state to its own citizens, does not of itself amount to persecution'.[264] In *KK IH HE (Palestinians - Lebanon) v SSHD*, the Tribunal, relying on Professor Hathaway's definition of persecution and categorization of rights, concluded that the exclusion of a stateless Palestinian from accessing Lebanese government hospitals does not constitute serious harm because 'the differential treatment of Palestinian refugees stems entirely from their statelessness' and is therefore justified.[265] Following incorporation of the EU 2004 Qualification Directive in UK law, the UKAIT refers to the EU definition of persecution in Regulation 5(1), which

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[258] '"They live under the most appalling conditions, denied the right to travel, free medical care, to register marriages and in some cases to have a driving license"' (*BA*, para.65, quoting Mr Shiblak).

[259] *BA*, paras.65-66 and para.81.

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

[261] *BA*, para.88.

[262] For a similar argument made in the context of women' refugees and whether they should be recognized refugee status on the grounds of membership to a particular social group or political opinion, see Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects*, Butterworths, 2000, p.181.

[263] *KK IH HE (Palestinians – Lebanon) v Secretary of State for the Home Department*, 29 October 2004, UKAIT, para.101.

[264] Ibid, para.104. The same conclusion was reached in Ireland in the case of a Palestinian stateless person from Libya on the ground that the Libyan policy to control the movement of the Palestinian population within its territory may constitute discrimination (but not persecution) or equally an exercise of its right to regulate immigration; statelessness per se does not confer refugee status: High Court, *S.H.M. v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2009] IEHC 128. For a similar decision in Australia, see Appeal No. 0808284 [2009] RRTA 454, 21 May 2009, discussed above in section 4.1.

[265] *KK IH HE*, paras.101 and 104.

encompass Hathaway's principles.[266] All in all, the Tribunal does not agree that the limitations placed by the Lebanese authorities on Palestinians for security reasons are based on race, but rather that these are properly justified on the grounds of their statelessness and their practical inability to return.[267] Thus, the Tribunal denied recognizing that the Lebanese authorities were engaged in a strategy of discrimination against Palestinians.

In a case where the applicant's nationality was unclear (she was either Ethiopian or Eritrean or both or neither – however her country of former habitual residence was Ethiopia), the UKAIT was not convinced that although significant, the discriminations that she would face upon return to Ethiopia would amount to persecution (or serious harm) because expulsions of persons of Eritrean ethnicity, although still taking place at the time (June 2001), the latest country of origin information did not confirm that these continued 'to be wide-scale or routine'.[268]

The Federal Administrative Court of Germany recognizes that denial of citizenship for the reasons stated in Article 10 of the Qualification Directive may constitute persecution within the meaning of Article 1A(2) of the 1951 Refugee Convention together with Article 9 of the Qualification Directive. The Federal Court focuses on the intensity of interference and the resulting exclusion of the person from the material rights of citizenship.[269] The decisive factor for the German Federal Court lies in the exclusion from residency protection; the person is rendered stateless and unprotected; in addition, denial of citizenship must be based on a Convention ground to constitute persecution within the meaning of Article 1A(2) Refugee Convention.[270] Such practical approach may be flagged as good practice, and appears to be similar to that in the US courts which view statelessness as a sufficiently deplorable condition itself to amount to persecution (based on past persecution), even regardless of the consequences of the act of denationalization or of considerations of refusal of entry, provided it occurs on account of a protected ground, such as, ethnicity or membership in a protected group (see discussion below).

In Germany still, the High Administrative Court Sachsen-Anhalt found the Refugee Convention ground to be missing in a case involving a stateless Kurd from Syria because 'a general institutional practice cannot be detected which is aimed against ethnic Kurds in a manner that is relevant to asylum grounds'; any such restrictive practice is not related to ethnicity because 'not all Kurds living in Syria, which have left the country illegally and want to return, are affected by this denial'.[271] Consequently, the denial of re-entry of stateless Kurds from Syria is not considered political persecution.

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[266] *MM and FH (stateless Palestinians) v SSHD*, UKAIT, 04 March 2008, reaffirming *KK IH HE (Palestinians – Lebanon)*, para.127.
[267] *MM and FH (stateless Palestinians)*, ibid, para.136.
[268] *YL (Eritrea) v Secretary of State for the Home Department*, UKAIT, 30 June 2003, para.41.
[269] German Federal Administrative Court, decision of 26 February 2009, 10 C 50.07 (English summary – available on EDAL)
[270] Ibid.
[271] Germany, High Administrative Court Sachsen-Anhalt, 25 May 2011, 3 L 374/09.

In Spain, the High National Court[272] found the denial of basic human rights, including the lack of documentation and education, to a stateless person who was part of the Urdu-speaking Bihari minority in Bangladesh, to constitute discrimination but not persecution, due to lack of evidence and credibility.[273] The applicant was nevertheless granted humanitarian protection because of the severity of the conflict in his country of origin.

In Belgium, the Aliens Appeals Board granted refugee status to a stateless asylum seeker from Uzbekistan who after five years of residence abroad was deprived of his Uzbek nationality and passport, and had his name removed from his address in Uzbekistan.[274] Accordingly, if he were to re-enter Uzbekistan, the Uzbek authorities would suspect that he had applied for asylum in Belgium (since he would have no documents) and the treatment feared from such imputed political opinion constituted a well-founded fear of being persecuted.

The New Zealand RSAA too has considered whether a stateless person's risk of serious discrimination resulting from the arbitrary revocation of her nationality, could amount to persecution. The case involved a stateless person (who claims to have been a citizen of Israel) and her husband (a citizen of Israel). She claimed to have been arbitrarily stripped of her citizenship by her country of former habitual residence (Israel) because she was Christian, leading to the loss of significant rights attached to nationality (including work, free medical care, social welfare, departure and return to Israel).[275] She was unable to fall back on the nationality that she had acquired at birth because the Soviet Union no longer existed and she had not claimed the citizenship of the Russian Federation or the Republic of Tajikistan when leaving for Israel in 1991. The RSAA's decision is restrictive in that it considers the 'right' to nationality to be nothing more than aspirational. However, it recognizes that withdrawal of nationality may constitute persecution. The RSAA explained: 'it is one thing for a state to withhold nationality, it is a quite different matter when a state, having conferred nationality upon a person, then withdraws it by what in th[is] case … might be characterized … as a "willful act of neglect, discrimination or violation".[276]

The RSAA then considered the consequences of rights attached to nationality and found 'if removing those rights is of sufficient importance that the State sees a fundamental benefit in

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

[273] In 2008, a decision of the High Court of Bangladesh recognized the formerly stateless Urdu-speaking community or Biharis, as citizens of Bangladesh (unless they personally and voluntarily rejected it). Since then most of them have been able to access their rights as citizens, although access to passport remains a problem. See UNHCR, 'Note on the nationality status of the Urdu-speaking community in Bangladesh', December 2009, available at: http://www.refworld.org/docid/4b2b90c32.html [accessed 19 July 2013]; and UNHCR submission for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Bangladesh, October 2012, available at: http://www.refworld.org/docid/508640242.html [accessed 19 July 2013]

[274] Belgium, Conseil du Contentieux des Etrangers, *X v Commissaire general aux refugies et aux apatrides,* Decision No. 22144, 28 January 2009.

[275] NZ RSAA Appeal No.76077, 19 May 2009.

[276] Ibid, para.103.

doing so, then the removal of those rights and the specific consequences of doing so, can be so significantly discriminatory as to amount to serious harm tantamount to being persecuted'.[277] The RSAA concluded that this was the case here.[278] Moreover, the arbitrary revocation of the appellant's citizenship was for reason of her Christianity. The RSAA therefore found objective evidence of a real chance that the appellant would be persecuted for reason of her religion if she were to return to Israel.

The New Zealand RSAA has also held that, independently of whether or not an applicant is able to return, the Kuwaiti government's policies of 1985, declaring Bidoons to be illegal residents, resulted in years of institutionalized and 'systematic form of discrimination against the Bedoon in an effort to drive them out of the country'.[279] The Authority further explained that 'The Bedoon today live in abject poverty and are not entitled to welfare'.[280] It therefore concluded that 'a restrictions on the appellant's social and economic rights would continue to operate against him' if he were to be returned to Kuwait, including his right to work and his right to an adequate standard of living (Articles 6 and 11 ICESCR, respectively),[281] and that these 'considered cumulatively together with the precariousness of his existence' constitute persecution for lack of nationality.[282]

This approach was confirmed a few years later by the RSAA, which noted that the appellant:

> was denied access to free education, health care and other social benefits, barred form employment, denied basic official documents … vulnerable to arrest and the threat of deportation and was restricted in his ability to leave and return to Kuwait. The curtailment of the right of *bidoons* to take up employment in the public or private sector or otherwise earn a living, in particular, condemned the appellant's family to economic hardship.[283]

The Authority highlighted a 'pattern of historical discrimination and in particular, the manner in which citizenship has been used by the ruling elite "to organize and define the internal power relationships"'[284] clearly suggesting that such persecutory treatment was for reasons of (lack of) nationality and membership of the social group of Bidoons. This finding was confirmed in another case involving a Bidoon, who although he could have returned to Kuwait as a matter of fact, on a false passport, using a smuggler or agent, he would be detained, most likely indefinitely, and at real risk of 'being persecuted for reasons of race,

[277] Ibid, para.106.
[278] Ibid, para.111.
[279] NZ RSAA, Refugee Appeal No. 71687, decision of 28 September 1999, p.19.
[280] Ibid, p.18.
[281] Ibid p.29.
[282] Ibid, p.20, referring to Hathaway's definition of persecution as the sustained or systemic denial of basic or core human right or the denial of human dignity in an important way, in James C. Hathaway, *The Law of Refugee Status*, Butterworths, 1991.
[283] Appeal No.74467, decision of 1 September 2004, para.75.
[284] Appeal No.74467, para.94.

nationality and/or membership of a particular social group, namely *bedoon'*.[285]

Finally, the NZ RSAA has held that:

> if the nationality of a candidate for refugeehood is indeterminable, it would be best in keeping with the Convention, as well as the humanitarian spirit underlying the instrument, to give the applicant the benefit of the doubt. This would mean in some cases considering him a national of his country of origin … but should it, for some reason, be more favourable for a person of indeterminable national status to be considered a stateless person, he should be considered as such.[286]

For the NZ Authority, this latter view often applies in practice because it considers the 'nationality' ground of persecution in Article 1A(2) to include statelessness. Thus, 'persecution *for reasons of nationality* is also understood to include persecution for *lack of nationality'*;[287] the problem with such an approach is that it may lead to the circular notion that persecution cannot define the ground. In any case, in this Appeal No. 1/92, the NZ RSAA rejected the social and economic problems faced by the appellant, a Palestinian stateless person, as insufficiently intolerable or causing unbearable suffering to amount to a well-founded fear of being persecuted.

In Australia, cases involving stateless persons indicate that the courts have recognized in principle the existence of a particular social group for the purpose of the Refugee Convention in cases of 'non-citizen Latvians, non-citizens Latvians of Russian origin or Russian speakers'[288] or even 'persons in HKSAR or the PRC or in Indonesia who share the characteristic of having difficulty finding work because of their age'[289] but denied protection if there is a lack of 'a selective and discriminatory withholding of State protection from non-citizen Latvians of Russian origin for a Convention reason'.[290]

Finally, in the US, the Supreme Court held the deprivation of nationality of a US citizen to be 'more primitive than torture, for it destroys for the individual the political existence that was centuries in the development'.[291] In *Haile v. Gonzalez (Haile I)*, the Seventh Circuit recognized, in principle, the arbitrary expulsion and denationalization by Ethiopia of thousands of ethnic Eritreans born in Ethiopia, to be 'a particularly acute form of persecution'.[292] In *Haile v. Holder (Haile II)*, the Seventh Circuit explained that '[i]f Ethiopia denationalized the petitioner because of his Eritrean ethnicity, it did so because of hostility to Eritreans' and

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[285] NZ RSAA Appeal No.76506, decision of 29 July 2010, para.84.
[286] NZ RSAA, Refugee Appeal No.1/92, 30 April 1992.
[287] Ibid, referring to the writings of Grahl-Madsen and Hathaway.
[288] Case no. 0908370 [2010] RRTA 33, 18 January 2010, at para.44.
[289] Case no. 0908992 [2010] RRTA 389, 14 May 2010, at para.144.
[290] Case no. 0908370 [2010] RRTA, 18 January 2010, at para.46.
[291] *Trop v Dulles*, 356 U.S. 86 (1958), at 102.
[292] *Haile v. Gonzales (Haile I)*, 421 F.3d 493 (7th Cir. 2005) at 496. See also, for the same point of law, *Mengstu v. Holder*, 560 F.3d 1055 (9th Cir. 2009) at 1056-7.

recognized this, for the first time, to constitute persecution.[293]

A year later, in *Stserba v Holder*, the Sixth Circuit applied *Haile II* and held denationalization motivated by ethnic considerations to constitute persecution.[294] Stserba and her husband were Estonian citizens, ethnically Russian. Their Estonian citizenship had previously been revoked following the collapse of the USSR, and they only regained it 'by complete chance'. Their son, who was mildly disabled, became an Estonian citizen at birth. They alleged past persecution on account of Russian ethnicity and fear of future persecution. The Court held that although not every revocation of citizenship is persecution, ethnically motivated denationalization resulting in statelessness could constitute persecution.[295] The Court will need to consider the practical consequences of denationalization, which may vary between genocide, expulsion, or the possibility to remain in the country and become naturalized but with some hurdles.[296] Even regardless of the consequences, 'a person who is made stateless *due to his or her membership in a protected group* may have demonstrated persecution, even without proving that he or she has suffered collateral damage from the act of denationalization'.[297] Thus, as in this case, rules that limit citizenship to pre-1940 citizens and their descendants so as to exclude ethnic Russians who emigrated during the Soviet occupation, may demonstrate past persecution on account of ethnicity.[298] Only a change of circumstances would rebut the presumption of future persecution. The case further reveals that Stserba's invalidation of her Russian medical degree as a pediatrician also constituted persecution on account of her ethnicity, due to the 'sweeping limitations' on her job as a pediatrician to which she was subjected.[299]

However, cases based purely on economic deprivation (e.g., inability to work due to the fact of being a woman in Saudi Arabia with no legal status) have generally been rejected, unless it can be established that the denial of work would result in economic deprivation of sufficient severity.[300]

In sum, the case law above reveals that courts and tribunals in the UK, New Zealand, Australia, Germany, Spain and Belgium generally consider the practical consequences of the act of deprivation (or denial) of nationality to be key in their assessment of whether the act in question amounts to persecution; these need to be serious enough or sufficiently severe to

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[293] Haile v. Holder (Haile II), 384 F. Appendix 501 (7th Cir. 2010). For an excellent article on US case law on statelessness and persecution, see Stewart E. Forbes, '"Imagine There's No Country": Statelessness as Persecution in Light of *Haile II*', 61 *Buffalo Law Review* 2013, pp.699-730.

[294] *Stserba at al. v Holder*, No.09-4312, United States Court of Appeal, 6th Circuit, 20 May 2011.

[295] Ibid, page 8.

[296] Ibid, page 9.

[297] Ibid, page 10.

[298] Ibid, pages 11-12.

[299] Ibid, page 13.

[300] *El Assadi v Holder*, US Court of Appeal, 25 April 2011, p.4. This is also the view of the Australian courts, e.g., case no. 0908992 [2010] RRTA 389, 14 May 2010, at para.141 (a case involving a stateless person who unsuccessfully claimed refugee status based on his age and the fact that he would find it very difficult to find work if returned to one of his countries of former residence, Indonesia, China or Hong Kong).

reach the threshold of persecution because discrimination is not the same as persecution. In some of their decisions, the UKAIT, the New Zealand RSAA and one of Germany's High Administrative Court have specifically required the existence of an institutionalized, widespread or systematic discrimination resulting in severe violations of basic human rights (whether civil and political, or social, economic and cultural). Accordingly, the UKAIT recognizes that undocumented Bidoons in Kuwait have been persecuted as a particular social group or because of their race – but not documented Bidoons or undocumented stateless Palestinians (e.g., in Lebanon). The UK courts have also held that in no circumstances may the practicalities of return/re-admission influence the issues of persecution and well-foundedness. The NZ RSAA recognizes that living in abject poverty, with no welfare, no right to work and no adequate standard of living, taken 'cumulatively together with the precariousness' of one's existence constitutes persecution on ground of nationality (since nationality includes lack of nationality and therefore statelessness). The Australian RRTA recognizes non-citizen Latvians of Russian origin in Latvia as a particular social group but denies them protection if 'a selective and discriminatory withholding of State protection' cannot be shown. The United States and in Germany, the Federal Administrative Court, stand alone for recognizing that ethnically motivated denationalization resulting in statelessness could constitute persecution, even regardless of the consequences.

5 SUMMARY OF KEY FINDINGS ON THE INTEPRETATION OF ARTICLE 1A(2) OF THE 1951 REFUGEE CONVENTION

What does the above discussion tell us about the correct interpretation of Article 1 of the 1951 Refugee Convention in relation to stateless persons?

Article 31(1) VCLT requires the treaty's provision to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Article 31(2) VCLT further explains that the 'context' shall comprise the text, including its preamble, as well as any subsequent agreement, such as the 1967 Protocol, and Article 31(3)(b) that 'any subsequent practice in the application if the treaty which establishes the agreement of the parties regarding its interpretation' shall also be taken into account. The limitations of 'ordinary meaning' and recourse to 'context', 'object and purpose' as well as 'subsequent practice', within the context of Article 1 of the Refugee Convention as it applies to refugees with a nationality, have been thoroughly discussed in the doctrine.[301] However, no systematic argument has been made to date on the ordinary meaning of words, context, object and purpose of Article 1A(2) of the 1951 Refugee Convention, as it applies to stateless persons.

The discussion above indicates that historically, denial of nationality or statelessness was often linked with being a refugee; the two situations became separated during the drafting of the 1951 Refugee Convention, and whereas refugees (including stateless refugees) were

[301] See note 2, supra.

discussed then, the situation of stateless persons (non-refugees) was left for consideration at a later date. A reading of the preamble to the Refugee Convention further indicates a 'strong human rights language'. [302] Specifically, the Preamble affirms the principle of non-discrimination in the enjoyment of fundamental rights and freedoms, such as those set out in the UDHR. Combatting discrimination is therefore a fundamental purpose of the Convention. More generally, it is now the common view that 'Refugees are owed international protection precisely because their human rights are under threat' and that 'Human rights principles … should inform the interpretation of the definition to who is owed that protection';[303] a strong interrelationship therefore exists between human rights principles and refugee protection, based on the Preamble.

With reference to Article 1A(2) of the 1951 Refugee Convention, the case law surveyed above indicates that not all stateless persons are refugees. Firstly, there is overwhelming agreement and support amongst courts across the world that the inability (by being stateless) to return to one's country of former habitual residence due to practical obstacles does not amount to persecution. What matters is whether the applicant can demonstrate a well-founded fear of being persecuted on the five listed grounds. Courts generally acknowledge a clear link between persecution and arbitrary denial of nationality resulting in the denial of the right to return, and therefore assess persecution by reference to issues of nationality.

Secondly, the very lack of nationality may itself lead to severe discrimination amounting to persecution, without consideration of return.[304] This scenario is captured in the case law of domestic courts, which shows divergence in the level of severity required for discriminatory treatment(s) to amount to persecution. For example, the NZ RSAA and the US Court of Appeal accept as persecution the denial of nationality together with the social and economic problems faced by a stateless person provided these problems are sufficiently intolerable or causing unbearable suffering. The case law of the US and German courts ought to be flagged in this context as it contains elements of good practice. US courts (and similarly the German Federal Administrative Court) view statelessness as a sufficiently deplorable condition itself to amount to persecution provided it occurs on account of a protected ground, such as, ethnicity or membership in a protected group,[305] and this regardless of the consequences of the act of denationalization. This approach must be praised for it recognizes denationalization for what it is: a severe and serious violation of human rights that entails 'the total destruction of the individual's status in organized society'.[306] Hence, the misfortune is 'not the loss of specific rights, then, but the loss of a community willing and able to

[302] UNHCR, Interpreting Article 1, p.1.
[303] UNHCR Interpreting Article 1, p.2. See also, Storey, 'Persecution: Towards a Working Definition'.
[304] See in particular para.54 of the UNHCR Handbook: '… It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice religion, or his access to normally available education facilities'.
[305] The United States is a party to the 1967 Protocol, and this practice reflects that advocated in para.51 of UNHCR Handbook.
[306] US Supreme Court, *Trop v. Dulles*, 356 U.S. 86, 101-2.

guarantee any rights whatsoever', namely, 'the right to have rights'.[307] This is a strong affirmation of the right to a nationality as an entitlement, a human right, in the context of refugee law. In contrast, all other courts across the world (with some marginal differences) have focused exclusively on the effects or consequences of statelessness on the person, e.g., the denial of human rights through discriminatory acts, such as arbitrary denial of the right to enter one's own country. This is perhaps because technically, they should enjoy stateless person status.

Finally, the case law of international courts is important in complementing and strengthening our understanding of the legal issues involved. The case law surveyed in section 3 of this paper, deals exclusively with arbitrary denial or withdrawal of nationality from a human rights law perspective; it is not concerned with refugee status. However, as a human rights treaty, the 1951 Refugee Convention calls for an interpretation that is at least in harmony with this case law, in cases relating to arbitrary deprivation of nationality. This case law suggests that international and regional courts have actively contributed to the changing notion of 'nationality'. There is now growing recognition by courts, the world over, that 'nationality' is a human right, an entitlement, in place of a privilege. The importance of this shift from State's sovereignty to a human right is critical for stateless persons because if in theory stateless persons are meant to benefit from the fundamental human rights embodied in international law, in practice 'nationality' (or a citizenship status) remains the gateway to enjoyment of these rights.[308]

6 CONCLUSION

Twenty years later, Goodwin-Gill's statement that 'State practice confirms that stateless persons were not to be ignored as refugees' remains valid.[309]

This paper has examined claims to refugee status based on arbitrary deprivation of nationality in relation to the 1951 Refugee Convention (and 1967 Protocol). Thus, it has dealt mainly with the third (or last) cause of statelessness as identified by UNHCR, namely, discrimination and arbitrary deprivation of nationality. In any such situation, discrimination is often both a *cause* of statelessness (i.e., the arbitrary deprivation of nationality or act of denationalization) and an *effect* of statelessness on the person (i.e., the denial of human rights through discriminatory acts against stateless persons).[310] A correct approach to assessing whether discrimination and arbitrary deprivation of nationality amounts to persecution on

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[307] *Mendoza-Martinez*, 372 U.S. at 161, quoting Hannah Arendt, *The Origins of Totalitarianism* (1951) 294.

[308] Colin Harvey, 'Is humanity enough?', p.88.

[309] Guy S. Goodwin-Gill, 'Stateless Persons and Protection under the 1951 Convention or Refugees, Beware of Academic Error!' (December 1992), texte présenté au Colloque portant sur 'Les récents développements en droit de l'immigration', Barreau de Québec, 22 janvier 1993, at p.7.

[310] UNHCR has referred to the 'erased persons' from Slovenia as being subjected to discrimination in two respects: the decision to erase them targeted a specific group of foreigners only, namely the citizens from the SFRY; many of the erased faced discriminatory treatment because of a lack of legal status. UNHCR Submission in *Kuric*, para.4.2.6.

Convention grounds, calls for both the cause and the effect of statelessness to be examined by courts (i.e., an application of the principle of indivisibility of rights).

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

- of any serious violations of human rights for a Convention reason;[311] or
- based on the circumstances of each case;[312] or
- based on cumulative grounds;[313] or
- based on the consequences or 'substantially prejudicial nature' of the act for the person concerned.[314]

In addition, the treatment in question must be for a particular motive (race, religion, nationality, membership to a particular social group, or political opinion).

The domestic case law surveyed shows a strong preference for an approach based on the consequences or 'substantial prejudicial nature' of the arbitrary deprivation of nationality to the person concerned. On occasion, courts have recognized the cumulative grounds approach in such cases. However, the first and second approaches to 'persecution', whereby the right to a nationality *itself* is found to be violated, are seldom used. What is currently missing is a generous and progressive approach to the right to a nationality within the refugee definition, especially where courts are dealing with deprivation of nationality and discrimination issues.

To illustrate this point, this paper has discussed the fundamental character of the right to nationality in international human rights law (the cause), and the effects should this basic right be violated (the consequences). It has highlighted the approach of international/regional human rights courts based on the indivisibility of rights. Arbitrary deprivation of nationality resulting in statelessness heightens the risk of being refused entry and cases where the right to return has been denied are many. Furthermore, stateless persons are often the most vulnerable to discriminatory treatment in the society in which they live because deprivation or denial of nationality itself may be discriminatory treatment and/or may lead to discriminatory treatment beyond the actual act depriving a person of her or his nationality (e.g., the denial of residence, the right to work, education, basic health care etc.). Such acts are clearly captured by the existing human rights framework. However, deficiencies in domestic and international mechanisms of enforcement impede their ability

[311] UNHCR Handbook, para.51.
[312] Ibid, para.52.
[313] Ibid, para.53.
[314] Ibid, para.54.

to prevent and to produce legal remedies to such abuses. Solutions may be found through more efficient national procedures within the countries in question. However, this paper argues that for stateless refugees, legal remedies should be found in international refugee law, namely, the 1951 Refugee Convention.[315] Most stateless persons face discrimination and vulnerability, and what we need is a generous definition of persecution.

Justice McHugh in applicant *A & Anor v MIEA & Anor* observed that:

> Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a particular social group.[316]

No court is willing to recognize statelessness *per se* as persecution. This is because the cause of statelessness (i.e., discrimination and/or deprivation of nationality) may well violate human rights law but not all human rights violations are persecutory acts, and the 1954 Stateless Status Convention should be applied. Thus, courts tend to focus on the effects or consequences of statelessness on the person (e.g., the denial of human rights through discriminatory acts) as these are easier to measure in terms of severity.

This paper argues that short of engineering one's deprivation of nationality for personal convenience, all deprivation of nationality should lead to finding of persecution because 'nationality' is and continues to be the gateway for the exercise of most basic human rights. Where deprivation of nationality is found to be discriminatory and/or arbitrary, this should lead to finding of persecution for a Convention ground. The task is a simple one, even in the field of economic, social and cultural rights, because as argued by Roth, the 'nature of the violation, violator and remedy is clearest when it is possible to identify arbitrary or discriminatory governmental conduct that causes or substantially contributes to an ESC rights violation', as opposed to a problem of distributive justice.[317]

Such an approach would further be consistent with growing consensus that asylum seekers and refugees are a special category of persons, as vulnerable people.[318] Their vulnerability

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[315] In cases where a person qualifies both as a refugee under the 1951 Refugee Convention and as a stateless person in accordance with the 1954 Statelessness Convention, the State must apply to the person the more favourable provisions in the Refugee Convention, as provided in the Preamble to the 1954 Convention, third recital.

[316] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

[317] Kenneth Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization', *Human Rights Quarterly* 26 (2004), pp.63-73, at 69.

[318] E.g., High Court of Kenya, *Kituo Cha Sheria and Others v Attorney General*, 26 July 2013, paras.34 and 40, available at: http://www.refworld.org/docid/51f622294.html [accessed 11 March 2014]; and *MSS v Belgium and Greece*, European Court of Human Rights, judgment of 21 January 2011. See also, Alexandra Timmer and Lourdes Peroni, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights

imposes specific obligations on States,[319] in addition to their obligation to respect, protect, and fulfill human rights, such as, for instance, the duty to address refugees' basic needs or the duty not to obstruct humanitarian organisations from providing assistance to refugees in need.

Based on an analysis of international courts' decisions, this paper identifies the following good practice:

- The right to nationality is a fundamental human right; it must be protected equally for everyone (including children) and nationality rules must therefore not be discriminatory nor applied in a discriminatory manner;
- The right to nationality allows the individual to acquire and exercise rights and obligations inherent in membership in a political community;
- The right to nationality provides the individual with a minimum measure of legal protection;
- Full remedies must be provided by the States' authorities responsible for violating this right;
- A deporting State must do everything it can to ensure the re-entry of a stateless person (through the issuance and delivery of a travel document to the person) in the former country of residence or country of birth; should removal not be possible in practice, the deporting State should lawfully admit the stateless person into its territory, and facilitate naturalization;
- Asylum seekers are a particularly underprivileged and vulnerable population group in need of special protection;
- A definition of acts of persecution that includes 'arbitrary deprivation of nationality'.

Based on an analysis of domestic courts' jurisprudence, this paper has identified the following best practice:

- 'Former habitual residence' refers to the length and character of the time a refugee spent in a country, independently of whether residence was lawful;
- In the case of more than one country of former habitual residence, the last country of habitual residence alone should be relevant, especially if the applicant spent a considerable number of years in that last country; the benefit of the doubt principle should then be applied with regard to all other countries;
- Denial or deprivation of nationality amounts to persecution if the consequences are sufficiently serious, including significant economic hardship threatening the capacity to subsist (such as denial of the right to work and the right to an adequate standard of living coupled in the context of an already precarious existence);
- Denial or deprivation of nationality for a discriminatory reason constitutes persecution;

Convention Law', 11 *International Journal of Constitutional Law* 2013, 1056-1085.

[319] These may be provided by constitutional provisions (e.g., Article 21(3) of the Constitution of Kenya – 'All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities') or human rights treaties (e.g., Article 3 or 5 of the ECHR or Article 4 of the EU Charter of Fundamental Rights).

- Denial of the right to return or refusal to re-enter one's country of habitual residence, for a Convention reason, amounts to persecution;
- The inability freely to leave and freely to re-enter one's country's on discriminatory grounds amounts to persecution, without requiring that widespread and systematic discriminatory treatment be shown;
- Give the applicant the benefit of the doubt and treat him or her as either a national of his/her country of origin or as a stateless person if, for any reason, this treatment should be more favourable to him or her;
- Reasons for persecution of stateless persons to include all five grounds listed in the Convention, namely, race, religion, nationality, membership of a particular social group or political opinion.